Neutral Citation: [2014] IEHC 12

The High Court

Record number 2013/595 COS

In the matter of Fuerta Limited

and

In the matter of the Companies Acts 1963 to 2012

Judgment of Mr Justice Peter Charleton delivered on the 22nd of January 2014

1. Bank of Scotland plc seeks to wind up Fuerta Limited under section 213 (f) of the Companies Act 1963 on the ground that the court should be "of opinion that it is just and convenient that the company… should be wound up." A novel point arises.

2. Section 213(f) is most often associated with situations such as deadlock or oppression. Traditional case law has been based on the decision of the House of Lords in *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360. Example in Ireland of deadlock, relying on the analysis in earlier English and Irish case law, are *Bluzwed Metals Limited v Transworld Metals SA* (High Court, unreported, Lavan J, 9 May 2001) and *In the Matter of Irish Tourist Promotions Limited* (High Court, unreported, Kenny J, 22 April 1974). Oppression by a majority of a minority is quite often brought as a ground for relief under section 205 of the Act of 1963 and not winding up under section 213(f), though there are exceptions; *In Re Dublin Cinema Group Limited* [2013] IEHC 147. What is clear, however, is that whatever the traditional analysis, the express wording of the subsection is not limited to these instances of deadlock or oppression. In the *Ehrahimi* case, Wilberforce J at page 374 indicated that it would be wrong to turn illustrations of the jurisdiction into rules limiting that jurisdiction. In Derek French – Applications to Wind Up Companies (2nd edition, 2008) the author describes the following categories as identified in existing decisions:

> Cases in which the company was promoted fraudulently.
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> Cases in which the company's substratum has gone.
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> Cases in which there is a 'deadlock'.
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> Cases in which there is a constitutional and administrative vacuum.
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> Cases in which the management and conduct of the company are such that it is unjust and inequitable to require the petitioner to continue as a member.
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> Cases in which the company is a quasi-partnership company and the circumstances described [of breakdown of a trusting relationship] exist.

3. The author notes that other cases are in a class of their own or constitute a small group. Another approach to classification is to list the instances as: exhaustion of substratum; justifiable lack of confidence in management; deadlock preventing or inhibiting corporate action; and the breakdown of the partnership upon which the company was expressly founded; see French p 602 and *Coutu v San Jose Mines Limited* 2005 BCSC 453. But that is not all. In particular, the notion of serious irregularity within a company can serve as fertile ground for the expansion of the traditional categories for the use of the just and equitable ground to wind up a company. *In the Matter of Dublin and Eastern Regional Tourism Organisation Limited* [1990] 1 IR 579 was a case based upon particular facts which establishes the principle that if the company does perform as it is expected to in law, it may be just and equitable to wind it up. The company in question was established to cooperate with the national tourist board, Bord Fáilte Éireann, in promoting and coordinating tourism development and was bound to follow the directions of that body. Where serious disagreement arose as between members of the company and Bord Fáilte Éireann, Costello J considered that situation sufficient to wind it up. The company, he reasoned, through its chairman and directors were all bound to cooperate with the policies and follow the directions of Bord Fáilte Éireann. At page 582, the judge stated:

> In these circumstances it seems to me that it would be just and equitable to wind up the company under the section on which the petitioner relies. I am satisfied that the facts referred to in paragraph 26 of the petition justify me in reaching the conclusion that the company is no longer able to continue to pursue the purpose for which it was incorporated and that it would be just and equitable to wind up the company because of the facts which have been established.

4. There is sufficient authority that the court should not trammel its own jurisdiction under section 213(f) through reference to authorities that merely exemplify the jurisdiction. Furthermore, the *Dublin and Eastern Regional Tourism Organisation* case is not to be confined to express obligations to follow statutory directions. The principle in that case seems to be not only confined to the notion that a company should be able to pursue the purposes for which it was incorporated, but that companies should abide by the law in such a way that those dealing with them can have confidence that their independent corporate existence, as establishing their ability to act as a legal person, is not compromised by deliberate or reckless failure to observe the code of company law. Even in the absence of argument by analogy with the *Dublin and Eastern Regional Tourism Organisation* case, the elaborate regulation of companies through legislation, the privilege that incorporation confers on the shareholders, the seriousness of infringing positive obligations and negative prohibitions in that code – often breaches are classified as criminal – and the entitlement of the public to have resort to the Companies Registration Office as a source of reliable information on what otherwise is an opaque structure, all indicate that compliance with law is central to obtaining and maintaining corporate personality. Such privilege can be lost by neglect and such neglect can in extreme circumstances be so serious as to enable the High Court to wind up a company on the just and equitable ground.

5. Fuerta Limited was incorporated in February 2006 as company number 414785. The directors of the company have been seriously in default of the legal obligation to file annual returns in the Companies Registration Office. When there is persistent default, the Registrar of Companies will strike a company off the Register of Companies, in which case it ceases to have corporate personality. Creditors of the company quite often apply to the High Court to have a company reinstated; thus enabling them to enforce a security held against the company. But, that application is time-consuming requiring, as it does, the observations of the Companies Registration Office, the relevant Minister of Government and the Revenue Commissioners. Such orders, when granted, often make restoration conditional on the directors filing all outstanding returns and the company paying all outstanding taxes within three months

of the order. Such orders are conditional that if such steps are not taken the High Court order of restoration will automatically lapse. In all, therefore, after the striking of a company from the Register of Companies, up to six months may be required to properly reinstate it. In the economic climate in which Ireland finds itself, a failure to make annual returns is particularly grave. This company has been struck off before. According to the affidavit evidence, in June of 2010 an application was successfully made to the Companies Office to restore it. Since then, despite whatever assurances were given to the Registrar of Companies, no annual returns have been filed.

6. The objects of the company include the power to buy and deal in land. The company was formed with the express object of owning and managing a nursing home. The facility in question is near Marlay Park to the south of Dublin city. The company was incorporated as a vehicle for participating in the development of that nursing home and the petitioner Bank of Scotland made available a loan facility of up to €15 million pursuant to a structure in respect of which the company held a 61% stake in the investment in relationship with a number of individual investors who made up the balance of 39%. Enforcement of the bank's security is now mandated but a sale of control of the facility is only possible with either the compliance of the company or through a liquidator controlling the company. The problem has been that the directors of the company have not responded in any positive way to a series of approaches. The directors were informed of this petition but while the email traffic exhibited in an affidavit shows that thought was given by the directors to engaging a solicitor to represent the company, and that it was also considered that perhaps one or more of the directors might appear at the hearing, in the result there was no such representation at the hearing. The result of the stasis that has gripped the company has been that an attempt to sell the facility through engaging with the company, pursuant to the rights of Bank of Scotland in securing the loan, has proved impossible. Should a liquidator be appointed, the evidence establishes that the liquidator could step into the shoes of the company and exercise its corporate personality with a view to disposing of assets. As the situation stands, any rationalisation of the structure of investment has become impossible. The relevant taxation structure for the best use of the assets of Fuerta Limited has a limited time span and in terms of legitimately availing of legislative exemption the Court has been informed that a deadline of 28th January 2014 needs to be met.

7. Resort to this section of the Companies Act is not lightly to be undertaken. It should only be engaged in the most intractable of situations. Winding up is, of course, the ultimate step in company law. Where other avenues are available, winding up on the just and equitable ground due to non-compliance with the code of company law should not be invoked. Nor should lack of corporate compliance as a ground for invoking the just and equitable jurisdiction to wind up the company be based on anything other than a most serious lack of compliance coupled with an absence of reasonably available alternative steps and in the context of existing or impending prejudice.

8. These elements are present here. On 2nd July 2012, Bank of Scotland wrote to the Companies Registration Office requesting that the impending striking from the register of companies due to the non-filing of returns be held back for 12 months. This was agreed to. There was an official warning that after 12 months there would be an automatic strike off. A further six-month extension was allowed, though with an appropriate condition from Harry Lester, assistant registrar of companies, in the following terms:

> From previous correspondence, the request fitted into our criteria. However, from your recent letter there is no mention of proposed enforcement action or any timescale set down as to when this matter will be resolved. The Registrar cannot indefinitely allow a company to remain on the register without filing annual returns.

9. Apparently further time has been granted, though it is fair to note that striking from the register, with loss of corporate personality, is now imminent. Furthermore, the correspondence between the solicitors acting on behalf of the petitioner Bank of Scotland and the directors of the company show no realistic prospect of any other avenue being open to resolve this situation. There has been a record of half-promises and deadlines that have not been met. Every step that could be taken before resorting to this extreme step has been pursued.

10. In those circumstances it is both just and equitable that this company should be wound up.