Neutral Citation No. [2009] IEHC 590

THE HIGH COURT

2009 6555 P

BETWEEN

TROON DEVELOPMENTS LIMITED

PLAINTIFF

AND

GERARD HARRAHILL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 7th day of December, 2009.

The application
On this application the plaintiff, a building company, seeks an injunction restraining the defendant, the Collector-General of the Revenue Commissioners, from presenting a petition to wind up the plaintiff pursuant to the provisions of s. 213 of the Companies Act 1963 (the Act of 1963). The plenary summons in this matter was issued on 17th July, 2009. Simultaneously with the plenary summons the plaintiff issued the notice of motion seeking that relief.

Factual background
On 2nd February, 2009 the Revenue Commissioners issued what was described as a final demand on the plaintiff for payment of €2,680,917 in respect of arrears of tax. Subsequently, on 22nd June, 2009 the defendant issued a demand to the plaintiff for repayment of €2,370,512.05 in respect of value added tax (€2,550,040) and interest (€315,472.05). The demand was expressed to be a demand for the purposes of s. 214 of the Act of 1963 and, failing payment within 21 days, a petition to wind up the plaintiff was threatened.

The case made in the grounding affidavit in support of the plaintiff's application, which was sworn by a director of the plaintiff, Laurence Mahon, was that the plaintiff was unable to pay the sum claimed by the Revenue Commissioners, which it was acknowledged was not in dispute as between the plaintiff and the Revenue Commissioners, because of the alleged wrongful payment by the plaintiff's former solicitors of the net proceeds of sale of units in a development at Cork Street in the City of Dublin, including sums in respect of V.A.T., to the plaintiff's lender, First Active Plc., and the alleged wrongful refusal of First Active Plc. to return the payments to the plaintiff so that the plaintiff could remit them to the Revenue Commissioners. Mr. Mahon explained that the plaintiff had borrowed €22 million from First Active Plc. on the terms of a Loan Offer dated 24th October, 2006, which required the plaintiff's solicitors to undertake that "all net sales proceeds (net sale proceeds being the entire of the sale proceeds less reasonable estate agents and solicitors sale costs)" from the units in Cork Street would be applied towards the reduction of the plaintiff's loan facilities. In October 2007, when the sales of the units were completed, the plaintiff's former solicitors paid to First Active Plc. the balance of the consideration received in respect of the sales, having first deducted their costs as solicitors and the costs of the sale, but having made no provision for value added tax.

Around February 2009 the plaintiff's current solicitors took up the issue of the alleged wrongful payment of the V.A.T. component of the proceeds of sale with the Ulster Bank group, of which First Active Plc. forms part, and ultimately on 1st July, 2009 proceedings were issued by the plaintiff against First Active Plc. and the members of the former solicitors firm. Those proceedings were admitted into the Commercial Court. The factual basis on which the plaintiff sought to have the presentation of a petition by the defendant restrained, in essence, was that, if the plaintiff was successful in the proceedings in the Commercial Court, which it was hoped could be dealt with expeditiously, the amount due to the Revenue Commissioners would be paid. Alternatively, if the proceedings in the Commercial Court were not successful, a petition to wind up by the defendant would not be resisted.

A somewhat different slant on the factual background was given in the replying affidavit filed on behalf of the defendant, which was sworn by an official in the Debt Management Unit of the Revenue Commissioners. The deponent, Kathleen Bourke, deposed to the fact that in October 2008 the plaintiff was served with an audit notification and subsequently made a voluntary disclosure of approximately €2 million due for V.A.T. The explanation provided to the Revenue Commissioners at the time was the explanation given by Mr. Mahon in his affidavit. However, it was suggested that the proceedings against First Active Plc. and the former solicitors were a reaction to the s. 214 demand, which, in a subsequent affidavit, was disputed by Mr. Mahon. Ms. Bourke also raised issues as to the plaintiff's ability to continue as a going concern arising out of reservations by the plaintiff's auditors in its most recent financial statements for the year ended 31st October, 2008. In the affidavit of Mr. Mahon in response to Ms. Bourke's affidavit, the position adopted on behalf of the plaintiff was that it was "open to doubt" if the auditors' concerns represented a correct view of the state of affairs of the plaintiff.

Insofar as there is a factual controversy as between the plaintiff and the defendant on the affidavits filed on this application, the Court cannot resolve that controversy. Moreover, it would be wholly inappropriate for the Court to express any view in relation to the Commercial Court proceedings in the absence of the defendants to those proceedings.

Legal principles invoked on behalf of the plaintiff
As I have stated, the unequivocal position of the plaintiff is that the debt claimed by the Revenue Commissioners is not disputed. In arguing that it would be appropriate for the Court to restrain the presentation of a petition at the suit of the defendant, counsel for the plaintiff relied on two decisions in which orders of that nature were granted.

The first was the decision of the Supreme Court In Re Bula Ltd. [1990] 1 I.R. 440. The company which it was sought to wind up in that case, Bula Ltd., was hopelessly insolvent. The petition was presented by three banks to which the

company was indebted as secured creditors, who had already appointed a receiver who had been attempting to sell the assets of the company. The opposition to the petition came from, inter alia, Munster Base Metals Ltd., which had obtained judgment against the company in the sum of approximately IR£690,000 and had registered the judgment as a judgment mortgage against certain property of the company. McCarthy J., with whom the other Judges of the Supreme Court agreed, identified the motivation in presenting the petition as follows (at p. 447):

> *"It was avowedly for the purpose of defeating the Munster manoeuvre towards becoming a secured creditor that the petition was presented. It was not for the purpose of recovering the banks' debts, a purpose itself of questionable validity, much less to produce a benefit to a class of creditors to which the petitioners belong. In fact, the petitioners are the only members of the class to which they belong; whatever nicety of distinction may lie between creditors secured by debenture and creditors secured by registration of a judgment mortgage, in the instant case the granting of the petition would nullify the effective registration and remove Munster from possible identification in the same class as the petitioners."*

Having referred to s. 213 and s. 309 of the Act of 1963, and having stated that the section (and I assume that this is a reference to s. 213) gives to the Court a true discretion which should be exercised in a principled manner that is fair and just, McCarthy J. stated (at p. 448):

> *"I would hold that a creditor is prima facie entitled to his order so as to shift the initial burden to those who oppose the winding up; the petitioner does not have to demonstrate positively that an order for winding up is for the benefit of the class of creditors to which he belongs, but, if issue is joined on the matter, and a case made that the petition is not for that purpose but for an ulterior, though not in itself improper object, then the burden shifts back to the petitioner. Here, the ulterior motive or purpose is not in issue and, until the hearing in this Court, no other object appeared to be in mind."*

Later (at p. 449) McCarthy J. stated that the petitioners' prima facie right to an order had been displaced by their own evidence. The Supreme Court dismissed the petition.

The second authority relied on by counsel for the plaintiff was the decision of this Court (McCracken J.) in Re Genport Ltd. (The High Court, McCracken J., -unreported, 6th November, 2001). The petition at issue in that case was a step in a protracted and multi-faceted litigation in relation to a valuable hotel premises in Morehampton Road in Dublin between Crofter Properties Ltd., the landlord of the premises, and the company, Genport Ltd., which was the tenant of the premises. When the petition was presented in 1995, a claim by Crofter Properties Ltd. and a counter-claim by Genport Ltd. were the subject of a pending action in the High Court and the petition was stayed pending the outcome of that action. The judgment of McCracken J. was on foot of an application by the petitioner to re-enter the petition. The petitioner, an individual, had been a party to an earlier bout in the litigation. She had obtained a decree for costs against the company and a co-plaintiff of the company, Philip Smyth. She had not sought to execute against the assets of the company nor to proceed in any way against Mr. Smyth. Moreover, it was contended that she was in fact indemnified against her costs, either by Crofter Properties Ltd. or by one of its directors.

Having quoted from the decision of McCarthy J. in the Bula Ltd. case, McCracken J. stated as follows:

> *"In the present case it appears beyond doubt that if a winding up order is made, the benefit to the petitioner will be negligible, and the probability is that neither she nor any of the ordinary creditors will recover anything at all. If her motive was to recover the monies due to her, there were a number of other avenues open to her which she has chosen not to take. In particular, she has chosen not to pursue Philip Smyth.*
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> *On the other hand, the principal beneficiary if a winding up order is made will be Crofter Properties Ltd. That company will recover vacant possession of very valuable property, and there must be a reasonable prospect that the counter-claim against that company which is in the course of hearing would not be pursued by a liquidator. This seems to me to be the motive of seeking a winding up order at this stage. It may well be said, as was in the Bula case, that the motive is not in itself an improper motive, as the petitioner is an officer of Crofter Properties Ltd., and indeed Crofter Properties Ltd. is almost certainly the largest creditor of the Company. There is no doubt in my mind that this application has not been brought to benefit the ordinary creditors of the Company as such, but to benefit Crofter Properties Ltd. in its position as lessor of the property to the Company and as one particular general creditor. In those circumstances, while I am not taking the drastic remedy of dismissing the petition as was done in the Bula Ltd. case, nevertheless I would propose to adjourn the petition generally, again with liberty to re-enter."*

Counsel for the plaintiff made the point that the plaintiff comes to court "with clean hands". As regards the position of the defendant, he made it clear that he was not suggesting that the petition was brought for an ulterior motive, as had happened in the Bula case. However, he submitted that the situation here is analogous to the situation which arose in the Genport case, in that, if the winding up order is made, the alleged wrongdoing against the plaintiff whereby the plaintiff was deprived of the amounts in respect of value added tax is likely not to be pursued in the Commercial Court Proceedings. Therefore, it was submitted, the defendant should exercise forbearance and allow the plaintiff to pursue its remedy in the Commercial Court proceedings.

In response, counsel for the defendant relied on the oft quoted passage from the judgment of Keane J. in Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd. [1996] 1 I.R. 12 (at p. 27) to the following effect:

> *"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 least, that there is a suitable alternative remedy. It would not be appropriate to apply the principles laid down by the Supreme Court in Campus Oil Ltd. v. The Minister for Industry and Energy (No. 2) [1983] I.R. 88 in cases of this nature where it is the creditor's right to have recourse to the courts, rather than any right of the plaintiff company, which is under threat."

Conclusions
Given that it is acknowledged that the plaintiff does not dispute that the debt the subject of the s. 214 notice is due and owing to the Revenue Commissioners, the defendant is a creditor who has locus standi to bring a petition to wind up the plaintiff. Further, having regard to the failure of the plaintiff within 21 days of the service of the s. 214 demand to meet the debt, by virtue of the operation of s. 214 the plaintiff is deemed to be insolvent. Accordingly, by virtue of s. 213 of the Act of 1963 the plaintiff may be wound up and, indeed, as was implicitly recognised by McCarthy J. in the Bula case, if a petition at the suit of the defendant on foot of the s. 214 demand were before the Court, the defendant would be entitled to a winding up order ex debito justitiae, subject to the Court's discretion to decline to make a winding up order. Therefore, such a petition, far from being bound to fail, would be likely to succeed unless there was some equitable basis for refusing to make a winding up order or for postponing the making of a winding up order.

There is nothing in the circumstances of this case which would make it unjust or inequitable to make a winding up order or not to accede to an application to adjourn the petition pending the outcome of the Commercial Court proceedings, if it were before the Court. As has been acknowledged on behalf of the plaintiff, no ulterior motive can be ascribed to the defendant. The defendant is merely trying to secure payment of an acknowledged debt in respect of value added tax. As counsel for the defendant submitted, in a winding up only a very small portion of that debt, about €50,000, would be a preferred debt and, in respect of the balance, the defendant would have the status of an unsecured creditor. It is a debt that is growing, because interest is accruing on it.

As regards the Commercial Court proceedings, both from the perspective of the defendant and from the perspective of the Court there are many imponderables. Most significantly, neither the defendant nor the Court can form any view as to the prospect of success in those proceedings. Even if the plaintiff were to succeed, it is impossible on the evidence before the Court to form any view as to how that would benefit the defendant, because, as counsel for the defendant submitted, the defendant is not privy to the financial affairs of the plaintiff and does not know whether, or to what extent, the plaintiff at the termination of such proceedings would be indebted to secured or other creditors. Further, as counsel for the defendant submitted, in the event of the plaintiff being unsuccessful, the probability is that the plaintiff would be further burdened with the costs of the proceedings. Finally, if the plaintiff is wound up, whether to pursue the Commercial Court proceedings would be a matter which no doubt the official liquidator would consider.

In short, the factual situation in this case is distinguishable from the factual situation which existed in the Genport case and, in my view, the plaintiff has not pointed to any factor which would justify the Court, on the grounds of fairness and justice, injuncting the defendant from bringing a petition. On the contrary, it would be unfair and unjust to the defendant to grant an injunction.

Order
Accordingly, the plaintiff's application must be refused and there will be an order to that effect.

Changed circumstances
The Court has been apprised of the fact that since the application was heard, the circumstances have changed in that the plaintiff is unable to give security for costs as required in the Commercial Court proceedings and, consequently, is no longer seeking to restrain the defendant from presenting a petition. However, the defendant was anxious that the judgment which had been reserved would be delivered.

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