Neutral Citation Number: [2009] IEHC 572

THE HIGH COURT

2009 8218 P

BETWEEN

DONAL RIGNEY LIMITED

PLAINTIFF

AND

EMPRESA DE CONSTRUCOES AMANDIO CARVALHO S.A.

AND

CONSTRUCOES GABRIEL A.S. COUTO S.A.

AND

ROSAS CONSTRUTORES S.A.

TRADING TOGETHER UNDER THE STYLE AND TITLE RAC EIRE

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 27th day of November, 2009.

The application
This is the plaintiff's application for an interlocutory injunction restraining the defendants from advertising or otherwise publishing details of, and from proceeding with or taking any steps to enforce, a petition under Record No. 2009/460COS (the petition) presented by the defendants to this Court on 20th August, 2009 to have the plaintiff company wound up. The plaintiff also seeks an order directing the removal of the petition from the file of the proceedings in the Central Office of the High Court. This application was preceded by an ex parte application made on behalf of the plaintiff to the Court on 11th September, 2009, as a result of which an order was made by the Court (MacMenamin J.) on 11th September, 2009 restraining the defendant until further order from advertising or otherwise publishing details of the petition.

Factual background
Between April 2008 and December 2008 there was a contractual relationship between the plaintiff, as sub-contractor, and the defendants, as the main contractors, relating to works involved in the construction of the Nenagh By-Pass in County Tipperary. The plaintiff was engaged by the defendants to provide earth moving and haulage services in connection with the project. The terms of payment which had been agreed between the parties at a meeting on 5th April, 2008 were set out in a fax dated 7th April, 2008 sent by the defendants to the plaintiff, which trades under the name "Hiredepot". It was pointed out in the fax that at the meeting the defendants had stated that during adverse weather conditions that the work would have to stop. It is the position of the plaintiff that subsequently it was agreed that the plaintiff would be paid for "down-time" hours. Having regard to the evidence which I will outline, that is not in dispute on this application.

The dispute concerns the fact that, as is admitted by the plaintiff, the defendants paid the plaintiff twice in respect of four invoices issued by the plaintiff in May 2008 which aggregated €156,214.31, in that the defendants on 30th July, 2008 issued a cheque in the sum of €156,214.31 in respect of the four invoices in question to the plaintiff and subsequently the amounts claimed on foot of two of the invoices were included in a cheque issued by the defendants to the plaintiff on 16th September, 2009 and the amounts claimed in respect of the other two invoices were included in a cheque issued by the defendants to the plaintiff on 24th September, 2009. The plaintiff cashed the three cheques and got value for them. The position on this application, accordingly, is that by the end of September 2009 the plaintiff had been paid twice by the defendants in respect of each of the four invoices. The evidence adduced on behalf of the defendants is that the overpayments were noted by the defendants in February 2009. The plaintiff has not taken issue with that factual assertion.

Prior to February 2009, unhappy differences had arisen between the plaintiff and the defendants, which resulted in an agreement dated 18th December, 2008 (the Settlement Agreement) made between the defendants and the plaintiff (named as Hiredepot). The Settlement Agreement recited that the plaintiff had claimed the sum of €158,863.04 from the defendants and that both the defendants and the plaintiff had agreed "to settle all sub-contractor claims against" the defendants. In clause 1 of the agreement it was provided as follows:

> *"[The defendants] shall pay the sum of €158,863.04 to the [plaintiff] in full and final settlement of all claims which the [plaintiff] has now or in the future against [the defendants] and the [plaintiff] shall take no steps to seek or execute judgment against [the defendants] or the constituent members of [the defendants] in respect of any matter whatsoever. Any proceedings against [the defendants]/its constituent members shall be brought in the place of their legal seat."*

The defendants appear to be Portuguese companies. In Clause 2 of the Settlement Agreement it was provided "for the avoidance of doubt" that the agreement did not exclude the plaintiff from any liability resulting from defects in the provision of sub-contractor services prior to the date of the Settlement Agreement. The sum of €158,863.04 was paid by the defendants to the plaintiff in accordance with the Settlement Agreement in January 2009.

Following the discovery of the overpayment, by letter dated 6th March, 2009, the defendants' solicitors, Mason Hayes + Curran, wrote to the plaintiff seeking recovery of the overpayment of €156,214.31. The response of the plaintiff, by letter of 18th March, 2009, was that, as far as the plaintiff's records showed, there was not an overpayment on the account.

The plaintiff also referred to the Settlement Agreement and asserted that it was made "in full and final settlement for all claims". By letter dated 31st March, 2009 to the plaintiff, the defendants' solicitors reiterated that the four invoices in issue had been paid twice. They referred to a "schedule of invoices", a copy of which was enclosed, which listed the invoices which amounted to €158,863.04, the sum paid under the Settlement Agreement, which invoices were issued between 21st August, 2008 and 27th October, 2008. Additionally, it was pointed out that the Settlement Agreement did not "settle claims" the defendants had against the plaintiff. Once again repayment of the sum of €156,214.31 was requested. The plaintiff did not respond to that letter.

What happened next was that by letter dated 25th May, 2009 the defendants' solicitors demanded payment of the sum of €156,214.31 forthwith and stated that the demand was being made pursuant to s. 214(a) of the Companies Act 1963 (the Act of 1963). It was pointed out that, if payment was not received within 21 days, the defendants' solicitors were instructed to issue a petition to wind up the plaintiff company. There was no response from the plaintiff to that demand. In due course, the defendants presented the petition on 20th August, 2009. The petition was returnable for 23rd September, 2009.

By letter dated 7th September, 2009 from the defendants' solicitors to the plaintiff's solicitors, which referred to the fact that the petition had been served on the plaintiff on 21st August, 2009 but had elicited no response, the defendants' solicitors informed the plaintiff's solicitors that their instructions were to progress the matter by advertising the petition in newspapers and in Iris Oifigiúil on 15th September, 2009 unless they heard from the plaintiff in the meantime. The plaintiff's solicitors responded on the same day, 7th September, 2009, referring to the plaintiff's letter of 18th March, 2009 asserting that there was no overpayment on the account. The plaintiff's solicitors stated that there was a clear bona fide dispute between the parties which should be resolved in ordinary litigation. It was stated that, if an undertaking not to advertise the petition was not forthcoming by close of business on 9th September, 2009, an injunction would be sought to restrain publication. No undertaking was forthcoming, which led to the initiation of these proceedings and the application for an interim injunction on 11th September, 2009.

The foregoing are the essential facts which are not in dispute. It is necessary now to consider the affidavits filed in support of, and in answer to, this application to ascertain the factual basis on which the plaintiff disputes the defendants' contention that they are entitled to recover the overpayment of €156,214.31 from the plaintiff.

The affidavit grounding the interlocutory application was sworn on 10th September, 2009 by Therese Lynnott, the Financial Controller of the plaintiff. It was on the basis of this affidavit that the interim order was made. The principal factual component of this affidavit was an averment by Ms. Lynnott that, following representations by the Managing Director of the plaintiff, Donal Rigney, to the defendants' foreman, Diego Barbosa, as to the numerous and substantial delays due to adverse weather conditions which were being experienced and the fact that the parties had not reached a specific agreement in relation to the payment for "down-time", Mr. Barbosa told Mr. Rigney to keep an account of "down-time" hours and that this would be looked after at the end of the account, that Mr. Barbosa's assurance was repeated to Mr. Rigney on a number of occasions thereafter and that the plaintiff continued to carry out works on the basis that the matter for payment of "down-time" was agreed. Ms. Lynnott further averred that on the 31st October, 2008 a sales advice note was furnished to the defendants in respect of monies due and owing to the plaintiff in respect of "down-time" between the months of April and September 2008 in the sum of €156,223.75. The sales advice note was exhibited. It was numbered T3160. It set out the amount claimed for "down-time (Wet time & Hold ups) … as per agreement", which was itemised for each of the six months between April and September 2008. The document stated at its foot in bold capital letters: THIS IS NOT AN INVOICE FOR PAYMENT. The deponents for the defendants do not deny receiving the sales advice note and, on the basis of their affidavits, I think it is appropriate to assume that they did receive it. In her affidavit, Ms. Lynnott averred that any overpayment by the defendants to the plaintiff prior to the termination of the contractual arrangement between the parties in the Settlement Agreement was set off against the sum due to the plaintiff in respect of "down-time" pursuant to the sales advice note of 31st October, 2009.

The first affidavit sworn on behalf of the defendants in response to the application for an interlocutory injunction was the affidavit of Luis F. B. C. Roma, who described himself as a Project Manager of the first defendant, an entity in the defendant partnership. Mr. Roma quoted the provisions of the Settlement Agreement which I have already quoted, adding emphasis to the statement in the recital that the agreement was "to settle all [the plaintiff's] claims against the [defendants]" and the statement in Clause 1 that the sum of €158,863.04 was to be paid in full and final settlement of "all claims which the [plaintiff] has now or in the future against [the defendants]". Mr. Roma asserted that it was clear from the Settlement Agreement that there was no question of it being in full and final settlement as between the parties and, in particular, of any claim by the defendants. Further, it was asserted that it did not include, and could not have included, the debt the subject matter of the proceedings. The deponent did not spell out why, but I assume it is on the basis that the defendants did not note the existence of the overpayment until February 2006, to which he had averred earlier.

Later in his affidavit, in support of his contention that the plaintiff's application for an interlocutory injunction should be refused, in addition to contending that there had been non-disclosure on the part of the plaintiff on the application for interim relief, Mr. Roma referred to a statement by Ms. Lynnott in her affidavit that, by presenting the petition, at the time and in the manner in which they had done so, the defendants were seeking "to renege" on the Settlement Agreement and recoup the monies paid to the plaintiff on foot thereof. He then averred in paragraph 39:

> *"Of course, that could never have been the case because the only outstanding invoice at the time of the [Settlement Agreement] was for €156,223.75 (as exhibited at Exhibit "TL4"). As is clear from this Affidavit, therefore, the plaintiff's contentions were incorrect."*

That averment obviously refers to the sales advice note of 31st October, 2008 which was exhibited by Ms. Lynnott as Exhibit "TL4". Apart from indicating that the defendants did, in fact, receive the sales advice note, I find it difficult to understand what Mr. Roma was attempting to convey by that averment.

The plaintiff's application for an interlocutory injunction was back before the Court (Dunne J.) on 21st September, 2009. On that occasion the plaintiff was given liberty to file a further affidavit and the defendants were given liberty to respond to it and time limits were fixed. There is some controversy on the affidavits subsequently filed as to the basis on which the plaintiff was given permission to file a further affidavit. All this Court can do is to determine the issues on the basis of the totality of the evidence now before it.

The supplemental affidavit filed on behalf of the plaintiff was sworn by Mr. Rigney on 24th September, 2009. He averred

that he was in Dubai on business between 31st August, 2009 and 7th September, 2009 and was not in a position to swear the affidavit to ground the application for interim relief, which required to be sworn on short notice in circumstances where the defendants were threatening to advertise the petition within a matter of days. Mr. Rigney accepted that overpayments aggregating €156,214.31 were received by the plaintiff in September 2008. However, he went on to assert that, notwithstanding the prima facie double payment, the plaintiff is not indebted to the defendants. He rationalised that assertion on the basis that the defendants had failed to provide a remittance in respect of invoice

No. T23325 dated 31st October, 2008 in the sum of €156,223. 75. That invoice is exhibited. To a large extent it is a replication of sales advice note T3160, to which it refers. The differences are that it gives the plaintiff's VAT registration number, it shows VAT due at the rate of 0%, so that no VAT is claimed, and it contains a statement that "VAT on this supply is to be accounted for by the Principal Contractor". Mr. Rigney did not aver as to when invoice No. T23325 was issued by the plaintiff. However, counsel for the plaintiff informed the Court that it issued at the end of January or the beginning of February 2009. Mr. Rigney averred that Invoice No. T23325 was never discharged and that the sum owing to the plaintiff on foot thereof "was effectively set off against any previous overpayment" to the plaintiff by the defendants for the purpose of reconciling the plaintiff's accounts and, on that basis, the plaintiff is not indebted to the defendants.

As to the effect of the Settlement Agreement, having averred that it was executed by the plaintiff without the benefit of legal advice, and having suggested that the plaintiff was pressurised to execute it, Mr. Rigney, while acknowledging the terms of the Settlement Agreement, averred that the reality of the situation was that it represented and was intended by both parties to represent a full and final settlement of all outstanding matters between them. On that basis, he averred that the plaintiff has substantial grounds for disputing the debt the subject of the petition. Mr. Rigney further averred that the plaintiff is not insolvent, although he did not exhibit any accounts to back up that averment.

The affidavit filed by the defendants in response to Mr. Rigney's affidavit was sworn on 30th September, 2009 by Carlos M.T. Carvalhosa, who described himself as "a previous financial manager" of the defendants. Mr. Carvalhosa's signature appears at the foot of the schedule of invoices enclosed with the defendants' solicitors' letter of 31st March, 2009. Mr. Carvalhosa averred that invoice No. T23325 did not exist prior to this application and he averred that certainly no such invoice was furnished to the defendants. He made no reference to the sales advice note No. T3160.

In paragraph 10 of his affidavit Mr. Carvalhosa averred as follows:

> *"I say that the last invoice issued by the plaintiff was dated 27th October, 2008. The [defendants] made a number of payments to the plaintiff between October and December 2008 in discharge of the outstanding invoices such that by the time the agreement was reached on 18th December, 2008 the balance owed pursuant to the invoices was €10,105.03. This is clear from the plaintiff's statement of account referred to at LFR8. The purpose of the Settlement Agreement … was to agree a figure due in respect of the claims being made by the plaintiff against the [defendants] particularly claims for down-time as referred to by the plaintiff."*

Later, Mr. Carvalhosa averred that the Settlement Agreement was in full and final settlement of any claim the plaintiff had and that, insofar as the plaintiff now relies on invoice No. T23325, it did not exist at any material time and should not be taken into account by the Court in adjudicating on this application.

I find the contents of paragraph 10 of Mr. Carvalhosa's affidavit puzzling. One of the difficulties in this case is the similarity between the amount of the admitted overpayments and the sum claimed by the plaintiff in respect of "down-time", which, although it appears to be coincidental, is conducive to confusion. In any event, the puzzling aspect of paragraph 10 is that the statement that the figure paid to the plaintiff on foot of the Settlement Agreement, €158,863.04, contained a component to cover claims for "down-time" is at variance with the letter of 31st March, 2009 and the schedule of invoices enclosed with it. As I have stated, according to that letter and the enclosed schedule, the sum of €158,863.04 paid pursuant to the Settlement Agreement represented payment in respect of invoices issued between 21st August, 2008 and 27th October, 2008. It is clear on the evidence that none of those invoices related to "down-time".

On the other hand, the balance of €10,105.03 referred to in paragraph 10, as judicious use of a calculator has disclosed, is entirely consistent with the figures produced by both sides and does not cast any light on the factual issues in this case. That figure represents the difference between €158,863.04 (the aggregate amount of the invoices per the schedule of invoices which accompanied the letter of 31st March, 2009 adjusted upwards by the sum of €7,456.30, which appears as an adjustment on that schedule) and €156,214.31 (the amount of the overpayment).

The applicable law

As I have had occasion to state frequently in the recent past, to find a clear and comprehensive summary of the law relevant to an application to restrain the presentation, advertising or prosecution of a winding up petition, one has to look no further than the decision of the High Court (Keane J., as he then was) in Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd. [1996] 1 I.R. 12. In his judgment (at p. 23) Keane J. outlined the provisions of the Act of 1963 which were relevant in that case and are relevant in this case, namely:

> (1) Section 213, which provides that a company may be wound up, if, inter alia, the company is unable to pay its debts (paragraph (e));
>
> (2) Section 214, as amended, which provides that a company shall be deemed to be unable to pay its debts, inter alia –
>
> > "(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [€1,269.74] then due, has served on the company, by leaving at the registered office of the company, a demand in writing requiring the company to pay the sum so 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 …";

(3) Section 215, which provides that a winding up petition may be presented, inter alia –

> "… by any creditor or creditors (including any contingent or prospective creditor or creditors) … so, however, that –
>
> (a) …
>
> (b) …
>
> (c) the court shall not give a hearing to a winding-up petition presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable, and until a prima facie case for winding-up has been established to the satisfaction of the court."

In his judgment, Keane J. then set out the principle which, in my view, is applicable in resolving the issue in this case, stating:

> *"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 [1968] 1 WLR 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.*
>
> *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."*

Later in his judgment (at p. 25) Keane J. stated that the jurisdiction to restrain presentation of the petition is one to be exercised only with great caution and summarised what he considered to be the correct approach (at p. 27) as follows:

> *"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 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 when 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 would 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. It would not be appropriate to apply the principles laid down by the Supreme Court in Campus Oil 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."*

The issues

Arising from the foregoing analysis of the relevant provisions of the Act of 1963, it seems to me that the issues which fall for consideration on this application are as follows:

(1) whether the defendants are creditors within the meaning of those provisions, so as to have locus standi to present a petition to wind up the plaintiff;

(2) whether the defendants are creditors who are entitled to rely on the provisions of s. 214(a) of the Act of 1963, so that the plaintiff is deemed to be insolvent; and

(3) if the defendants have locus standi and can rely on s. 214(a), whether the plaintiff has established that it is disputing the debt in good faith and on substantial grounds.

I will deal with each of those issues in turn.

Locus Standi

While there is no definition of "creditor" in the Act of 1963, it is well settled that the word "creditor" includes a contingent or a prospective creditor, as s. 215 indicates. In order to determine whether the defendants are creditors within the meaning of the provisions of the Act of 1963, it is necessary to consider the nature of their claim. It is for a liquidated sum which was paid to the plaintiff under a mistake of fact, the mistake being that the relevant invoices had not been already discharged. As such, as counsel for the plaintiff acknowledged, citing the decision of Robert Goff J. in Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd. [1980] QB 677 at 695, the defendants are prima facie entitled to recover the sum claimed. While counsel for the plaintiff contended that the defendants' claim is bound to fail because there is a defence available to the plaintiff, whether that contention is correct goes to the third issue. As to whether the defendants are creditors so as to give them locus standi to present a petition to wind up the plaintiff, in my view, the fact that they have a prima facie entitlement to recover the sum of €156,214.31 means that they are creditors and that they have locus standi.

Entitlement to rely on s. 214(a)

As the wording of s. 214(a) indicates, the entitlement to rely on it applies where a debt in a sum in excess of €1,269.74 is "then due" by the company to the creditor when the creditor serves the demand in writing requiring payment of the sum "so due". Unless the creditor pays up or secures or compounds the sum due to the reasonable satisfaction of the creditor within three weeks, the company is deemed to be unable to pay its debts. In this case, in my view, the sum of €156,214.31 paid under mistake of fact was prima facie due to the defendants when the demand for the purposes of s. 214(a) issued on 25th May, 2009. Accordingly, as the plaintiff did not pay up or secure or compound to the satisfaction of the defendants within three weeks, the defendants, as petitioning creditors, were entitled to rely on s. 214(a).

That conclusion means that, as counsel for the defendants submitted, the defendants are not contingent or prospective

creditors, so that they do not have to bear the heavier onus provided for in s. 215(c) of establishing to the satisfaction of the court that there is a prima facie case for winding-up. It also obviates the difficult question whether at this juncture the court would be concerned with whether the defendants would be able to meet the requirements of s. 215(c) or whether that would be a matter for the court hearing the petition, as Keane J. suggested obiter in the Truck and Machinery Sales case (at p. 27) following the views expressed by Goulding J. in Holt Southey v. Catnic Components Ltd. [1978] 1 WLR 630, which views were explicitly disapproved of by Buckley L.J. in the Stonegate Securities case (at p. 587).

Bona fide defence on substantial grounds
Despite any observations I may have made during the course of the hearing before I received the comprehensive written submissions from both sides, I have come to the conclusion that the crucial issue is whether the plaintiff in good faith and on substantial grounds disputes any liability for the sum claimed by the defendants.

It is necessary to consider the nature of the plaintiff's claim for the sum of €156,214.31 in greater depth at this juncture. I consider it to be a common law claim for money had and received and that the remedy which the defendants may have to pursue to recover the sum is a restitutionary remedy, not a contractual remedy. Counsel for the plaintiff contends that there is a defence to the claim, again citing Robert Goff J. in the Barclays Bank case, contending that this is a situation in which "the payee has changed his position on good faith, or is deemed to have done so". Counsel for the plaintiff also relied on the analysis of the defence of change of position contained in the judgment of Lord Goff in Lipkin Gorman (A Firm) v. Karpnale Ltd. [1991] 2 AC 548 at 579 – 580 and laid particular emphasis on the following passage:

> *"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or, alternatively to make restitution in full."*

The kernel of the plaintiff's argument that there are substantial grounds for disputing the defendants' claim was put by counsel for the plaintiff as follows: if the court accepts –

> (a) that the defendants had liability to the plaintiff in respect of "down-time" prior to the execution of the Settlement Agreement, and
>
> (b) that the sum of €158,863.04 paid by the defendants to the plaintiff on foot of the Settlement Agreement did not contain a sum discharging the liability for "down-time", and
>
> (c) that the plaintiff would not have entered into the Settlement Agreement but for the fact that it had received and retained the monies which the defendants now seek to recover and use them to discharge the liability in respect of "wet time",

it follows that it would be unconscionable and inequitable to permit the defendants to recover the sum of €156,214.31 which forms the basis of the petition.

As regards the factual proposition at (a), counsel for the defendants submitted that this fact was conceded in paragraph 39 of Mr. Roma's affidavit. I have already commented on paragraph 39, which I have taken as an indication that the defendants had received the sales advice note before the Settlement Agreement was executed. Paragraph 10 of Mr. Carvalhosa's affidavit, which I have quoted, certainly seems to acknowledge a liability on the part of the defendants to the plaintiff in respect of "down-time" prior to the execution of the Settlement Agreement. In relation to the proposition at (b), despite the averment in paragraph 10 of Mr. Carvalhosa's affidavit, the sum of €158,863.04 paid on foot of the Settlement Agreement would appear not to include any payment for "down-time", as the schedule of invoices which bears Mr. Carvalhosa's signature and which was included in the letter of 31st March, 2009, which both sides accept as showing the build up of the sum of €158,863.04, indicates. As regards the proposition at (c), what Mr. Rigney has averred to is that the Settlement Agreement represented and was intended by both parties to represent a full and final settlement of all outstanding matters between them. While the Settlement Agreement contained a saver for any liability which the plaintiff might have to the defendants for defective work, notwithstanding the manner in which clause 1 was formulated, I think it is reasonable to conclude for the purposes of this application that it is open to the plaintiff to argue that the settlement was intended to be a cut-off in respect of all claims between the parties other than the type of claim expressly excluded, namely, a claim by the defendants for defective work.

In adopting the position that the plaintiff is precluded from seeking to set off the amount it claims is due for "down-time" against the amount admittedly overpaid by the defendants in September 2009, it seems to me that the defendants are trying to go behind the Settlement Agreement, while depriving the plaintiff of the opportunity to do likewise. If such approach were allowed, it would mean that what is "sauce for the goose" is not "sauce for the gander". I consider that it is open to the plaintiff to make the case that it changed its position in entering into the Settlement Agreement and that it would be unconscionable and inequitable to preclude the plaintiff from seeking to set off its claim against the claim now being pursued by the defendants. On that basis, I consider that the plaintiff has demonstrated that there are substantial grounds for disputing the debt which forms the basis of the petition.

While the passage from the judgment of Keane J. in the Truck and Machinery Sales case which I have quoted makes it clear that it is not appropriate to apply the principles laid down in the Campus Oil case on this type of application, nonetheless this type of application does give rise to the type of difficulties which arise on an ordinary application for an interlocutory application to which the Campus Oil principles do apply. In this connection, the words of Lord Diplock in American Cyanamid v. Ethicon [1975] 1 All ER 504, which was followed by the Supreme Court in the Campus Oil case, as to the court's function on an interlocutory application are apposite. He said (at p. 510):

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

In this case, as the content of the affidavits outlined earlier indicates, not only are there conflicts of evidence between the two sides, but each side's account of its dealings with the other is difficult to reconcile internally. The legal principles

which would be ultimately applicable in resolving the dispute between the parties, if it were litigated, would to a large extent turn on the findings of fact which would be made following a plenary hearing, particularly as to the meaning and effect of the Settlement Agreement. Aside from that, as the very thorough written submissions which the Court has from both sides illustrates, the issues of law which would be likely to arise would be difficult.

As regards whether the plaintiff is bona fide disputing the defendants' claim, notwithstanding that the affidavit evidence gives rise to considerable difficulty, that is the case on both sides and overall I do not see a basis for finding that the plaintiff is not acting bona fide.

The defendants' claim is an unusual claim because of the factual circumstances in which it is made. It is a claim in respect of which the defendants have the alternative remedy of litigation. In my view, it must be litigated if it is to be pursued, because I consider that the plaintiff is disputing all liability in respect of the defendants' claim in good faith and on substantial grounds. I am not saying that on the evidence before the Court the plaintiff has a strong defence to the claim. On the state of the evidence it is impossible to form that view. However, having carefully considered the matter, I cannot rule out the prospect of a very serious injustice to the plaintiff, if this application were refused and the petition was allowed to proceed.

Other issues
It is necessary to address three other issues raised by the defendants.

First, it was submitted that the Court should refuse the reliefs sought on this application on the ground of alleged lack of disclosure by the plaintiff on the application for interim relief. In particular, the defendants criticised the plaintiff's failure to exhibit all of the inter partes correspondence and on the basis that the plaintiff was selective in only including the correspondence which emanated from the plaintiff or its solicitors. Although I believe that all of the inter partes correspondence should have been exhibited for completeness, I am satisfied that the omission of the correspondence emanating from the defendants' solicitors was in no way capable of misleading the Court as to the parties' respective positions.

Secondly, the defendants have raised the issue of the plaintiff's failure to adduce evidence of insolvency and merely to include what has been described as "nothing more than a bold assertion" of solvency. In view of the conclusion I have reached, that the plaintiff is in good faith and on substantial grounds disputing the alleged debt, the petition cannot be maintained. In the circumstances, the issue of solvency or insolvency of the company does not arise for determination, as, evidentially, the defendants' claim to be entitled to present the petition is based on

s. 214(a) of the Act of 1963 and not otherwise.

Finally, the plaintiff's claim to set-off exceeds the defendants' claim to recover the overpayment. As matters stand, given that the defendants are relying on the Settlement Agreement, the defendants cannot make the case that the plaintiff would remain indebted to the defendants in the sum of €2,639.29 (being the difference between €158,863.04 and €156,223.75) even if the set-off was allowed.

Order
There will be an order restraining the defendants from advertising or otherwise publishing details of the petition and from proceeding with it. As a matter of record the petition will remain on the file in the Central Office.

I will hear further submissions as to any other orders which the parties consider appropriate.