

THE HIGH COURT

2005 No. 23 COS

IN THE MATTER OF CEDARLEASE LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2003

Judgment of Miss Justice Laffoy delivered on 8th March, 2005.

The Application

This is a petition by a creditor seeking that Cedarlease Limited (the Company) be wound up by the court. It raises a novel point because the creditor petitioner is the Commissioners of Customs & Excise for the United Kingdom (the Petitioner).

Factual Background

The petition and the verifying affidavit sworn on 24th January, 2005 by Susan Deborah Neil, a senior lawyer with the Petitioner, disclose the following facts:

- The Company was incorporated in the State on 9th March, 1998 as a private company limited by shares. Its registered office is in the City of Dublin. Its principal object is to carry on business as cars, vans and other transportation vehicles renters, hirers and lessors.
- In February, 2000 the Aberdeen Office of the Petitioner decided –
 - (a) to register the Company for U.K. value added tax with effect from 1st November, 1998, and
 - (b) to assess the Company for undeclared output tax totalling Stg.£839,404.25 in the period from 1st November, 1998 to 30th November, 1999.
- The Company requested a reconsideration of those decisions. The conclusions on the reconsideration, which issued on 5th May, 2000 from the Tax Avoidance Branch of the Strategy and International Division of the VAT Policy Directorate of the Petitioner, confirmed that the Company was registerable for VAT with effect from 1st November, 1998 and also confirmed the assessment of Stg.£839,404.25.
- On 3rd November, 2004 the Petitioner's solicitors in this jurisdiction served a demand on the Company pursuant to s. 214 of the Companies Act, 1963 (the Act of 1963) formally demanding payment to the Petitioner of a sum of Stg.£911,167.65 in respect of outstanding VAT liabilities, including late notification penalties and interest. In the demand the Company was notified that, if it failed to pay the sums claimed to be due within 21 days from the date thereof, the Company would be deemed to be unable to pay its debts in accordance with s. 214 and in such circumstances the Petitioner would issue a petition in this court for the purposes of seeking to wind up the Company.

amount of the claim shall be regarded as a debt due to the Minister for Finance by the person against whom the claim is made by the claimant in respect of a tax or duty under the care and management of the Revenue Commissioners.

The response of counsel for the Petitioner to the contention made by counsel for the Company that the Petitioner should have pursued its claim by making a request for assistance under S.I. No. 462 of 2002 was that, while there may be a short route, availing of the jurisdiction conferred by the Insolvency Regulation, and a longer route, proceeding under S.I. 462 of 2002, by which the Petitioner may pursue its claim, both instruments must be interpreted as being mutually exclusive and the Petitioner is not precluded from availing of the shorter route.

Insolvency Regulation

The net issue for consideration is whether the Insolvency Regulation overrides the common law principle so that this court has jurisdiction to hear a petition by the revenue authorities of a foreign state to wind up a company incorporated in the State.

The provisions of the Insolvency Regulation which it was submitted are pertinent to a consideration of that question are the following:

- Recital (7), which records that insolvency proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Counsel for the Petitioner made the point that the Insolvency Regulation dovetails into the Brussels Convention. Although the 1968 Brussels Convention in the intervening period since the making of the Insolvency Regulation has been replaced by Council Regulation (EC) No. 44/2001 of 22nd December, 2000, insolvency proceedings remain outside the scope of that Council Regulation, as do revenue, customs and administrative matters and social security.

- Recital 8, which provides:

"In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States."

- Recital (21), which, in part, provides as follows:

"Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions"

- Article 1, which defines its scope and provides that the Insolvency Regulation, subject to exceptions provided for in Article 1.2 which are not relevant here, shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. As defined in article 2, insolvency

- Article 39, which is contained in chapter IV which deals with the provision of information for creditors and lodgement of their claims, provides:

"Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of the proceedings, including tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing."

Conclusions

The cross-border element on this application is the fact that the creditor petitioner is located in another Member State. It is clear beyond doubt that, if proceedings to wind up the Company which had been initiated on the petition of a third party were pending in this court, the Petitioner would be entitled to prove for its debt in the winding-up proceedings by virtue of article 39, notwithstanding that it is a tax authority of a foreign state. The effect of the common law principle would thereby be overridden.

The grounds on which this court may wind up a company and the standing of a person or body to initiate the winding-up proceedings are governed by Irish law – the Act of 1963, as amended. In the instant case it has been established that the Company has failed to comply with a demand under s. 214 of the Act of 1963, so that the Company is deemed to be unable to pay its debts. Therefore, a ground on which the Company may be wound up by the court exists (s. 213(e)). While the Insolvency Regulation does not expressly provide that a creditor located in another Member State shall have the right to initiate insolvency proceedings, in my view, as the instant case illustrates, it would defeat the purpose of the Insolvency Regulation if that were not the case.

I have come to the conclusion that the Insolvency Regulation confers jurisdiction on the court to wind up the Company on the petition of the Petitioner and that, in effect, the common law principle is rendered inapplicable by the Insolvency Regulation.

Order

There will be an order that the Company be wound up by the court.

Approved: Laffoy

8/03/05