Neutral Citation no. [2003] NICA 47 | *Ref:* **CAMF4041**

Judgment: approved by the Court for handing | *Delivered:* **25/11/03**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE CITY HOTEL (LONDONDERRY) LIMITED

Appellant;

SAMUEL STEPHENSON PRACTISING AS STEPHENSON & CO ARCHITECTURE
and
STEPHENSON ARCHITECTURAL ENGINEERING LIMITED

Respondents.

Before: Carswell LCJ, McCollum LJ and Campbell LJ

CAMPBELL LJ

[1] This is an appeal from an Order of McLaughlin J. refusing an injunction to restrain the respondents from presenting or advertising a petition to wind up the appellant company on the ground that it is to be deemed to be unable to pay its debts by reason of its failure to pay the sum of £161,274.00 said to be due in a statutory demand.

[2] The judge ordered that Patrick Joseph Doherty, a director of the appellant company, pay the respondents costs and granted leave to appeal and a stay pending the outcome of the appeal.

[3] The creditor is described in the statutory demand as Stephenson and Company, Architects. The amount claimed is stated to be due on foot of an invoice for professional architecture and design services, in connection with the re-development of the site of the former City Hotel in Londonderry.

[4] Once it is apparent that a debt is disputed on substantial grounds a petition to wind up a company is an abuse of the process of the court, *Mann v Goldstein* [1968] 2 All E.R. 769. The appellant claims that this debt is disputed

on three grounds and contends that the judge ought to have granted an injunction.

[5] The first of these grounds concerns the identity of the creditor in the statutory demand. The judge proceeded on the basis that the creditor was Samuel Stephenson practising as Stephenson and Company Architecture. The appellant submits that the agreement it entered into for architectural services appears to have been with Stephenson Architectural Engineering Limited.

[6] Sam Stephenson signed the letter of appointment on behalf of the company containing the agreement between Sam Stephenson and Company and the appellant. The letter is on writing paper headed Sam Stephenson and Company Architecture and the writing paper carries at the bottom of the page, in small print, the words "Stephenson Architecture Engineering Limited". The invoice on which the statutory demand is based is headed Stephenson and Company Architecture and in the statutory demand the creditor is described as Stephenson and Company, Architecture.

[7] Samuel Francis Stephenson states in an affidavit, sworn on 30 October 2002, that Stephenson Architecture Engineering Limited operates under the name of Stephenson and Company, Architecture. The respondents' solicitor advised the appellant's solicitor that his client traded as "Samuel Stephenson practising as Stephenson and Co, Architecture "

[8] On an interlocutory application Girvan J. ordered on 17 October 2002 that Samuel Stephenson practising as Stephenson Architecture Engineering Limited be joined as a party to these proceedings.

[9] It is plain that there is sufficient connection between the party on whose behalf the agreement was made, namely "Sam Stephenson and Company", on headed paper carrying the additional word "Architecture" and "Stephenson and Company, Architecture," the creditor in the statutory demand, to justify the judge treating the respondent as Samuel Stephenson practising as Stephenson & Co Architecture. Accordingly this ground of appeal must fail.

[10] The second ground of appeal raises a question as to whether the respondent waived any claim for fees. Patrick Doherty, who is described as a property developer, signed the letter of appointment on behalf of the appellant. At this time he was an equal shareholder in the company with Kevin Downey and Louis McLoughlin and since 1 March 1999 he has been the controlling shareholder. Mr Doherty accepts that he signed the agreement for the services of the architect however he does not consider himself bound by it for a number of reasons.

[11] James Sammon, a quantity surveyor and the project manager for the City Hotel development, claims in an affidavit that the architects failed to produce drawings as requested and that their work lagged behind the rest of the project. Mr Doherty alleges that in the course of a telephone conversation in the summer of 2000, Mr Stephenson agreed to write off his fees for work on behalf the appellant company provided that Mr Doherty did not seek to recover expenses due to him for two other projects in which he had been engaged with Mr Stephenson.

[12] It was agreed in the letter of appointment that fees would become due to the architect when the site was transferred and planning permission had been obtained These fees were paid after some delay and according to Mr Doherty he was surprised to receive a further invoice for £161,274 dated 30 July 2002.

[13] Mr Stephenson denies that he discussed fees with Mr Doherty in the summer of 2000 or waived fees due on the City Hotel project. He claims that his firm did all that was required to produce a bill of quantities, to allow the contractor to tender and the structural engineers to produce drawings for the foundations. In particular Mr Stephenson relies on a fax message, dated 22 May 2001, from the appellant's solicitors in which it is stated that fees in relation to the project would be paid if the appellant was successful in defending the Department's application for possession of the lands at Foyle Street and also in the event that it obtained a grant from the Northern Ireland Tourist Board. The author of the fax message, Mr Brendan Fox, Solicitor, has explained that at this time the appellant was engaged in a dispute with the Department of Social Development regarding the Foyle Street site and that it was imperative that the architect should attend a hearing before the Lands Tribunal. He suggests the content of the fax message is consistent with the averment of Mr Doherty that the architect's fees were dependent upon the project going ahead. If this is so it is difficult to comprehend why Mr Stephenson would have waived his fees a year earlier as Mr Doherty suggests he did.

[14] The judge observed that the earlier transactions with Mr Stephenson on which Mr Doherty relies were not between them as individuals but between various companies in which they may have had a controlling interest. It is clear that the appellant company had no role in either of the transactions forming the basis for Mr Doherty's claim that Mr Stephenson agreed to forgo fees due from the appellant company.

[15] The judge concluded that in the proceedings before him the existence of any collateral agreement could not be resolved satisfactorily and that the dispute was not genuine in the legal sense.

[16] Mr Horner QC on behalf of the appellant submitted that Mr Doherty as controlling shareholder had plenipotentiary powers and that the judge was wrong to say that the appellant was not a party to any agreement reached with Mr Stephenson. So it was argued that since in his judgment the judge acknowledged that the issue of the existence of a collateral agreement could not be resolved on evidence contained in affidavits, it followed that there was a substantial dispute.

[17] Mr Thompson QC who appeared for the respondent referred to the fact that the transactions on which Mr Doherty relied as forming part of the collateral agreement of the summer of 2000 involved a company called Manningtreel Limited which had been liquidated. Mr Thompson accepted that there could be a binding agreement, such as Mr Doherty described, if Manningtreel Limited still existed. However it would be essential to know more about the terms of the agreement as the judge has outlined in his judgment at paragraph 15.

[18] The judge was required to decide if, on the evidence before him, the debt was disputed on substantial grounds. In the proper exercise of his discretion he was entitled to reach the conclusion that it was not, therefore this court will not interfere.

[19] In an amended notice of appeal, lodged with the leave of the court, the appellant refers to the failure of the judge to take account of an agreement between the parties that any dispute would be resolved by arbitration. This agreement is contained in the conditions of appointment of the Royal Institute of the Architects of Ireland annexed to the letter of appointment. Clause 3.03 provides;

> "if any dispute … shall at any time hereafter arise between the parties to the Agreement ….. as to the rights, liabilities or duties of the said parties …. the same shall be and is hereby referred to the Arbitration of a person …. Every or any such reference shall be deemed to be a submission to the Arbitration within the meaning of the Arbitration Act (Northern Ireland) 1957 … or any Act amending the same."

[20] The relevant legislation is the Arbitration Act 1996 and section 9(1) which reads as follows:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a

> matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

Mr Horner relied on *Halki Shipping Corpn. v Sopex Oils Limited* [1997] 3 All ER 833. where parties to a charter party had agreed to refer any dispute arising therefrom or in connection therewith to arbitration. Clarke J. held that any subsequent claim which the other party refused to admit or did not pay was a relevant dispute which the claimant was entitled and bound to refer to arbitration notwithstanding that the respondent did not have a sustainable defence. On appeal [1998] 2 All E.R. 23 – the Court of Appeal affirmed the decision of Clarke J. and held that section 9 of the Arbitration Act 1996 introduced a significant change in the power of the court so as to exclude the Order 14 jurisdiction. At page 56 letter J Swinton Thomas LJ said:

> "The important distinction between section 9 of the 1996 Act and section 1(1) of the 1975 Act is the omission of the words
>
> > 'that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.'
>
> Accordingly the court no longer has to consider whether there is *in fact* any dispute between the parties but only where there is a dispute with (sic) the arbitration clause of the agreement and the cases which turn on that distinction are now irrelevant."

[21] Mr Horner relied on *Halki* as showing that to succeed in obtaining a stay on this ground the appellant was required to satisfy the less onerous test of showing that there was a dispute.

[22] "Legal proceedings " are defined in section 82 (1) of the Arbitration Act 1996 as meaning "civil proceedings in the High Court or a county court." This raises the question as to whether a statutory demand is a civil proceeding in the High Court? A statutory demand is a written formal demand served by a creditor on a company under Article 103(1)(a) of the Insolvency (Northern Ireland) Order 1989 requiring the company to pay the sum due. If it neglects to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor within 3 weeks then the company is deemed unable to pay its debts. Mr Thompson submitted that a statutory demand is evidence and he referred to the other ways in which a company is deemed unable to pay its

debts referred to in Article 103 (1) of the Insolvency Order including article 103(1)(e) which provides:

or "if it is otherwise proved to the satisfaction of the High Court that the company is unable to pay its debts as they fall due".

[23] In our view Mr Thompson is correct. A statutory demand is not "legal proceedings" and it is not open to the appellant to apply to the court "in which proceedings have been brought" to stay those proceedings under section 9(1)(a) of the Arbitration Act 1996.

It follows that this ground of appeal must also fail.

[24] On 21 January 2003 the judge ordered that the appellant pay the respondents costs. Subsequently the respondents issued a summons applying for an order that the costs of the proceedings be awarded against Patrick Joseph Doherty. The factual bases for this application, as set out in the affidavit of the respondent's solicitor, are taken from the judgment of McLaughlin J. There the judge refers to the accounts of the appellant as showing that it is technically insolvent and goes on to say that Mr Doherty whom he describes as the alter ego of the company must meet any indebtedness of the appellant.

[25] The respondent's application succeeded and the judge ordered the costs of the proceedings be awarded against Mr Doherty who now appeals against this order.

[26] The power to award costs is contained in section 59(1) of the Judicature Act (Northern Ireland) 1978 which provides;

> "Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid."

Order 62 rule 2(4) of the Rules the Supreme Court states:

> "The powers and discretion of the Court under section 59 of the Act (which provides that the costs of an incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that the Court shall have full power to determine by whom

> and to what extent the costs are to be paid) …. Shall be exercised subject to and in accordance with this Order."

[27] In *Anderson v Hyde* [1996] 2 BCLC 144 this Court accepted that the effect of s 59 of the Judicature Act and the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd. The Vimeira* [1986] AC 965 was to give jurisdiction to the court to make an order for costs against a person who had not been joined as a party to the proceedings.

[28] In *Symphony Group Plc. v Hodgson* [1994] QB 179 at 191 Balcombe L.J. referred to a number of reported cases where the court has been prepared to order a non-party to pay the costs of proceedings. He mentioned a group of cases where a person has some management of the action, for example a director of an insolvent company who causes the company improperly to prosecute or defend proceedings. He noted that while it was not suggested in any of those cases that it would never be a proper exercise of the jurisdiction to order the director to pay the costs, in none of the cases was it the ultimate result that the director was so ordered. This is not surprising since as Nicholls L.J. observed in *In re Land and Property Co. Plc.* [1991] 1WLR 601 the circumstances in which it will be just to make such an order will be exceptional and "in the nature of things it will very seldom be right to order a person who is not a party to proceedings to pay the costs of the proceedings."

[29] An appellate court will not interfere with a judge's order for costs unless he has failed to exercise his discretion in accordance with settled principles. Without the benefit of the judge's reasoning leading to the making of the order this court must itself decide whether it is a case in which it is just that an order should have been made requiring Mr Doherty to pay the respondents costs.

[30] It is not uncommon for a company faced with a statutory demand to apply for an injunction to restrain a creditor from presenting a petition to wind up the company. There is nothing exceptional about this case other than the fact that it was a one-man company that sought an injunction. The application has failed but the grounds upon which it was said that the debt was disputed were not so unsound as to make the application for an injunction improper. In the circumstances we do not consider that it is just that Mr Doherty should be required to pay the costs of the proceedings.

[31] Accordingly we allow the appeal on this issue and reinstate the order of 21 January 2003 requiring the appellant to pay the costs.