THE HIGH COURT

[2013 No. 2 COS]

IN THE MATTER OF ELY PROPERTY GROUP LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 26th day of February, 2013.

The petition

1. This petition to wind up Ely Property Group Limited (the Company) was presented on 7th January, 2013. The petitioner is Copsey Murray, Chartered Accountants (the Petitioner), an accountancy partnership based in this jurisdiction. The basis on which the Petitioner asserted in the petition that it had an entitlement to have the Company wound up was that the Company had failed to comply with a demand under s. 214(a) of the Companies Act 1963 (the Act of 1963) and that, in the circumstances, the Company is deemed to be insolvent. The debt alleged by the Petitioner to be due to it is in the sum of €53,746.91 in respect of accountancy services provided to the Company and other companies in the Ely Property Group. The petition has been resisted by the Company, which contends that there is a *bona fide* dispute in relation to the debt.

2. The petition has generated an unusually large number of affidavits from deponents in an unusually broad range of areas of involvement with the Company, in that, while the Petitioner initially relied on the deemed insolvency, which was alleged to arise from non-compliance with the s. 214(a) demand, at a later stage it adduced evidence with a view to demonstrating that the Company is insolvent. Moreover, a number of parties who claimed to be creditors of the Company swore affidavits in support of the Petitioner's application to wind up. In line with the old adage that "it's an ill wind that blows nobody any good", the Company paid off the debts of two of those creditors prior to the hearing of the petition, so that they are no longer in the fray.

3. I propose considering the factual position based on the affidavit evidence in the following order:

> (a) the evidence in relation to the Petitioner's debt and whether, as a matter of law, a deemed insolvency can be found to exist in accordance with s. 214;
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> (b) the evidence as to the insolvency of the Company in general; and
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> (c) the evidence as to the attitude of the other creditors.

The Petitioner's debt/deemed insolvency: the evidence

4. The proponents on this aspect of the matter are Anthony Kenny, a partner in the Petitioner's firm, and Philip Marley, the Managing Director of the Company. The sequence of the relevant affidavits is as follows:

> (a) the verifying affidavit was sworn by Mr. Kenny on 21st December, 2012;
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> (b) Mr. Marley swore an affidavit on 21st January, 2013, the thrust of which was that the Company is not indebted, and has no liability, to the Petitioner;
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> (c) Mr. Kenny swore a second affidavit on 8th February, 2013 and contradicted various averments of Mr. Marley in his affidavit; and
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> (d) Mr. Marley swore a second affidavit on 13th February, 2013 in which he acknowledged one error on his part in the earlier affidavit, but persisted in his assertion that all fees due by the Company, as distinct from its subsidiary and associated companies, had been paid to the Petitioner and that there was no debt due to the Petitioner.

5. Mr. Marley implicitly questioned whether the s. 214 demand was properly served. The evidence establishes that it was served by being left at 22 Ely Place, Dublin, 2. In his first affidavit Mr. Marley asserted that the Petitioner knew with certainty that in October 2012 he had vacated his former offices at 22, Ely Place, Dublin, 2 and had moved to the United Kingdom. The requirement in s. 214(a) in relation to the service of a demand is that it has been served on the company "by leaving it at the registered office of the company". At the time the demand, which was dated 19th November, 2012, was served, 22, Ely Place, Dublin, 2 was the registered office of the Company. Indeed, it has been established that the reports and financial statements for the year ended 31st December, 2010, which were audited by Shrewsbury Accounting, Registered Auditors with a London address, and were lodged in the Companies Registration Office (CRO) on 30th November, 2012, recorded the registered office of the Company as 22, Ely Place, Dublin, 2. Accordingly, I am satisfied that service of the demand dated 19th November, 2012 was in compliance with s. 214(a).

6. The interaction of the Petitioner with the Company, as set out in Mr. Kenny's affidavits and as corroborated by contemporaneous documentation, is as follows:

> (a) KPMG, the Company's former auditors, resigned as auditor of the Company and its subsidiaries on 15th December, 2009.
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> (b) In December 2009 the engagement between the Petitioner and Company commenced. On 10th December, 2009 the Petitioner issued what was described as a "revised fee proposal" to the Company. Having listed the companies in the Ely Property Group, the first of which was the Company, which was referred to as "Parent holding company", it was stated in the proposal:
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> > "We understand that [the Company] is effectively the holding company for the Group. We are advised there is limited accounting activity within [the Company] and that the Group's trading activities arise from the student

letting and property development subsidiaries. Our client in relation to this matter is [the Company]."

(c) On 6th January, 2010, the Petitioner sent a letter addressed to the directors of the Company stating that the purpose of the letter was to set out the basis on which they had agreed to act as auditors of the companies in the Ely Group and referred to the fact that the scope of their services had been summarised in the proposal to the directors dated 10th December, 2009. Acceptance of the terms set out in the letter by the Company and its subsidiary companies was endorsed on the letter on 13th January, 2010. There were three appendices attached to the letter, the first listing the companies in the Group, the second setting out the assumptions underlying the Petitioner's fee indication and the third setting out the indicative auditory fees for each of the companies in the Group. Mr. Marley attached some significance to a document, which I surmise was an earlier version of the third appendix, to support his contention that the Company was not liable for the fees generated in respect of all of the companies in the Group but that each company was liable for the fees in connection with the services rendered to it. Mr. Kenny's response in his second affidavit was that that document was, as titled, a fee indication and merely an exercise to show what work the Petitioner would perform that must be paid for by the Company. That explanation is consistent with the document itself.

(d) In 2010 the Petitioner issued three invoices to the Company, which were dated 14th January, 2010, 23rd March, 2010 and 23rd November, 2010. Each invoice was in the same form and the fees claimed were described as for professional services rendered and more specifically as fees "in respect of audit of financial statements for the [Company] and subsidiary companies". Those invoices, which aggregated €44,770 inclusive of VAT, were discharged in full by the Company.

(e) In 2011 the Petitioner issued three similar invoices to the Company: on 1st April, 2011 (for €12,100 inclusive of VAT); on 10th May, 2011 (for €12,100 inclusive of VAT); and on 17th October, 2011 (for €12,100 inclusive of VAT).

(f) In 2012 the Petitioner issued one further similar invoice to the Company: on 27th March, 2012 (for €12,300 inclusive of VAT).

(g) The position, accordingly, is that in 2011 and 2012 the Petitioner issued invoices which aggregated €48,600 to the Company, which sought fees for the services invoiced in the same format as the invoices which issued to the Company in 2010 and which the Company had discharged in full.

(h) The following further invoices were issued by the Petitioner to the Company in 2011 and 2012:

(i) an invoice dated 5th May, 2011 addressed to the Company for €3,327.50 (inclusive of VAT) in respect of specified services which had been rendered by the Petitioner, for example, the provision of company secretarial assistance to four companies in the Group which had been struck off the Register of Companies;

(ii) an invoice dated 20th July, 2011 addressed to one of the subsidiary companies, Aldborough Developments Limited, in the sum of €6,413 (inclusive of VAT), which represented that it was for additional fees in respect of audits;

(iii) an invoice dated 15th August, 2011 addressed to another subsidiary, Ely Property (Herbal Hill) Limited, for €2,178 (inclusive of VAT), which was also for additional fees in respect of audits;

(iv) an invoice dated 27th March, 2012 addressed to the Company for €6,765 (inclusive of VAT), which was for professional services relating to non-audit services, which were itemised;

(v) an invoice dated 22nd June, 2012 to the Company in the sum of €4,305 (inclusive of VAT) for professional services described as the provision of assistance to companies forming part of the Group, which was further particularised;

(vi) an invoice dated 7th November, 2012 to the Company in the sum of €14,657.91 (inclusive of VAT), which was itemised as adjustment to fees issued at earlier dates consequent to withdrawal of the discount for prompt payment;

Mr. Marley has made no specific challenge to any of the foregoing invoices, either as to quantum or the nature or quality of the service rendered.

(i) During 2011 and 2012 the Petitioner received payments aggregating €32,500 from the Company or its subsidiaries. It is Mr. Marley's position that, in the light of those payments, there is no debt due by the Company to the Petitioner. Obviously, the Petitioner has given credit for the said sum of €32,500 in arriving at what is claimed to be the net sum due to the Petitioner, that is to say, €53,746.91. Apart from that, as regards the four invoices (referred to at (e) and (f) above) issued by the Petitioner in 2011 and 2012, in which the Petitioner claimed fees for services similar to the services in respect of which the Company had discharged the fees claimed in 2010, even allowing for the payments of €32,500, there is a shortfall of €16,100 in respect of the total amount due to the Petitioner thereunder.

(j) The Company was struck off the register for non-compliance with the statutory requirements in relation to filing annual returns on 8th April, 2011. An order restoring the Company to the register was made by this Court on 14th May, 2012 on the application of Investec Bank Plc. Subsequent to the restoration of the Company, on 26th June, 2012, Investec appointed Paul McCann of Grant Thornton as Receiver and Manager, of a part of the property of the Company.

7. The gist of Mr. Marley's affidavit, although not expressed with any clarity, is that the agreement between the Petitioner and Ely Property Group was that each company in the Group would be invoiced in respect of services rendered to that company and that the practice initially adopted by the Petitioner in raising invoices to the Company in respect of services rendered to the Company and its subsidiary and associated companies was contrary to the agreement. Mr. Marley further averred that, following receipt of the invoices dated 1st April, 2011, 5th May, 2011 and 10th May, 2011, he had numerous telephone conversations with Mr. Kenny pointing out that that practice was in breach of what had been agreed and that the Company was not responsible for fees due by other companies in the Group. As has already been outlined, the invoice dated 5th May, 2011 differed from the other two invoices and, indeed, from the invoices which had been issued and discharged in full in 2010, in that it claimed fees for specific services outlined in it. It has been

suggested by Mr. Marley that, as a result of those conversations, the Petitioner acted correctly in sending subsequent invoices, for example, the invoice addressed to Aldborough Developments Ltd. and the invoice addressed to Ely Property (Herbal Hill) Ltd., but that, in subsequent invoices, the Petitioner reverted to its earlier practice. In his first affidavit Mr. Marley proceeded to make a sweeping assertion that in the light of the "payments totalling €32,000-00 (sic)", the Company has no liability to the Petitioner, and he did so without any analysis of the amounts claimed in, and the services to which, the various invoices related.

8. Mr. Marley further averred that "an issue arises between the parties regarding the quantum of fees charged by" the Petitioner and that, despite repeated requests, the Petitioner has failed to provide any breakdown of fees. No documentation whatsoever evidencing those requests has been exhibited.

9. In his second affidavit Mr. Marley restated his belief that all fees due by the Company, as distinct from its subsidiary and associated companies, were paid to the Petitioner and this time he correctly referred to the sum for which credit was given by the Petitioner (€32,500), stating that fees due by the Company were part of that sum. That sweeping statement is not backed up by any analysis and does not stand up to scrutiny.

10. In her affidavit sworn on 1st February, 2013, to which I will refer further below, Julia Ind, a director of the Company from 2004 to July 2012, averred that she does not recall any dispute arising in the nature of the quality of the work undertaken by the Petitioner for the Company, nor does she recall any issue in relation to the fees agreed and charged for the work by the Petitioner. Mr. Marley's response in his third affidavit sworn on 14th February, 2013 was that Ms. Ind was not privy to any negotiations with the Petitioner regarding fees, that she was merely "a conduit of clerical information" and that she was seeking to overstate her true role. Further, it was asserted that she was motivated by malice towards Mr. Marley.

The Petitioner's debt/deemed insolvency: the law and its application

11. While counsel for the Petitioner relied on the judgment of the High Court (Finnegan J.) in Re *Millhouse Taverns Limited* [2000] IEHC 55, the most recent decision of the Supreme Court in which the earlier authorities referred to by Finnegan J. were cited is *Re WMG (Toughening) Limited (No. 2)* [2003] 1 I.R. 389 where McCracken J. 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 . . . 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'."

12. In this case, Mr. Marley, on behalf of the Company, has asserted that the Company does not owe any fees to the Petitioner because it has discharged any fees properly claimed by the Petitioner against the Company in accordance with their agreement. In determining whether the petition should be dismissed, or, alternatively, whether a winding up order should be made, the Court has to determine whether, in disputing the Petitioner's debt, the Company is acting –

(a) *bona fide*; and

(b) is disputing liability on substantial grounds.

In general, in a situation such as has arisen in this case, where factual controversies arise on the affidavit evidence, a court must exercise caution in coming to a conclusion on the facts. On the other hand, where the alleged debtor merely asserts that there is nothing due to the creditor because the creditor has already been paid what is due and, in any event, the creditor has charged too much, the Court will assess the *bona fides* of the debtor against the evidence adduced by the petitioning creditor. In particular, the Court will assess the *bona fides* of the alleged debtor against its own actions vis-à-vis the creditor. It will also have regard to whether there is contemporaneous documentary evidence which supports one side or the other and what weight should be attached to it.

13. In this case, the Petitioner has adduced the type of documentary evidence that one would expect an accountancy firm to have in place to govern its relationship with a client and to demonstrate the process by which over three years it charged and invoiced the client for services. That documentary evidence suggests that it was the Company that was the client of the Petitioner and that the Company assumed responsibility for the fees incurred in respect of work done by the Petitioner, not only in relation to the Company but also its subsidiaries and associated companies. Not one shred of documentary evidence has been adduced by the Company in support of its contention that the Company was not responsible for the fees incurred in relation to the subsidiary and associated companies. Apart from that, in the first year of the arrangement, the Company discharged the invoices submitted by the Petitioner, which clearly on the face of each invoice covered fees incurred not only by the Company, but also fees in respect of its subsidiary and associated companies. There is no documentary evidence whatsoever that at any time during the three year period the Company questioned the manner in which the Petitioner was invoicing for work done or the amount of the fees being charged. During the second and third years of the arrangement, the Company continued to pay fees to the Petitioner, albeit not in the precise amounts invoiced. Having regard to what transpired between the Petitioner and the Company over a period of almost three years, it is impossible to conclude that the Company is *bona fide* disputing the Petitioner's debt. Moreover, in the light of what actually transpired between the parties, it is impossible to conclude that the Company has substantial grounds for disputing the debt.

14. In the circumstances, I am satisfied that the Company is deemed to be insolvent pursuant to s. 214(a) of the Act of 1963 by reason of its failure to comply with the demand issued by the Petitioner to it in accordance with that provision on 19th November, 2012. In particular, I am satisfied that the presentation of the petition does not constitute an abuse of process, as contended by the Company.

Insolvency of the Company in general

15. In her affidavit, Ms. Ind has averred that she believes she resigned from her directorship with the Company and with the companies associated with it in July 2012 but, for reasons unknown, she appears to be still registered as a director in the CRO.

Indeed, a CRO printout dated 12th January, 2013 exhibited by her in her affidavit names Mr. Marley and Ms. Ind as the directors of the Company and Ms. Ind as the secretary. I do note, however, a reference to a statutory declaration that a person ceased to be a director, which is stated to have been effective from 26th June, 2012, to have been received in the CRO on 29th June, 2012 and to have been registered on 26th July, 2012 in the list of documents on the CRO printout.

16. In addition to the averments she has made in relation to her knowledge of the Company's arrangement and interaction with the Petitioner referred to earlier, Ms. Ind has also averred that she believes that the Company is at present insolvent and has ceased any form of trading. She has averred to various matters which are apparent from the CRO printout, for example, the appointment of the Receiver and Manager by Investec Bank Plc.

17. Mr. Marley, in his third affidavit, has averred that he is "aghast" at what Ms. Ind has averred and has suggested that she displays a complete lack of understanding concerning the various charges which appear on the CRO printout. Mr. Marley has dismissed Ms. Ind's assertions by general observations, such as statements that –

> (a) the security for the borrowings from Investec Bank Plc was "ring-fenced" on property in Dundalk and that to suggest that there is a debt of the size asserted by Ms. Ind to Investec Bank Plc "is simply untrue and untenable",
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> (b) the security for borrowings from Royal Bank of Scotland Plc "is ring-fenced to the two properties" referred to by Ms. Ind, the value of which exceeds liability, and
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> (c) the Company has no liability to Anatrim Limited or to Royal Bank of Scotland (Ireland) in relation to a development in Limerick.

Mr. Marley has also pointed out that the various lending institutions which have charges registered against the assets of the Company have not sought to be heard on the petition.

18. While I attach little weight to that last observation, because secured creditors will usually rely on their security, I do not think it would be proper to form any view as to the general financial state of the Company on the basis of Ms. Ind's averments and Mr. Marley's responses.

Attitude of other creditors

19. An affidavit was sworn on 30th January, 2013 by Zena Bolt in support of the petition. Ms. Bolt averred that she was due a balance of €20,000 on foot of a determination made by the Labour Court on an appeal under the Employment Equality Acts 1998 – 2007, which said determination was dated 15th October, 2009. When the petition came on for hearing, the Court was informed that matters had been settled as between the Company and Ms. Bolt.

20. An affidavit was sworn on 31st January, 2013 by Bernadette Moroney McAleer who claimed that a debt of €9,108.60 was due to her and her husband by the Company. She averred that she supported the petition.

21. Anthony Lynch, as director of Osel Architecture Limited, swore an affidavit in February 2013 (the day of the date being blank in the jurat) in which he averred that he had obtained judgment against the Company (formerly Ely Property Group Plc) in an English court for Stg £8,853.35. Mr. Lynch averred that he believed that the Company is unable to pay its debts as they fall due. In fact, the Company had settled with Mr. Lynch by the time the petition had come on for hearing.

22. An affidavit was sworn on 1st February, 2013 by Michael Collis, a director of Space Student Living Limited (Space), a company registered in the United Kingdom, which is now in creditors' voluntary liquidation. Mr. Collis is a chartered accountant. He averred that he made the affidavit on the authority of the joint liquidators of Space. Mr. Collis made an allegation that Mr. Marley (a former director of Space) and persons associated with him had improperly removed funds from Space and the funds in question went either to the Company or to Ely Properties Limited, a subsidiary of the Company. Mr. Collis exhibited a letter dated 31st January, 2013 from DLA Piper, Solicitors, on behalf of the joint liquidators of Space, to the directors of "Ely Property Group" demanding repayments of sums aggregating Stg £480,000 which were alleged to have been transferred to the addressee from the bank accounts of Space without any board authorisation and without any legitimate commercial reason or benefit to Space. 23. The contents of the affidavit of Mr. Collis were corroborated by David Armour, a chartered accountant and the finance director of Space, who was also authorised by the joint liquidators, by affidavit, which was sworn on 1st February, 2013, in which he averred that the Company is indebted to Space in the sum of not less than Stg £480,000.

24. Mr. Marley, in his fourth affidavit, sworn on 14th February, 2013, has refuted the allegations made by Mr. Collis, which he has averred are untrue. He has also exhibited a letter from DLA Piper to him personally dated 11th October, 2012 in which Space has "intimated a claim" against him, but no proceedings have been served on him. He has averred that any proceedings the liquidators of Space do institute against him or the Company will be fully defended and he would welcome the opportunity of dealing with each of the false allegations made against him by Mr. Collis and Mr. Armour.

25. At the hearing of the petition counsel appeared on behalf of the liquidators of Space and stated that Space (in liquidation) is owed Stg £480,000 by the Company. The liquidators of Space support the petition. It was submitted that they have no way of knowing what assets the Company has and that a liquidator should be appointed to investigate the complaints.

26. Counsel also appeared on behalf of Ms. Ind at the hearing. Ms. Ind's concern is that, as she still appears as a director of the Company in the CRO, she may be a director of a non-compliant and insolvent company. It was submitted on behalf of the Company that Ms. Ind is not a director of the Company, nor is she a creditor, and her standing to participate on the hearing of the petition was questioned.

27. While I have outlined the position adopted by the various parties other than the Petitioner and the Company who filed affidavits or appeared on the hearing of the petition, it is appropriate to emphasise that, in determining that the Company should be wound up, I have not attached any significance or weight to their submissions.

Order

28. On the sole basis that the Company is deemed to be unable to pay its debts by reason of non-compliance with the Petitioner's demand dated 19th November, 2012, I propose making an order that the Company be wound up. I am satisfied that all the proofs in relation to the service of the petition and its advertisement are in order. I propose appointing Aidan García Díaz as official liquidator for the purposes of the winding up. An affidavit of Barry Lyons, solicitor, sworn on 1st February, 2013 attests to the suitability of Mr. Diaz to be the official liquidator. I will direct Philip Marley, who, apparently regards himself as the sole director of the Company, to

swear and file a statement of affairs within twenty one days. The Petitioner's costs will be reserved and the matter will be listed in the Examiner's Court List at an appropriate date in the Easter term.