THE HIGH COURT

[2013 No. 30 COS]

IN THE MATTER OF CONNEMARA MINING COMPANY PLC AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 25th day of February, 2013.

The proceedings thus far

1. On 23rd January, 2013 Trampus Limited (the Petitioner) presented a petition in the High Court, which was returnable on 18th February, 2013, seeking an order that Connemara Mining Company Plc (the Company) be wound up under the provisions of the Companies Acts 1963 – 2012. When the matter first came before the Court on 18th February, 2013, the petition had not been advertised as required by Order 74, rule 10 of the Rules of the Superior Courts 1986 (the Rules), as amended. However, on that day there was also before the Court a motion on behalf of the Petitioner for the directions of the Court as to the advertisement of the petition, to include an order that the petition be advertised in one London daily morning newspaper.

2. Apart from an affidavit of Barry O'Donoghue, a solicitor in the firm Ferrys Solicitors, which is on record for the Petitioner, to ground the motion for directions, the following evidence was before the Court on the 18th February, 2013:

> (a) an affidavit of Mark Gregory Hardy (Mr. Hardy), who is described as a director of the Petitioner, which was sworn on 23rd January, 2013 and which verified the petition;
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> (b) an affidavit of James Finn (Mr. Finn), the Company secretary and director of the Company, which was sworn on 14th February, 2013, in which, at the outset, it was asserted that the Petitioner does not have *locus standi* to present the petition and that it should be dismissed, and in which Mr. Finn also strenuously contested the factual basis on which the Petitioner seeks to wind up the Company and asserted ulterior motive, although characterised as purpose, on the part of the Petitioner in bringing the petition; and
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> (c) a second affidavit of Mr. Hardy sworn on 18th February, 2013.

Predictably, the affidavits are replete with evidential conflicts.

3. When the petition was called on for hearing on 18th February, 2013, counsel for the Company submitted that at that stage the petition should be dismissed on the grounds that the Petitioner does not have *locus standi*. That issue was argued by both sides, counsel for the Petitioner submitting that the Petitioner does have *locus standi* and urging the Court to deal with the motion for directions.

The petition

4. It is recorded in the petition that the Company was incorporated in the State on 28th March, 2006. Its primary object is stated to be to –

> ". . . engage in all aspects of exploration and mining, research and development, information and technology exchange, to promote exploration and mining in Ireland and Worldwide, to acquire and hold shares, interests and investments of all descriptions and to engage in all related activities . . ."

It is also recorded that the Company is listed on the AIM sub-market of the London Stock Exchange and, at the date of the petition, it had approximately five hundred registered shareholders.

5. The capacity in which the Petitioner brings the petition is stated as follows therein:

> "[The] Petitioner is the largest single shareholder in the Company and, at the date of this Petition, beneficially owns 1,625,000 fully paid-up shares representing a 6.32% interest in the Company. As some of the shares in respect of which your Petitioner is a contributory have been held by it, and registered in its name, for at least 6 months during the 18 months before the commencement of the winding up, [the] Petitioner is entitled to present this Petition . . . in accordance with s. 215(a)(ii) of the Companies Act 1963 (as amended)."

6. In the petition, the Petitioner has advanced two grounds on which the Company should be wound up, namely:

> (a) the inability of the Company to pay its debts; and
>
> (b) that it is just and equitable that it should be wound up.

7. The particularisation of the assertion as to the inability of the Company to pay its debts, as set out in the petition, is based on the Petitioner's interpretation of:

> (a) the Annual Report and Accounts for the year ended December, 2011 of the Company, which, in accordance with the listing rules of the London Stock Exchange have been in the public domain since 26th June, 2012;
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> (b) the Company's Interim Report for the six months ended 30th June, 2012, which was released on 24th September, 2012;
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> (c) the filing by the directors of the Company of a document entitled "Exploration Update" on 20th November, 2012; and
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> (d) what transpired at an investors' presentation meeting held by the Company in the City of London on 20th November, 2012.

On the basis of what has been extrapolated from the foregoing and set out in the petition, it is asserted in the petition that the Company is unable to pay its debts within the meaning of s. 214(c) of the Companies Act 1963 (the Act of 1963).

8. The basis on which it is contended that it would be just and equitable that the Company be wound up, as set out in the petition, is

that there are proceedings pending in a court in Dallas, Texas against Mr. Finn and another director of the Company "in respect of [their] conduct in their roles as directors of Endeavour Oil & Gas, Inc . . .". Having asserted that it is alleged in the proceedings that "they have been in breach of their fiduciary duties", it is stated as follows in the petition:

> "In the event that the allegations made against Mr. Finn and Mr. Teeling are true, it would cause [the] Petitioner to lose confidence in Mr. Finn's and Mr. Teeling's ability to continue to act as directors of the Company. . . . and therefore the financial interests of the creditors and contributories will be better protected by the winding up of the Company and the appointment of a liquidator who will marshal the assets of the Company."

9. Although I consider that it would be improper to express any view on the factual bases of the Petitioner's contention that the Company should be would up at this juncture, it is appropriate to record that, in his affidavit, Mr. Finn has strenuously disputed the veracity of the assertions made in the petition and the averments contained in Mr. Hardy's grounding affidavit as to the inability of the Company to pay its debts. Further, he has contended that it would not be appropriate for the Court to wind up the Company on just and equitable grounds because it is solvent. He has characterised the assertions in the petition and the averments in Mr. Hardy's grounding affidavit in relation to the proceedings in Dallas as "bare and baseless grounds". After questioning the logic of the position adopted by Mr. Hardy, Mr. Finn has averred that the legal proceedings in Dallas have nothing to do with the Company. Further, he has averred that the proceedings have been widely reported, the case is being defended and the directors are confident of success.

10. The second affidavit of Mr. Hardy was produced on the morning of the hearing and counsel for the Company sought to reserve the Company's position to respond to it, if the Court is not disposed to accede to the Company's request to strike out the proceedings at this stage, on the basis that the Petitioner as the holder of fully paid up shares in the Company does not have *locus standi* to seek an order to wind up the Company.

Relevant statutory provisions

11. The circumstances in which a company may be wound up by the Court are listed in s. 213 of the Act of 1963. One circumstance is if "the company is unable to pay its debts" (para. (e)). Another is if "the court is of opinion that it is just and equitable that the company . . . should be wound up" (para. (f)).

12. Section 214 of the Act of 1963 lists the circumstances in which a company shall be deemed to be unable to pay its debts, one of which is –

> "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."

That circumstance is to be found in paragraph (c) of s. 214, which is relied upon by the Petitioner in this case.

13. Section 215 of the Act of 1963 provides that an application to the Court for the winding up of a company shall be by petition presented either by the company or a creditor or a contributory. In s. 208 of the Act of 1963 the term "contributory" is defined as meaning –

> "every person liable to contribute to the assets of a company in the event of its being wound up . . .".

Further, there is a proviso in s. 215 to the effect that a contributory shall not be entitled to present a winding up petition unless one or other of two stipulated requirements is met, the second (para (a)(ii)) being that –

> "the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least 6 months during the 18 months before the commencement of the winding up . . .".

As I have recorded earlier, there is a statement in the petition to the effect that that requirement is complied with. The position of the Company is that, notwithstanding that the Petitioner is not disqualified by reason of non-compliance with s. 215(a)(ii), that does not mean that it has an entitlement to bring the petition.

14. Before leaving the provisions of the Act of 1963, I would observe that paragraph (g) of s. 213 provides that a company may be wound up by the Court if –

> "the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case so, however, that the court may dismiss a petition to wind up under this paragraph if it is of opinion that proceedings under section 205 would, in all the circumstances, be more appropriate."

Clearly, as a member of the Company the Petitioner would be entitled to invoke that provision, but it has not done so.

The jurisprudence of the Irish courts on a contributory as petitioner in company liquidation

15. In the annotation on s. 208 of the Act of 1963 in MacCann & Courtney "*Companies Acts 1963 – 2012"* the editors state:

> "There is U.K. authority to suggest that the court will be reluctant to allow an individual holder of fully paid shares to petition to wind up a company unless it can be shown the company is solvent and that a substantial surplus of assets will be available to the members, since otherwise the member will not have a tangible interest in the winding up. However, it is thought that in this jurisdiction, if the company is insolvent and ought to be wound up, but the directors have failed to take steps either to convene the necessary meetings for a creditors' voluntary winding up or alternatively to have the company authorise the presentation of a petition in the company's own name, the court would accede to a petition presented by an individual contributory who, although no longer having any tangible interest in the company because of the net asset deficiency, nonetheless wishes to ensure that there is an orderly realisation of assets for the benefit of the general body of creditors."

The authority relied on by the editors for the proposition in the last sentence in that quotation is the decision of the High Court (Kenny J.) in *Re Irish Tourist Promotions Limited* (22nd April, 1974, Unreported).

16. The position of a fully paid up shareholder who seeks to have a company wound up was considered more recently by this Court in *Re La Plagne Limited* [2012] 1 ILRM 203. However, the *ratio decidendi* of that case was that the petitioner who had invoked paragraph (e) of s. 213 had not demonstrated that the company he had sought to have wound up was unable to pay its debts.

17. The position of a fully paid up shareholder of a company who sought to be heard on the hearing of a petition to wind up the company at the suit of a person who claimed to be a creditor and alleged that the company was deemed insolvent by reason of failure to comply with his demand under s. 214(a) of the Act of 1963, to dispute the Petitioner's debt, in circumstances where the shareholder in question was a fifty per cent shareholder and the other fifty per cent shareholder was supporting the petition, was considered by this Court in *Re Forrest Lennon Business Support Services Ltd*. [2011] IEHC 523. However, I do not consider that decision, which is under appeal to the Supreme Court, to be of particular relevance to the argument advanced on behalf of the Company in this case that the Petitioner does not have *locus standi* to petition to have it wound up.

Conclusion

18. In short, I am of the view that there is no Irish authority which gives clear guidance on the standing of the owner of a fully paid up minority shareholding in a public limited company to petition to wind up the company either under paragraph (e) or paragraph (f) of s. 213 of the Act of 1963. Therefore, I think it would be premature to make a determination on the submission of the Company in this case that the Petitioner does not have standing, in circumstances where there has not been full compliance with the Rules in relation to the presentation of the petition. Accordingly, I consider that the proper course is to fix a new return date for the hearing of the petition so that by that date there shall be full compliance by the Petitioner with the requirements of the Act of 1963 and the Rules.

19. Accordingly, the petition will be heard on Tuesday, 20th March, 2013 at 10.30am. In addition to complying with the requirements of Order 74, rule 10 of the Rules, it is directed that the petition be advertised in the international edition of the Financial Times seven clear days before the hearing.

20. For the avoidance of doubt the Company has leave to file an affidavit in response to Mr. Hardy's affidavit sworn on 18th February, 2013, but to do so not later than 7th March, 2013. To obviate any further delays in the hearing and determination of the petition, I am directing that no affidavits, whether in relation to substantive issues or procedural issues, such as proof of advertising, should be filed on behalf of the Petitioner or the Company after 14th March, 2013. In view of the novelty of the issue which has been raised on behalf of the Company, I am directing that both the Petitioner and the Company file outline legal submissions on the substantive issues on the petition by 1pm on Friday, 15th March, 2013.