Neutral Citation Number: [2010] IEHC 5

**THE HIGH COURT**

**2009 708 COS**

**IN THE MATTER OF ABBEY TRINITY RETAIL LIMITED**

**AND IN THE MATTER OF THE COMPANIES ACTS 1963 - 2006**

**Judgment of Miss Justice Laffoy delivered on the 11th day of January, 2010**

**The basis of the petition**

On 10th November, 2009 Abbey Trinity Management Services Limited (the petitioner) presented a petition to wind up Abbey Trinity Retail Limited (the company). The basis of the petition was a demand under s. 214(a) of the Companies Act 1963 (the Act of 1963), as amended, wherein the petitioner demanded payment of a debt in the amount of €59,576 alleged to be due by the company to the petitioner in respect of arrears of service charges accrued in respect of a supermarket premises situate at Tuam Shopping Centre, Tuam, County Galway (the Shopping Centre), which is held by the company under a lease dated 22nd October, 2004 (the Lease) made between Fintan Gannon, Paul Kelly and Gerard Kelly of the first part, the petitioner of the second part and the company of the third part. In the final affidavit sworn on behalf of the petitioner, the affidavit of Tadhg O'Shea sworn on 17th December, 2009, it was averred that the petitioner is a cost recovery company, which means that all of the costs incurred must be recovered from the tenants in the Shopping Centre, which in turn means that failure of the company to pay the services charges which are due and owing is not only having a detrimental effect on the petitioner but will impact on the services which the petitioner can provide to other tenants in the Shopping Centre.

It is not in dispute that the company did not within three weeks of the service of the demand pay the sum claimed or secure or compound for it to the reasonable satisfaction of the petitioner. Accordingly, by virtue of the provisions of s. 214 the company is deemed to be unable to pay its debts. However, the position of the company is that the alleged debit is disputed, that dispute is in relation to the service charge which it is contended is the subject of an arbitration clause in the Lease and that, accordingly, the petition should be dismissed, the petition being alleged to be an abuse of process.

**The relevant provisions of the Lease**

The Lease is in the standard form for commercial occupation lease of a unit in a shopping centre. In addition to reserving rent it reserves, by way of additional rent, every amount payable by the company in respect of the "General Service Charge" calculated in accordance with the provisions of the Fourth Schedule and payable at the times and in the manner specified therein (clause 2.2). There is also a covenant by the company to pay the General Service Charge without deduction or abatement (clause 4.1.2).

The expression "General Service Charge" is defined in the Lease (clause 1.7) as meaning the aggregate costs, expenses and outgoings paid, incurred or borne as set out in the Third Schedule by the company in discharging the obligations, executing the works and providing the services, amenities and facilities specified therein. As one would expect, the Third Schedule covers a variety of obligations on the part of the petitioner including repairing, decorating, lighting and heating the common areas of the Shopping Centre, payment of rates and taxes in respect of the common areas, discharging the salaries and wages of management and office staff, maintenance, cleaning and security staff and suchlike.

The Fourth Schedule sets out the method of ascertaining the company's proportion of the General Service Charge and the method of payment thereof. Clause 1.2 provides that, of the 100% of the total costs, 25.8% is attributable to the Supermarket Unit, being the unit occupied by the company under the Lease. The provisions of the Fourth Schedule in relation to payment of the portion of the General Service Charge attributable to it by the company to which the Court's attention was drawn were the following:

> (a) sub-clause 2.1, which provides that the company shall pay in advance on 1st December in each year the amounts and proportion attributable to the demised unit to be estimated by the petitioner in respect of the service charge which shall be a fair and reasonable sum as may be reasonably determined having due regard to the current year's expenditure;
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> (b) sub-clause 2.2, which provides that the petitioner will in each of the year on or about 30th August make and notify in writing to the tenant an estimate (having regard to the general provisions of the Third Schedule and the economic conditions then prevailing) of the General Service Charge during the twelve months ending on the following 31st December in respect of the charges and the amounts and proportion thereof attributable to the demised unit and the company shall pay the same in one instalment on 31st December;
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> (c) sub-clause 2.3, which provides that the petitioner shall be at liberty from time to time at its discretion to alter the date and periods specified in sub-clause 2.1 and 2.2 and make all consequent adjustments thereby rendered necessary; and
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> (d) sub-clause 2.5, which provides that a certificate of the petitioner's auditors as to the actual amount of the General Service Charge and the proportion thereof attributable to the demised unit shall be final and binding upon the parties to the Lease and also provides that the petitioner's reasonable estimate to be provided to the company pursuant to sub-clause 2.2 shall be binding on the parties to the lease.

There is provision for arbitration in the body of the Lease and the provision relied upon by the company is clause 9.3.1 which provides as follows:

> "Any dispute or difference arising between the [petitioner] and the [company] as to their respective rights, duties or obligations hereunder or as to any other matter or thing in any way arising out of this Lease including assessments by … the [petitioner's] Managing Agents shall be referred to arbitration and in the case of any such disputes or differences relating to the calculation of the [company's] proportion of the General Service Charge, then the Arbitrator will be a Surveyor experienced in the management of Shopping Centres."

**The factual position in relation to the company's liability for the service charge**

The petitioner's deponent, Mr. O'Shea, has averred that the petitioner has exercised its right pursuant to sub-clause 2.3 of the Fourth Schedule to the Lease and now invoices the tenants in the Shopping Centre quarterly in advance for the General Service Charge. According to the petitioner, the amount alleged to be due by the company to the petitioner represents a balance due by the company on foot of an invoice issued on 1st April, 2009 in respect of the service charge for the quarter ended 30th June, 2009 and the total amounts due on foot of invoices dates respectively 1st July, 2009 and 1st October, 2009 in respect of the service charges for the quarters ended 30th September, 2009 and 31st December, 2009 respectively. The petitioner has acknowledged that since January 2009 the company has paid sums aggregating €60,690 in respect of services charges but states that all but €14,487.47 of that amount was in respect of arrears of service charge which were due in 2008 and for the first quarter of 2009, which the company had failed to pay.

The first response of the company to the demand under s. 214(a) was the company's solicitor's letter of 5th November, 2009, which was faxed to the petitioner's solicitors on 10th November, 2009 and received by them in hard copy on 11th November, 2009. In that letter it was complained that no accounts had been furnished to the company showing how the amount was calculated or when it was due and it was also complained that details of the actual costs incurred in 2008 by the petitioner had been promised but had not been forthcoming. There was also a grievance expressed about the fact that the petitioner had introduced a "pay to park" meter system which it was alleged interfered with the company's trade. In the letter it was stated that the company "disputes the amount claimed in its entirety and will rely on previous correspondence, requests oral and written …" in the event of proceedings being instituted for recovery of the amount claimed. In fact, no previous correspondence has been exhibited and it would appear that none exists. The position of the petitioner is that this letter was the first occasion on which the company disputed the amounts claimed in respect of the service charge. In fact, it is clear on the documentation put before the Court by the company itself that it made a payment on account in the sum of €2,000 on 8th October, 2009.

The first occasion on which the company invoked the arbitration clause in the Lease was in its solicitor's letter dated 3rd December, 2009, to the petitioner's solicitors, at a time when the petition was returnable to, and due for hearing on, 7th December, 2009. In that letter, and in previous letters of 17th November, 2009 and 23rd November, 2009, the complaint of the absence of information was reiterated. For instance, in the letter of 17th November, 2009 the company's solicitors stated that the information sought in their letter of 5th November, 2009 was crucial information without which the company could not address the issue of whether any monies are owing to the petitioner and whether account has been taken of all monies made by the company to date. The only other basis of defending the petitioner's claim in the correspondence is an assertion in the letter of 23rd November, 2009 that the petitioner had "failed to justify the high level of management charges accruing which bear no proportion to the apparent provision of services" in the Shopping Centre and a reference to "the high level of service charges being applied in respect of the provision of certain services … and … the lack of transparency with regards to same" in the letter of 3rd December, 2009.

**The law**

Section 213 of the Act of 1963 provides that a company may be wound up by the Court if, *inter alia*, "the company is unable to pay its debts" (para. (e)). Section 214 provides that a company shall be deemed to be unable to pay its debts if, *inter alia*, there is a failure to comply with a demand in writing requiring the company to pay the sum due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor (para. (a)), which is the provision invoked by the petitioner on this petition. Section 215 provides that an application to Court for the winding up of a company shall be by petition presented by, *inter alia*, a creditor. Section 216(1) sets out the powers of the Court on the hearing of the petition and confers on the Court a broad discretion, in that the Court may dismiss it, or adjourn the hearing conditionally or unconditionally or make any interim order or other order that it thinks fit.

In *Truck & Machinery Sales Ltd. v. Marubeni Komatsu Ltd*. [1996] 1 I.R. 12, Keane J. (as he then was) succinctly summarised the position where the company contends that the debt on which the creditor petitioner seeks to base the petition is disputed as follows (at p. 24):

> "It is clear that where 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 the court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. That was the effect of the decision of Ungoed-Thomas J. in *Mann v. Goldstein* [19968] 1 W.L.R. 1091, which was subsequently approved of by the Court of Appeal in *Stonegate Securities v. Gregory* [1980] Ch. 576, both of which decisions were expressly adopted by O'Hanlon J. in *In re Pageboy Couriers Ltd.* [1983] ILRM 510.
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> The words 'any liability' are, however, important: where a company admits its indebtedness to the creditor in a sum exceeding [€1,269.74] but disputes the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a petition."

While the Court is not concerned here with an application by the company for an injunction restraining the petition, the observations of Keane J. to the proper approach to be adopted by the Court on such an application are instructive. He

stated (at p. 27):

> "The constitutional right of recourse to the courts should not be inhibited, save in exceptional circumstances, and this applies as much to the presentation of a petition for the winding-up of a company by a person with the appropriate *locus standi* as it does to any other form of proceedings. The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In the context of winding-up petitions, I have no doubt that it should be exercised only where the plaintiff company has established at least a *prima facie* case that its presentation would constitute an abuse of process. In many cases, a *prima facie* case will be established where the plaintiff adduces evidence which satisfies the court that the petition is bound to fail, or, at the least, that there is a suitable alternative remedy."

As an alternative to the petition being dismissed, in this case, the company has sought an order staying the petition in reliance on the arbitration clause in the Lease. The main focus of the submissions made on behalf of the parties was the circumstances in which the Court is obliged to stay proceedings pending arbitration. Section 5 of the Arbitration Act 1980, as amended (the Act of 1980), provides as follows in sub-section (1):

> "If any party to an arbitration agreement … commences any proceedings in any court against any other party to such agreement … in respect of any matter agreed to be referred to arbitration, any party to the proceedings may at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings, apply to court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

As was pointed out by Kelly J. in *Gaya Ltd. v. Applied Medical Resources Corporation* [2006] IEHC 402, an authority relied on by counsel for the company, it is quite clear both from the wording of subs. (1) and from the jurisprudence which has developed on that provision and on similar provisions in other jurisdictions that the Court must grant a stay unless it is satisfied that the case falls within one of the exceptions identified in sub-section (1). The exception which counsel for the petitioner advocated comes into play on this petition is "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". On the question as to when in fact a dispute can be said to exist, counsel for the petitioner referred the Court to the commentary in Mustill and Boyd on *The Law and Practice on Commercial Arbitration in England*, (Butterworths, 2nd ed., 1989) (at pp. 122 – 124) concerning the meaning of a provision then in force in the United Kingdom similar to subs. (1), prior to an amendment of the law in 1996. In discussing the significance of an assertion by a claimant that the defendant has not raised a genuine dispute, in a context in which the defendant is seeking to stay litigation pending arbitration, it is stated that the law was then clearly established in England as follows (at p. 124):

> "Where the claimant contends that the defence has no real substance, the Court habitually brings on for hearing at the same time the application by the claimant for summary judgment, and the cross-application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other."

Counsel for the petitioner also referred the Court to a decision of the Commercial Court in England in *Hayter v. Nelson & Home Insurance Co.* [1990] 2 LLR 265, which also pre-dated the change in the law in England in 1996. In that case, Saville J. construed the words "there was not in fact any dispute" in the English provision which corresponded to subs. (1) as meaning that there was not in fact anything disputable. He further held that, when considering an application for summary judgment, a factor to be taken into account was the existence of an arbitration agreement between the parties, and only when it was readily and immediately demonstrable that the respondent had no good grounds at all for disputing the claim should the party be deprived of his contractual right to arbitrate.

It was also pointed out by counsel for the petitioner that in *Campus and Stadium Ireland Ltd. v. Dublin Waterworld Ltd*. [2006] 2 I.R. 181, Kelly J. had regard to what was contained in the affidavits and in concessions made in Court in concluding that he was satisfied that there was, in fact, no dispute between the parties but that the defendant had been and continued to be in breach of its obligations to pay rent and other specified sums, so that there was not in fact any dispute between the parties which would justify the Court making an order for s. 5 of the Act of 1980 in respect of the non-payment of rent.

No authority was cited which demonstrates the interface between s. 5(1) of the Act of 1980 and ss. 213 to 216 of the Act of 1963. Looking at the matter in point of principle, it seems to me that the emphasis placed on the arbitration clause and on s. 5 of the Act of 1980 by the company is misconceived.

The jurisdiction of the Court to make an order to wind up a company is specific jurisdiction which is designed, in the circumstances which have been invoked by the petitioner in this case, where it is contended that the company is unable to pay its debts, to provide a process whereby the company is liquidated in an orderly manner, its assets are got in and distributed to the persons entitled thereto in accordance with law. Whether an alleged debtor company contends that it is entitled to litigate or arbitrate the petitioner's claim that the company is indebted to it, the test as to whether a petition brought by the creditor based on a deemed insolvency by virtue of non-compliance with a demand under s. 214(a) should be dismissed is the same. It is the test which was clearly articulated by Keane J. in the passage in the *Truck & Machinery Sales* case which I have quoted earlier: whether the company in good faith and substantial grounds disputes any liability in respect of the alleged debt. That is the test which I now intend to apply.

**Debt disputed in good faith and on substantial grounds?**

I have earlier paraphrased the provisions of the Fourth Schedule to the Lease on which the petitioner relies. The proportion of the General Service Charge for which the company is liable is fixed at 25.87% in sub-clause 1.2 and it is on the basis of that percentage that the sums claimed on the invoices in issue on this petition were calculated. Sub-clause 2.1 states the tenant's obligation to pay in advance. Sub-clause 2.2, in general terms, sets out the petitioner's obligation in relation to claiming payment in advance. As I have outlined, in accordance with sub-clause 2.3 the dates and periods for payment have been varied. Sub-clause 2.4, which I have not paraphrased, provides for the ascertainment of the actual costs incurred by the petitioner at the end of a calendar year and a reconciliation of the company's actual liability for that year and the payments in advance received from the company and where necessary giving the company credit for any excess by way of set-off against the next payment due by the company. The function of the petitioner's auditors

referred to in sub-clause 2.5 relates to the exercise provided for in sub-clause 2.4. The second limb of sub-clause 2.5 relates to the estimation of the payment in advance which the company is obliged to make and it states clearly that the decision of the petitioner of what constitutes a reasonable estimate is binding. In my view, as a matter of construction of the Lease, the estimation of the payment in advance on account of the service charge due from the company under the Lease does not come within the provision for arbitration provided for in clause 9.3.1, which the company invoked, because it is governed by sub-clause 2.5 of the Fourth Schedule, which makes it binding on the company.

The invoices issues by the petitioner which remained undischarged by the company when the demand under s. 214(a) was made by the petitioner on the company represent payments in advance in respect of the service charge in respect of the second, third and fourth quarters of 2009. The petitioner's estimate of the sums to be claimed, in accordance with sub-clause 2.5 of the Fourth Schedule, is binding. The only conceivable basis on which the company could dispute the amount claimed is that it was not given a set-off for an overpayment in the previous year. While, in the second affidavit of Senan McGonigle sworn on 16th December, 2009 on behalf of the company, it is averred that the company specifically disputed the level of the service charge being levied at meetings with the representatives of the petitioner, that the petitioner has failed to furnish a proper breakdown and particulars in relation to the service charge which it is seeking to levy resulting in a lack of necessary transparency as to the service charge, that the fact that the Shopping Centre was undergoing development is 2004 and 2005 had an effect on the level of the service charge and since the development works have been concluded the amount of the service charge which the petitioner is seeking to levy is excessive, it is not contended that the company is entitled to a set-off in respect of an overpayment in a previous year. A document exhibited by Mr. McGonigle in his first affidavit, which was sworn on 4th December, 2009, indicates that the proportion (25.87%) of the actual cost in respect of 2008 for which the company was liable marginally exceeded the amounts invoiced excluding VAT. Mr. McGonigle did not raise any issue in relation to that statement.

On the basis of the foregoing analysis, I conclude that the company is not disputing liability for the sum of €59,576 claimed by the petitioner in respect of the service charge on substantial grounds.

Moreover, it is difficult to conclude that, in disputing the debt, the company is acting *bona fide*, primarily, because the company made payments on account up to 8th October, 2009 and did not complain, at any rate in writing, about the estimated amount of the service charge for 2009 until 5th November, 2009.

Apart from the foregoing, there are a number of other factors which have a bearing on whether the plaintiff is acting *bona fide*. On the date on which the petition was returnable before the Court, 7th December, 2009, counsel for the landlords in the Lease, Fintan Gannon, Paul Kelly and Gerard Kelly, informed the Court that the rent reserved by the Lease was in arrears in excess of €170,000 and that his clients were supporting the petition. In a second affidavit, sworn on 16th December, 2009, Mr. McGonigle denied that a sum of €171,670 was due to the landlords in respect of rent and contended that the company had entered into an arrangement with the landlords "to discharge a monthly sum on account of rent". However, a letter dated 11th December, 2009 from the landlords' solicitors to the company's solicitors stated that arrears of rent amounting to €171,670 were currently due. At the hearing of the petition on 18th December, 2009 counsel for the landlords once again reiterated the company's indebtedness to the landlords and their support for the petition.

Finally, the company's Abridged Financial Statements for the year ended 31st August 2008 were not filed in the company's registration office until 3rd December, 2009, at a time when the company was under a threat of strike off. The balance sheet shows a deficiency of assets in the amount of €3,010,519. In Note 2 it is disclosed that the company reported an operating loss for the year. It is also disclosed that the directors concluded, in the circumstances outlined, that there was a significant doubt as to the company's ability to continue as a going concern, but they have a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future. The company's auditors, Horwath Bastow Charleton, in their report stated that, in forming their opinion, which was not qualified, they had considered the adequacies of the disclosures made in Note 2 concerning the company's ability to continue as a going concern. They certified the financial statements as giving a true and fair view of the state of the company's affairs as at 31st August, 2008. I have taken the foregoing into account, as I have the fact that, in his second affidavit, Mr. McGonigle averred that the company is in a position to pay its debts as they fall due, although he did so in the context of the denial of the company's indebtedness to the landlords in the sum of €171,670.

**Determination on petition**

On the basis that there are not substantial grounds for the company disputing the petitioner's debt the subject of the s. 214(a) demand and, in any event, not being satisfied that the company's challenge to the debt is *bona fide* as opposed to being an attempt, as the saying goes, "to put off the evil day", and the company being deemed to be unable to pay its debts by reason of failure to comply with the demand under s. 214(a), I have come to the conclusion that the proper exercise of the Court's discretion under s. 216 of the Act of 1963 is to make a winding up order.