Neutral Citation Number: [2011] IEHC 319

THE HIGH COURT

2011 354 COS

IN THE MATTER OF MCR PERSONNEL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Miss Justice Laffoy delivered on 25th day of July, 2011.

1. The issue

1.1 The only issue which arises on the petition of Karl Farrelly (the petitioner) to wind up MCR Personnel Limited (the company), which was returnable in the High Court on 18th July, 2011, and which the petitioner sought leave to withdraw on that day, is whether the petitioner is entitled to his costs of the petition. Counsel for the company contended that the petitioner has no entitlement to costs, the petition not having been advertised.

1.2 Despite the increase in the number of winding up petitions being presented over the past three years, the issue of costs on a petition which is being withdrawn or struck out has not been seriously addressed before now and it is probable that an inconsistent approach has been adopted. For that reason, I reserve judgment on the issue. However, there is a certain irony in the fact that the issue is now being addressed at the behest of the company, which has been a petitioning creditor or has appeared as a creditor on the hearing of a petition more than once in the recent past.

2. History of debt and petition

2.1 The petitioner, the company's former landlord, in August 2010 settled High Court proceedings (Record No. 2006/3525P) against the company in respect of, *inter alia*, outstanding rent. The proceedings were settled on the basis that the petitioner would pay the sum of €43,750 in three instalments. If the company had complied with the settlement, the debt would have been discharged by 29th October, 2010. However, a balance of €18,000 remained outstanding after that day.

2.2 By letter dated 8th February, 2011, the petitioner's solicitors informed the company's solicitors that the settlement agreement has been made an order of the Court (which I understand to mean that the settlement agreement had been received and made a rule of Court) and enclosed a copy of the order of Quirke J. At that stage, it was intimated that the petitioner was willing to allow the company a further fourteen days (*i.e.* until 22nd February, 2011) to discharge the debt owing to the petitioner, but threatened to apply for judgment if the debt was not discharged within that period, and reserved its position to seek to wind up the company.

2.3 On 18th May, 2011 the petitioner served a notice in the form stipulated in s. 214(a) of the Companies Act 1963 (the Act of 1963) on the company. The company did not within three weeks after the service of the notice pay the sum due or secure or compound for it to the reasonable satisfaction of the petitioner. Accordingly, by operation of s. 214, the company was deemed to be unable to pay its debts. In fact, there was no response from the company to the notice of 18th May, 2011.

2.4 On 20th June, 2011 the petitioner, as he was entitled to do, presented the petition, which was given a return date of 18th July, 2011. The petition was served on the company on 21st June, 2011 together with the verifying affidavit of the petitioner and the exhibits referred to therein. On 27th June, 2011 the company transferred the sum of €18,000 to the petitioner's solicitors' office account. Late that day, the company solicitors wrote to the petitioner's solicitors informing them of the transfer of the funds and seeking confirmation that the petition would be struck out on 18th July, 2011 "with no costs order". That letter was incorrectly dated 22nd November, 2010. In any event, the petitioner's solicitors received it by fax late on 27th June, 2011. The response of the petitioner's solicitors was that they would be making an application for the petitioner's costs to the Court.

2.5 The debt having been discharged in reaction to the petition, sensibly, in my view, the petition was not advertised.

3. Submissions on behalf of the company

3.1 Counsel for the company relied on the following passage from French *on Applications to Wind Up Companies* (2nd Ed.) (at para. 4.6.2.3) under the heading "Creditors' Petition Achieving Payment of the Petitioner's Debt":

> "If a creditor petitioner's debt is paid before the hearing and no winding up order is asked for at the hearing then, provided the petition has been advertised, the company will be ordered to pay the petitioner's costs even if the company does not appear …."

The authority cited for that proposition is a decision of the English High Court, Chancery Division – *Re Shusella Ltd*. [1983] BCLC 505.

3.2 The factual circumstances which Nourse J. was addressing in his judgment in *Re Shusella Ltd.* were that, after the petition was presented but before it was advertised, the company had discharged the petitioner's debt. When the petition first came on for hearing, the company was not represented nor had any other person given notice of intention to support or oppose the petition. The petitioner sought to have the petition disposed of without advertisement, either by striking out, or by dismissal, but with an order that the company should pay the costs of the petition. Nourse J., in his judgment, outlined what he referred to as the "modern practice" of the Court as follows:

> "In recent years it has become the practice of the Court in a case where a petitioner who has duly complied with all the provisions of the Rules has received payment of his debt with no provision for the costs of the petition to dismiss the petition with an order for costs against the company, even if the company does not appear. … But it is important to emphasise that it applies only in cases where all the material provisions of the Rules including those applicable to advertisement have been complied with. The practice does not extend to cases where there has been a failure to comply

> in one or more respects. In such a case the petition must be struck out with no order of any kind in favour of the petitioner on the ground that r. 33 has not been complied with."

Counsel for the petitioner in that case had made the alternative suggestion that the Court should dispense with advertising, which under an amendment to the Rules (*i.e.* the Rules in force in England) the Court had power to do, so that all the material provisions of the Rules would then have been complied with and to dismiss the petition with an order for costs. While acknowledging that the suggestion had "a superficial attraction about it", Nourse J. rejected it stating:

> "If it were to become the practice of the Court to dispense with advertisement in cases of this nature, it would encourage petitioners to delay getting their petitions in order by the due date. There is also the ever present danger that petitioners might be encouraged to treat the Court merely as a debt collecting agency, an approach which it has always strongly deprecated."

Nourse J. put the petitioner to its election either to have the petition struck out with no order as to costs or to apply for an adjournment for an appropriate period to enable the petition to be advertised.

3.3 The Court was also referred to *Re Nowmost Company Limited* [1996] 2 BCLC 492, in which *Re Shusella Ltd*. was considered and the "modern practice" followed, the petition having been advertised. The judgment of Lindsay J. is interesting, in that it outlines the changing practice in the English High Court from 1875 onwards and sets out the reasoning behind the varying approaches adopted by the Court over the previous century.

4. Conclusions

4.1 Section 216 of the Act of 1963 deals with the powers of the Court on hearing a winding up petition and provides that 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. While that provision obviously envisages the hearing of the petition against the background of compliance with the various provisions of the Rules of the Superior Courts, 1986 (the Rules), rules 7 to 12 of Order 74 of which set out the requirements which the petitioner must comply with, including the requirement in rule 10 that the petition be advertised seven clear days before the hearing, and of the petitioner seeking relief in the terms of the prayer of the petition, it must also, by implication, confer on the Court jurisdiction to make the appropriate order when the petition comes before the Court in circumstances in which all of the requirements of the Rules have not been complied with and the petitioner is not pursuing a winding up order. In any event, the Court must have inherent jurisdiction to deal with the latter situation.

4.2 Whether the Court is exercising statutory jurisdiction under s. 216 or its inherent jurisdiction in the circumstances which arise on this application, in my view, the primary consideration is the proper application of Order 99 of the Rules, which provides, *inter alia*, that the costs of and incidental to every proceeding are at the discretion of the Court and the normal rule is that costs follow the event.

4.3 I do not think it would be appropriate for the Court to lay down a strict rule that a petitioner whose debt has been satisfied before the petition comes before the Court, where the petition has not been advertised, should not be entitled to the costs of presenting the petition. While I am acutely conscious of the importance of the factor which motivated Nourse J. in following the "modern practice" in *Re Shusella Ltd*. only where the petition has been advertised, that the Court should be astute in ensuring that creditors do not use the winding up process as a debt collection process, nonetheless, there are other factors to which the Court should have regard in considering an application by a petitioner for his costs. One is that, if the debtor company is not at risk of having to discharge the costs of the petition where it discharges the debt after the petition is presented but before it is advertised, there will be little incentive for the debtor company to comply with the s. 214 demand prior to the presentation of a petition. Another factor is that, if the petitioner has to bear the costs of the presentation of the petition to recover a debt to which he is clearly entitled, the defaulting debtor company gets off "scot-free", whereas the wronged petitioning creditor is penalised in costs. Further, in my view, it is contrary to common sense that there should be a practice whereby the petitioning creditor whose debt is discharged after presentation of the petition but before it is advertised will only have an entitlement to costs of presenting the petition in circumstances where the overall costs are unnecessarily ratcheted up by requiring him to advertise for no other reason than to comply with the Rules.

4.4 In the light of the factors outlined above, it seems to me that every case must be decided on its own facts, both in relation to the period before and the period after the presentation of the petition.

4.5 In this case, having regard to the history of the debt and the petition as outlined earlier, the petitioner, whose debt was payable under the settlement of High Court proceedings which had been made a rule of Court, was wholly justified in serving the s. 214 demand when he did, and was justified in bringing the petition when the s. 214 demand was not met. It was only when the petition was presented that the company discharged the debt, which was clearly lawfully due. It was discharged at a time when the petitioner had ample time in which to advertise the petition in compliance with the Rules. On the basis of the normal rule, that costs follow the event, in my view, the petitioner is entitled to his costs, viewing the event as the successful recovery by the petitioner of the debt due to him, rather than the winding up of the company which he sought, which had ceased to be necessary. That approach meets the justice of the case. The approach adopted in *Re Shusella Ltd*. would not; the company would have a genuine grievance if the Court inflicted on the company, in addition to the costs which have already accrued, the costs of advertising the petition unnecessarily.

5. Order

5.1 There will be an order striking out the petition together with an order that the petitioner is entitled to the costs to date against the company, such costs to be taxed in default of agreement.