Neutral Citation Number: [2011] IEHC 480

THE HIGH COURT

2011 514 COS

IN THE MATTER OF BURREN SPRINGS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Miss Justice Laffoy delivered on 19th day of December, 2011.

1. On 8th September, 2011 Gerard Harrahill (the Petitioner), the Collector General of the Revenue Commissioners, presented a petition to wind up Burren Springs Ltd. (the Company). The petition was returnable for 10th October, 2011. At the request of the Company it was adjourned from time to time. On 12th December, 2011 the Petitioner insisted that the petition be heard, despite the fact that the Company was seeking a further adjournment in the light of the facts which I will outline.

2. The petition was founded on a demand under s. 214 of the Companies Act 1963 (the Act of 1963), which was dated 14th March, 2011, and was served on the Company on 18th March, 2011. In the s. 214 demand, the Petitioner demanded payment of the sums summarised in the following table:

Value Added Tax	€99,430.00
PAYE/PRSE	€35,798.96
Interest	€3,876.51
TOTAL	€139,105.47

The Company did not comply with the demand within three weeks and, accordingly, by virtue of the operation of s. 214 there was a deemed insolvency.

3. In broad terms, the basis on which the Company sought to resist the making of a winding-up order was that it had a claim pending before the Revenue Commissioners for a research and development tax credit which, if allowed, would wipe out its indebtedness to the Revenue Commissioners. The detail of that claim has been outlined in an affidavit sworn by Brendan O'Mara, a director of the Company, on 8th December, 2011.

4. It is important to point out that, as invariably happens on petitions by the Petitioner, the proofs are in order and, but for the position of the Company, a winding-up order would be made. No creditor of the Company indicated to the Petitioner an intention to appear at the hearing of the petition, and no creditor or interested party, apart from the Company, appeared on the hearing of the petition.

5. Mr. O'Mara's affidavit sets out the factual position in relation to the claims for research and development tax credit under s. 766 of the Taxes Consolidation Act 1997 (the credit). Mr. O'Mara averred that the application for the credit for the accounting year ended 30th June, 2010 was submitted to the Revenue Commissioners on 17th June, 2011 and that the claim for the accounting year ended 30th June, 2011 was submitted on 26th September, 2011. The following table summarises the effect of the credit for each accounting year, if allowed, and the breakdown of the amount for each accounting year as regards the date on which the credit will be available:

Date on which credit available	Accounting y/e 30th June, 2010 €	Accounting y/e 30th June, 2011 €	Total €
23rd March, 2011	43,389.00	–	43,389.00
23rd March, 2012	44,046.00	45,928.00	89,974.00
23rd March, 2013	5,475.00	24,167.00	29,642.00
TOTAL	92,910.00	70,095.00	163,005.00

The above figures are the figures which are set out as representing the available credits in a letter dated 1st December, 2011 from the Revenue Commissioners to the Company, which I surmise was issued in anticipation of the petition being before the Court on 5th December, 2011. However, the basis on which the letter issued was that a decision had not been made by the Revenue Commissioners on the claims of the Company for credits and the figures were based on the assumption that the claims would be accepted in full. It was stated that the figures were based on figures submitted by the Company to the Revenue Commissioners on 17th June, 2011 and 26th September, 2011 and were also based on the contention of the Company that no corporation tax was due by it for the accounting years concerned. Accordingly, the figures which were furnished were provided in the interests of clarity but were subject to the qualifications set out above and, in particular, the qualification that they were subject to the claims being accepted in full.

6. In his affidavit Mr. O'Mara has acknowledged that, as of the date of swearing of the affidavit, the sum due to the Revenue Commissioners by the Company in respect of all taxes and interest had increased to €152,124. However, the position of the Company is that the credits to which it is entitled, which aggregate €163,005, exceed that sum, although it is acknowledged that, allowing for the credit available on 23rd March, 2011 (€43,389), there is currently due to the Revenue Commissioners the sum of €108,735. However, the point is made that the amount due will reduce to €18,761 on 23rd March, 2012, when the Company gets the credits available on 23rd March, 2012 (€89,974) and by 23rd March, 2013 the debt will be entirely extinguished and the Company will be entitled to a net refund of €10,881.

7. In a letter dated 6th December, 2011, the Company's accountants, Morrissey McCrann & Co., intimated to the Petitioner that the Company wished to enter into an instalment arrangement to fully discharge all its outstanding taxes. The response of the Revenue Commissioners in their letter of 7th December, 2011 was that, as the Revenue Commissioners had not yet determined that the credits were available for offset, the proposal was not acceptable and that the tax debts should be discharged in full immediately in order that the petition be withdrawn. Messrs. Morrissey McCrann & Co. replied on the same date, stating that the claims for the credits had been submitted on 17th June, 2011 and on 26th September, 2011, but that the Revenue Commissioners' technical assessment of the claims had not been carried out until 14th November, 2011 and had not concluded. It was contended on behalf of the Company that it was grossly unfair to proceed with the petition given that the decision had not been reached. The Company had complied with the terms of the adjournment of the petition in October 2011 by furnishing the accounts for both years.

8. The response of the Revenue Commissioners dated 8th December, 2011, although not on affidavit, was handed into the Court on 12th December, 2011. A number of points were made in that letter. First, it was contended that the letter of 17th June, 2011 had not been received by the Revenue Commissioners. I cannot comment on that, save to say that the letter is referred to in the letter of 1st December, 2011 referred to at 5 above. Secondly, it is stated, correctly, that the statutory due dates for payment of VAT and PAYE/PRSI apply regardless of any potential credits. Thirdly, it is stated that under s. 766 the credits must be offset to corporation tax in the first instance, but that corporation tax returns for the relevant years had not been "correctly filed until this week". Finally, it was stated that the matter of the Company's tax debts had been under discussion for a considerable period prior to the issue of the s. 214 demand and at no point during the discussions was the subject of potential credits raised.

9. In his replying affidavit Mr. O'Mara has averred to the difficulty he anticipates he would encounter in endeavouring to borrow the balance due to the Revenue Commissioners by way of bridging loan or otherwise, in the absence of a determination, obviously meaning a positive determination in favour of the Company, by the Revenue Commissioners of the Company's claims for the credits. He has averred that it would be unfair and inequitable that the Revenue Commissioners should be allowed to use their own failure to make a determination on the claims for the credits as a way of supporting and increasing the amount of debt due by the Company and that it would be unfair and inequitable to allow them proceed with the petition because that effectively prevents the Company from accessing bridging finance in the absence of a determination on the claim for the credits. On behalf of the Company Mr. O'Mara has sought an order dismissing the petition or, in the alternative, an order adjourning it until a date after 31st March, 2012 or until such time as the Revenue Commissioners has determined the claim for the credits.

10. No evidence of the financial state of the Company, other than the position in relation to its debt due to the Petitioner, has been put before the Court. The Court was informed, although this was not on affidavit, that the Company has a substantial claim against a third party, but proceedings have not issued in respect of that claim. On the basis that the Company is not in a position to pay the Petitioner the monies it owes in respect of outstanding taxes, which are now due and the amount of which is not disputed, it must be assumed for the purpose of the petition that the Company is insolvent.

11. Section 216 of the Act of 1963 provides:

> "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."

In general, where a petitioning creditor establishes that a company is unable to pay its debts, the petitioner will normally be entitled to a winding-up order *ex debito justitiae*. However, as is stated in the annotation on s. 214 of the Act of 1963 in MacCann and Courtney *Companies Acts 1963 – 2009* (2010 Ed.):

> "Nevertheless the Court still retains an overriding and unfettered discretion to refuse to order to wind up the company, albeit that it will only exercise this discretion sparingly and where good cause is shown."

12. On the Court's discretion to adjourn a petition, MacCann and Courtney, in their annotation on s. 216, state:

> "The Court is reluctant to grant lengthy adjournments of a winding up petition. Adjournments are often undesirable because the winding-up order (if made) dates back to the presentation of the petition. Furthermore if the matter is not dealt with quickly the books of the company tend to be out of date or lost (quite apart from any question of dishonest behaviour of the part of Officers). Officers and employees who could provide valuable information sometimes leave and cannot be traced. Dispositions made between the presentation of the petition and the making of the winding-up are void and any delay increases the number of these transactions and makes their examination more difficult. In certain circumstances the Court has granted an adjournment pending litigation between parties."

13. In my judgment in *Re Coolfadda Developers Ltd.* [2009] IEHC 263, I considered some of the more recent authorities in which the issue whether a petition to wind-up should be adjourned in this jurisdiction (*Re Genport Ltd.* and in the United Kingdom *Re Demaglass Holdings Ltd.* [2001] 2 BCLC 633; and *Re Minrealm Ltd.* [2008] 2 BCLC 141). For present purposes, I think what is important is the dictum of McCarthy J. in *In re Bula Ltd.* [1990] 1 I.R. 440, cited by McCracken J. in *Re Genport Ltd.,* in which he stated (at p. 448):

> "Section 213 of the Companies Act, 1963, provides that a company may be wound up by the court if the company is unable to pay its debts and s. 309 provides that the court may have regard to the wishes of the creditors or contributories of the company, in the case of creditors regard being had to the value of each creditor's debt. Both sections are expressed in a permissive form but 'may' sometimes means 'shall'. The section, in my opinion, gives to the court a true discretion which should be exercised in a principled manner that is fair and just."

14. While I have certain sympathy for the position of the Company as evidenced by Mr. O'Mara's affidavit, the crux of the matter is whether, if the Court were to adjourn the petition in the teeth of the Petitioner's insistence that the Court make a winding-up order, to, say, after the determination of the Company's claim for credits, it would be acting "in a principled manner". Particularly having regard to the fact that the outstanding taxes are VAT and PAYE/PRSI, which reflect sums paid by customers, or, deducted from employees' salaries which should have been remitted to the Revenue Commissioners in accordance with law, I have come to the conclusion that it would not. For that reason, I consider that I have no option but to make a winding-up order.