THE HIGH COURT

Record No: 2012/551 COS

In the matter of Dublin Cinema Group Limited

-and-

In the matter of the Companies Acts 1963 - 2012

Judgment of Mr. Justice Charleton delivered on the 25th day of March, 2013.

On the 4th of March 2013, which was the first day of the hearing of this petition to wind up Dublin Cinema Group Limited, an issue arose as to what order the High Court was empowered by the Companies Act 1963 to make. Following extensive argument, I gave an ex tempore ruling. These are my written reasons for that decision.

Background

The petitioner, Paul Anderson and the respondent, Paul Ward have a strong family connection. The differences between them do not arise out of malice. The two men are for many years directors of and members of Dublin Cinema Group Limited. This is a very successful company with many employees. The petitioner and the respondent and the employees of the company have given much entertainment to the people of Dublin over generations. Their family forbears in the company were rightly admired for their work, as are they. The company runs, among other cinemas, the Savoy Cinema in O'Connell Street. The respondent and the petitioner separately have plans to develop other cinema projects. On these projects, the involvement of Dublin Cinema Group Limited in them and as to the appropriate corporate vehicle for them, they cannot agree. Prior to the present difficulties they worked together harmoniously in what began as a family concern. After many years as colleagues, these and other differences arose between them. There has up to now been no possibility of reconciliation between them or of the settlement of these proceedings. This is demonstrated by the two failed attempts to reach any agreed resolution of the case through professional mediation prior to the commencement of this trial.

The present application

The application in this petition is to wind up the company under section 213(f) of the Act of 1963 as amended. The power to wind up a company under that subsection is on what is called the just and equitable ground. That is the only application before this Court. No alternative relief is sought. It is argued on behalf of the petitioner Paul Anderson, that the only power of a court, once such a petition is presented, is to either wind up the company or to refuse the petition. If the petition had been brought under section 213(g) of the Act of 1963 on the ground that the company's affairs were being conducted in a manner oppressive to, or in disregard of the interests of, a member, the court would, it is argued, have had more ample powers linking in to section 205 of the Act. Because that subsection was not used, it is urged on behalf of the petitioner that the court has no such amplitude of powers. Quite often in a situation of company deadlock, an application is brought for an order under section 205 of the Act of 1963. In invoking that subsection, a petitioner does not always include an alternative petition to wind up the company but seeks instead under section 205 an exit from the company or the rectification of its affairs. If an application had been made in this case not to wind up the company but, instead, under section 205, or had been made instead under section 213(g) which activates the powers under section 205 once such a petition is presented, the court would unarguably have had open to it to a much wider range of options. These include section 205 orders: for one director to buy out the shares of another director at a price fixed by the court; for the reduction of the company's capital; for the alteration of the company's articles and memorandum; or for the reversal of a particular decision. It is argued on behalf of Paul Ward, the respondent to this petition, that once any petition is presented to the court that may have as its result that a company may be wound up, section 216 of the Act of 1963 provides of itself, and without any necessity to invoke the powers under section 205, a wide discretion as to the order to be made and that these must include the amplitude of powers that are open under section 205. It is strongly argued in reply on behalf of the petitioner Paul Anderson that since the application was made by him under section 213(f) that none of the powers under section 216 on winding up a company contemplate the incorporation of any of the kinds of order open under section 205 and, further, that the specific inclusion of those powers in a petition to wind up under section 213(g) means that they are to be excluded under s213(f). In other words, that on this application to wind up the company the Court has none of the section 205 options open to it, merely the power to wind up or to refuse to wind up the company. The scheme of interaction between the various options set out in the Companies Act would otherwise, it is contended on behalf of the petitioner Paul Anderson, make no sense.

I will set out the relevant legislative provisions before turning to my reasons why I hold in favour of arguments advanced on behalf of the respondent Paul Ward.

Companies Acts 1963-2012

Section 205 of the Act of 1963 provides petitioners who are members of a company with the potential for relief where the affairs of the company or the powers of the directors are being conducted or exercised oppressively or in disregard of their interests.

The relevant portion of section 205 is as follows:

> (1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section.
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> (2) In a case falling within subsection (3) of section 170, the Minister may apply for an order under this section.
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> (3) If, on any application under subsection (1) or subsection (2) the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.
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> (4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the

memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company, and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

…

(7) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company, the court may order that the hearing of the proceedings or any part thereof shall be in camera.

Section 213, as amended, sets out the circumstances in which a company may be wound up by the court:

A company may be wound up by the court if—

(a) the company has by special resolution resolved that the company be wound up by the court;

(b) […]

(c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced, in the case of a private company, [or an investment company (within the meaning of Part XIII of the Companies Act, 1990)] below two, or, in the case of any other company, below seven;

(e) the company is unable to pay its debts;

(f) the court is of opinion that it is just and equitable that the company. [other than an investment company within the meaning of Part XIII of the Companies Act, 1990, or the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989),] should be wound up;

[(fa) the court is of opinion that it is just and equitable that the company, being an investment company within the meaning aforesaid, should be wound up and the following conditions are complied with—

(i) in the case of an investment company within the meaning of Part XIII of the Companies Act, 1990—

(I) the petition for such winding-up has been presented by the trustee of the company, that is to say, the person nominated by the Central Bank of Ireland under section 257(4)(c) of the Companies Act, 1990, in respect of that company;

(II) the said trustee has notified the investment company of its intention to resign as such trustee and six or more months have elapsed since the giving of that notification without a trustee having been appointed to replace it;

(III) the court, in considering the said petition, has regard to—

(A) any conditions imposed under section 257 of the Companies Act, 1990, in relation to the resignation from office of such a trustee and the replacement of it by another trustee; and

(B) whether a winding-up would best serve the interests of shareholders in the company; and

(IV) the petition for such winding-up has been served on the company (if any) discharging, in relation to the first-mentioned company, functions of a company referred to in conditions imposed under section 257 of the Companies Act, 1990, as a 'management company';

and

(ii) in the case of an investment company within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989, such conditions as the Minister may prescribe by regulations;]

(g) 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.

[(h) after the end of the general transitional period, within the meaning of the Companies (Amendment) Act, 1983, the company is an old public limited company within the meaning of that Act;]

[(i) after the end of the transitional period for share capital, within the meaning of the Companies (Amendment) Act, 1983, the company has not complied with the conditions specified in section 12 (9) of that Act.]

Section 216, as amended, sets out the powers of court on hearing any petition to wind up a company:

(1) On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

[(2) The court shall not make an order for the winding up of a company unless—

(a) the court is satisfied that the company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or a NAMA group entity, or

(b) if the company has any such obligation—

(i) a copy of the petition has been served on that Agency, and

(ii) the court has heard that Agency in relation to the making of the order.

(3) In subsection (2) 'bank asset' and 'NAMA group entity' have the same respective meanings as in the National Asset Management Agency Act 2009.]

Discretion on winding up a company

Patrick Ussher in *Company Law in Ireland* (Dublin, 1986) analyses section 205 and with characteristic clarity and concision states:

> Section 205, said Kenny J. in Re Westwinds Holding Co. Ltd., "made a profound change in the remedies available to a shareholder." For the first time in Ireland the court was given a discretion to remedy unprincipled conduct in the company even where no legal rights had been infringed, and a flexibility to suit the remedy to the matters of which complaint was made.

As noted in Courtney, *The Law of Companies, 3rd Ed.,* (Dublin, 2012) at p 631:-

> Section 205 of the Companies Act 1963 provides a very useful remedy where the relation ship between shareholders has broken down. Where oppression is found, the court has many options open to it, although the usual order is for the purchase or sale of either party's shares. An order to wind up a company under s.213(f) of the Companies Act 1963 on the ground that such is just and equitable may have disastrous consequences for all concerned.

The discretion, however, is not without boundaries. Clearly, section 205 does not exist to enable the High Court to become a substitute board of directors. Before the powers of the High Court may be invoked, there must be proof of the wrong as described by Ussher that underpins the remedy, even though, as he says, that wrong may not amount to the infringement of legal rights. A petitioner must show that "the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members". In *Colgan v. Colgan & Colgan* (Unreported, Costello J., 22nd July, 1993) unfortunate differences had arisen amongst the sons of the petitioner as successors to his enterprise. The court made an order that the respondents should be required to buy out the petitioner at a valuation determined by the court. That, however, was an instance where the powers under section 205 had been specifically invoked and not, as in these proceedings, where the only application that was brought was one to wind up the company on the just and equitable ground under section 213(f).

Section 205 was clearly introduced into company law in consequence of the 1962 Jenkins Committee on the reform of company law in the neighbouring jurisdiction and our section in Ireland is modelled on the equivalent England and Wales provision, which in turn is based on paragraph 212 of that report. Section 216 of the Act of 1963, on the other hand is about winding up a company under any of the grounds set out in section 213 of the Act. Under section 216 the court is given generalised powers on hearing any petition for a winding up. The court may dismiss the application to wind up the company, or adjourn the hearing conditionally or unconditionally, or may make an interim order, or make any other order that it thinks fit. The section goes on to say that a court should not refuse to make a winding up order because of an inequality between mortgaged assets or an absence of assets in the company and the assets that are available on a winding up.

Section 213(f) has a long and venerable history that is supported by case law going back to *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A.C. 360 and to *Re Westwinds Holding Company Ltd.* (Unreported, Kenny J., 21st May, 1974). Section 213 generally states that a court may order that a company should be wound up on a number of individually specified grounds. Section 213(a) sets out that if "the company has by special resolution resolved that the company be wound up by the court" it may be wound up. That is not the case here. Section 213(b) has been repealed by the Companies (Amendment) Act, 1983. Another ground for winding up is under section 213(c) where "the company does not commence its business within a year from its incorporation or suspends its business for a whole year". In other words, that it has become a redundant company. Under subsection (d), the ground for winding up is that the members are reduced below two or below seven, depending on the kind of company involved, accepting of course the exception in relation to shareholding through another company. The most common reason for winding up is that the company is unable to pay its debts – the ground under subsection (d).

The supposed ground that arises here is under section 213 (f). It is claimed that after hearing evidence from both the petitioner and the respondent it would be lawful to invoke the jurisdiction to dissolve the company on the basis that "the court is of opinion that it is just and equitable for the company……be wound up." That section could apply here, depending on how the facts of this disputed relationship are found. The circumstances for a just and equitable winding up certainly include a situation where a company is a quasi-partnership in the sense that its background is of two or more friends, two or more family members, or two or more business partners operating together through a limited liability or other corporate vehicle for the purpose of carrying on their business and where there is a situation of deadlock within the company. In other words, as in the cases cited, where behind the company there are a small number of investors who have gotten together through a less than formal start and who have operated not at arms length but, because of the ties of family or affection, based on long mutual co-operation between them. When that kind of governance breaks down, it can be just and equitable to wind up such company. But any application when made under section 213 does not necessarily exclude the plenitude of powers expressly available to a court under the plain wording of section 216.

If a court must consider whether it is just and equitable to wind up a company, it seems to me that a court must also consider whether there is any other order available to the court under section 216 that would be more just and equitable. That is especially so, it seems to me, where it is not just the original people founding and running the company that are involved. Where substantial numbers of employees are added in to the matrix of justice and equity because they depend on the company, it is hard to see why the wide discretionary powers under section 216 should be ignored in favour of a hedged-in assessment of the breakdown of a quasi-partnership in the guise of a company and the remedy that can traditionally be applied of winding up. Where a company expands to embrace the dependency of many more than the original founders and their successors, there are other people to be thought about. Nor is the just and equitable ground for winding up to be applied without proper consideration of not just how the company started but also what the company may have developed into. It is to be noted that section 205 refers, in particular, to oppression of a

member or a disregard of their interests. It is to be remembered as well that whereas section 205 is a specific provision that is predicated on particular grounds, the existence of that specific provision does not thereby fetter the court's wide powers on the hearing of a winding up petition under section 216.

The canons of construction require that I should give every section of every Act a meaning and should not presume that the Oireachtas is using surplusage or rhetorical devices in setting out the law. It is clear from the wording of the various provisions quoted that I have to give a meaning not only to the dismissal of a winding up petition under section 216, or the adjournment of a winding up petition instead of a dismissal under section 216, or the making of an interim order instead of a winding up petition, but I must also give a meaning to the power of the court, instead of winding up a company, to make any other order that it thinks fit. Clearly, the Oireachtas contemplated that a wide discretionary power was to be exercised by the High Court in hearing any winding up petition. That is not surprising as a winding up order involves the dissolution of a corporation, a most serious step. An application under the just and equitable ground does not at all exclude the kind of sensible powers that are characteristic of section 205 in the rectification of a company's affairs without the need to wind it up. Nor are such wide powers as described in section 205 excluded by the absence of any petition to that end. The Oireachtas would not have used the words in section 216 in their wide form but for an intention to give full and appropriate powers to a court on hearing any winding up petition under any of the individual grounds set out in section 213 and the wording of section 216 does not limit a court to any one particular aspect of the discretion to be exercised thereunder. Section 213(f) in enabling a company to be would up on just and equitable grounds does not exclude the implication of sensible powers to rectify the divisions within a company that are characteristic of many of the orders under section 205 simply because section 213(g) expressly incorporates those powers where a company is in danger of being wound up because of oppression or disregard of a member's interests. My view is that if circumstances are shown in evidence to exist whereby it is appropriate that one or other family member or quasi-partner should, on fair compensation, leave the management or membership of the relevant company in respect of which a winding up petition is brought on the just and equitable ground, then any appropriate order that the court "thinks fit" is an order I am empowered to make under section 216. What would be the alternative? In the event that I were to take a contrary view, it seems to me that I would be exceeding my jurisdiction which, as a judge, is merely to apply the law as the Oireachtas sets it out for me to apply and instead, to limit the wide and untrammelled powers of discretion which are clearly granted on the hearing of any petition to wind up a company under section 216.

I might add to that analysis that the code of company law should not be construed so that one section is excluded from the context of the entirety of the legislation in which it is set. The Court is obliged to consider the entire of Companies Act 1963 and the legislation which amends it, including, in particular, the Companies (Amendment) Act 1990, as amended, which empowers a court to save a company in an examinership application where there are shown to be grounds whereby a company may survive into the future on a new and usually slimmed-down basis following a scheme of arrangement with creditors, with a reasonable prospect of survival and where the application is not made, for instance, for fraudulent reasons or in order to avoid a revenue liability or against a background of disregard of the law or the reckless accretion of debt.

Taking into account the wide powers that are given to the High Court on hearing any application to wind up a company and the lack of statutory qualification to same and in particular my duty not to construe section 216 in isolation, I would regard it as an unnecessary fettering of the court's power for me to construe the phrase "*on hearing a winding up petition, the court may dismiss it, or make any other order that it thinks fit*" as excluding the power to order the petitioner Paul Anderson to buy out the shares of the respondent Paul Ward or vice versa or to make any order that will fairly restore appropriate governance to this important company. In looking to whether it would be just and equitable to wind up a company, of course a court must look to whatever alternatives to that ultimate step might also meet the justice and equity of the situation. It would be wrong of me to construe section 216 in such a way that was merely procedural; thereby rendering the wording to no more than the powers of a court to order an adjournment or to make the kind of order that typifies rules of court. The Oireachtas could not have intended powers akin to merely secondary legislation in placing such responsibility as is described in section 216 in a court that has to exercise a decision as to whether a company should cease to exist or whether an alternative order that fits the particular circumstances. It is clear that if a company may survive on a basis which is reordered by the court by the making of a sensible order on hearing a winding up petition, that such may be a viable alternative to winding up a company or dismissing a winding up petition. My decision is that instead of winding up a company or dismissing a winding petition, the court is also entitled to make such order as is appropriate as between the shareholders provided it is just and equitable with a view to reordering the company so that it may survive profitably into the future.

Result
In light of the foregoing, on the hearing of this petition under section 213(f) to wind up the company on the just and equitable ground, the Court has options other than simply making a winding up order or dismissing it and, instead, under section 216 "the court may... make… any other order it thinks fit". Plainly, that can include a share buy-out at an appropriate rate as between two shareholders such as the petitioner and the respondent to this petition. That may be the solution here, but one which in these circumstances requires oral evidence.

Aftermath
This ruling was made after an earlier decision that, as there were conflicts between the affidavits of the parties as to the facts, the case could not be decided on affidavit evidence alone. Following on the decision herein, limited evidence was heard from the petitioner. It is fair to describe that evidence as gentlemanly. The process of oral evidence was interrupted by the parties mutually seeking time for discussions. The case was then settled overnight.