THE HIGH COURT

Record No: 2024/117 COS

IN THE MATTER OF CITY QUARTER CAPITAL II PLC

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr Justice Rory Mulcahy delivered on 30 August 2024

Introduction

1. On 28 May 2024, Mr Tom Finneran presented a petition ("**the Petition**") to the High Court seeking to have City Quarter Capital II plc ("**the Company**") wound up pursuant to section 569(1)(d) of the Companies Act 2014, as amended ("**the Act**"), that is, on the grounds that the Company was unable to pay its debts as they fell due. In the petition and in his grounding affidavit, Mr Finneran asserted that there is an outstanding debt in the sum of €300,000 owed by the Company to Mr Finneran and his wife, a debt which remained unpaid despite demand having been made pursuant to section 570(a) of the Act.

2. In a replying affidavit sworn on behalf of the Company, Mr David O'Shea, a director of the Company averred that Mr Finneran was not a creditor of the Company at all and therefore did not have the requisite *locus standi* to present the Petition. Mr Finneran has not filed a replying affidavit. Rather he has indicated that he does not wish to proceed with the Petition but instead supports the application of the Joint Liquidators of Blackbee Investments Limited (in liquidation) ("**Blackbee**") to have Blackbee substituted as petitioner pursuant to section 572(5) of the Act and/or Order 74, rule 18 of the Rules of the Superior Courts ("**the Rules**").

3. The Company opposes the application to substitute on the basis that, it contends, it is a prerequisite for substitution that the Petition was presented by a party who had standing so to present it and, in circumstances where it claims Mr Finneran did not have such standing, it would be an abuse of process to permit substitution in this case.

Factual background

4. On 19 May 2023, Colin Farquharson and Luke Charleton were appointed as joint liquidators (the "**Joint Liquidators**") of Blackbee by order of the High Court on foot of a petition presented by the Central Bank of Ireland ("**the CBI**") on the basis, *inter alia*, that the CBI had concerns about the governance of Blackbee. The ultimate beneficial owner of Blackbee is Mr O'Shea. As appears from the affidavit of Mr Farquharson sworn in these proceedings, Blackbee was an investment firm regulated by the CBI. Blackbee typically invested client funds in bonds issued by the Company, a company of which Mr O'Shea is also the principal. It appears that there are 61 companies within the wider Blackbee group. Mr O'Shea is the principal or controller of all the companies within the group.

5. Bonds were issued by the Company to investors, and the Company then lent the monies raised on those bonds to special purpose vehicles for investment in real estate or other assets. The investors in the bonds were given a fixed charge over the underlying assets as security for the benefit of the investors. Blackbee acted as arranger in respect of regulated investments, but other companies within the group were used to arrange unregulated investments. The investment by Mr Finneran was an unregulated investment in respect of which another entity, Blackbee Alternatives Limited ("**Blackbee Alternatives**") was the arranger.

6. As appears from Mr Finneran's affidavit grounding the Petition, he invested the sum of €300,000 on 26 March 2021 on foot of an Investment Memorandum prepared by Blackbee Alternatives. The main terms of the investment were that it was a fixed two-year investment with a target return of 6% per annum, with the funds to be invested in a social housing project. The sums invested were to be secured by a first legal charge in favour of the investors over the underlying assets. The summary terms of the investment described

Blackbee Alternatives as "*the investment arranger*" and the Company as the "*issuer*". The investment maturity date was stated in the summary terms as being 24 March 2023.

7. Mr Finneran's affidavit details the efforts he took to secure the return of his investment following the maturity date. He exhibits a number of emails from Blackbee Alternatives advising that the maturity date had been postponed. The latest update provided by Blackbee Alternatives was that maturity was expected at the end of Q1 2024.

8. On 14 March 2024 and again on 17 April 2024, Mr Finneran's solicitors made written demand for payment under section 570(a) of the Companies Act 2014. The letters indicated that if payment was not made within 21 days, Mr Finneran would petition to have the Company wound up.

9. By letter dated 23 April 2024, the Company replied to the letter of 17 April 2024 stating that the letter had been forwarded to "*the respective party, and they shall respond at the earliest time possible*". Oddly, having suggested that the letter had been forwarded elsewhere, the letter went on to say that the demand letter "*contained factual inaccuracies however these will be addressed in our response*". No further reply to the demand letter was sent prior to the presentation of the Petition by Mr Finneran.

10. Mr Finneran presented the Petition on 28 May 2024. The Petition was advertised in *Iris Oifigiúil* on 7 June 2024 and in the *Irish Examiner* on 10 June 2024.

11. On the first return date of the Petition, 24 June 2024, the Joint Liquidators indicated Blackbee's willingness to be substituted as petitioner in the event that the petitioner did not proceed to hearing. In an affidavit sworn by the Joint Liquidators in support of the Petition on 27 June 2024, they indicated that they would be prepared to act as liquidators of the Company if the court considered that this would generate "*cost and time efficiencies*". They made clear that their interest in the winding up of the Company was in obtaining the books and records of the Company to which they had been denied access in the course of the liquidation of Blackbee.

12. In its response to the Petition, in an affidavit sworn by Mr O'Shea on 8 July 2024, the Company denied that Mr Finneran was a creditor of the Company. It was noted that the Investment Memorandum had made clear that there was potential risk associated with the

investment and potential loss to investors if the asset did not perform. There was, however, no averment that the investment has not performed. On the contrary, Mr O'Shea averred that the assets underpinning the investments are to be sold by the end of the year and money will be returned to investors then. He contended that Mr Finneran was seeking to "*skip the queue*" by presenting the Petition. The substance of Mr O'Shea's response, however, is that Mr Finneran's engagements were all with Blackbee Alternatives rather than the Company and therefore, as stated at paragraph 17 of his affidavit, "*Mr Finneran has not produced, because he cannot, any evidence to show the nexus between him and the Company that is necessary in order to ground the Petition herein.*" Notably, nowhere in Mr O'Shea's affidavits does he aver that the Company is solvent or able to pay its debts as they fall due.

13. The Joint Liquidators and Mr O'Shea exchanged affidavits concerning the extent to which Blackbee is a creditor of the Company, but the parties are now agreed that that is an issue which falls to be determined at the hearing of the Petition in the event that Blackbee is substituted as petitioner.

14. On or about 8 July 2024, Mr Finneran indicated that he did not wish to proceed with the Petition and sought leave to withdraw it. The Joint Liquidators indicated an intention to apply to be substituted as petitioner. The court (Sanfey J) fixed directions for the hearing of that application which was heard by me on 30 July 2024. At the hearing, Mr Finneran indicated his support for the substitution application. Another creditor, Harvest Trustees Limited, also appeared and indicated that it was neutral in relation to the application.

Power to substitute

15. Section 572(5) of the Act provides as follows:

Where a petitioner does not proceed with his or her winding-up petition, the court may, upon such terms as it shall deem just, substitute as petitioner any person who would have a right to present a petition in relation to the company, and who wishes to proceed with the petition.

16. The wording of the section is similar, though not identical, to the wording of Order 74, rule 18, which is in the following terms:

When a petitioner consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called in Court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned, or if appearing, does not apply for an order in the terms of the prayer of his petition, the Court may, if, and upon such terms as it shall deem just, substitute as petitioner any person who would have a right to present a petition, and who desires to prosecute the petition.

17. Neither party contended that any difference in wording between the statutory provision and the Rule had any bearing on the issue to be decided on this application.

18. The purpose of the power to permit substitution of a petitioner was explained in *Re Lycatel Ireland Limited* [2009] IEHC 264, in a case in which it was contended that the power to substitute only arose in circumstances where a petition had been advertised in accordance with statutory requirements:

20. "*The purpose of the power of substitution of a petitioner conferred by r. 18 is succinctly explained in the following passage from French on* Applications to Wind Up Companies *(Oxford University Press, 2nd Ed., 2008) at p. 245:*

> "Without provision for substitution, an insolvent company could delay being wound up by paying off petitioning creditors one by one, forcing other creditors to present and advertise new petitions, then waiting until the petition by each creditor was at or near hearing before paying that creditor off too. In order to counter these tactics, several creditors would have to present petitions simultaneously. As Needham J. said *in D.M.K. Building Materials Pty Limited v. C. B. Baker Timbers Pty Limited* [(1985) 10 ACLR 16 at p.19]:
>
> > *'The purpose of substitution, in my opinion, is to ensure that once a prima facie right to the winding up of a company has arisen, the company should not escape from that position except upon the basis of fair dealing with all its creditors, not merely by paying off the particular [applicant].'"*

21. I reject the argument advanced by counsel for Wavecrest that r. 18 is predicated on the petition having been advertised. On the contrary, each of the circumstances outlined in r. 18 as giving rise to the discretion to substitute may arise even if the petition has not been advertised. On the basis of my experience of dealing with the Chancery 2 List, each of those circumstances is more likely to arise when the petition has not been advertised than when it has. I find that the power conferred by r. 18 applies even if the petition has not been advertised."

19. The Joint Liquidators contend that the courts have recognised the benefits in ensuring that a company is subject to only one petition rather than requiring petitions from each affected creditor. They refer to the decision of Mervyn Davies J in *Re Creative Handbook Limited* [1985] BCLC 1 in which he rejected an objection to substitution by the Inland Revenue on the grounds that Revenue could have launched its own petition, noting that it was the "*usual, if not invariable, practice of this court to ensure that the winding up of a company is the subject of one petition only and not the subject of two or more petitions.*"

20. The Joint Liquidators argue that the power to order substitution is not confined to circumstances where the company the subject of the petition has settled with petitioner. This is not disputed by the Company. However, the Company argues that it is only permissible where the original petitioner was entitled to present the petition in the first instance.

Arguments of the parties

21. The parties agree that the court's power to substitute is a discretionary one. Although the argument before the court and in the written submissions involved some debate regarding what were the requirements of section 572(5) and Order 74, rule 18, in effect, the dispute between the parties was a dispute as to how the court should exercise its undoubted discretion.

22. The Joint Liquidators' position is that the only requirement for substitution is that a petition be presented and that the original petitioner make clear that they do not wish to proceed with the petition. As the matter was advanced by counsel for the Joint Liquidators, "*[t]he only requirement is that a petition has been presented, whether it's good, bad or indifferent, and that the petitioner is applying to have it withdrawn*." The Joint Liquidators contend that once it is established that the original petitioner does not intend to proceed with a petition, then substitution should be allowed.

23. The Company's position, by contrast, is that the original petition must have been one which was "*capable of presentation*", that is, one which comes with the four corners of the statutory rules in relation to the presentation of a petition. In this case, the Company says that the Petition was not capable of presentation because it was not presented by a creditor of the Company. It relies on section 571(1) of the Act which sets out the persons who may present a petition to wind up a company:

> *(1) An application to the court for the winding up of a company shall be by petition presented either by—*
>
> > *(a) the company, or*
> >
> > *(b) any creditor or creditors (including any contingent or prospective creditor or creditors) of the company, or*
> >
> > *(c) any contributory or contributories of the company,*
>
> *or by all or any of those parties, together or separately, but this is subject to the following provisions.*

24. The Company refers to the observations of Ungoed-Thomas J in the decision of the High Court of England and Wales in *Mann and Anor v Goldstein and Anor* [1968] 1 WLR 1091 (at p. 1095) that in a winding up, the requirement that a company be unable to pay its debts is "*additional to the pre-condition of presenting the petition, that the petitioner must be a creditor and is not an alternative to it.*" The court in that case concluded (at p. 1096):

> "*When it is clearly established that there is no debt, it seems to me similarly to follow that there is no creditor, that the person claiming to be such has no locus standi and that his petition is bound to fail. Once that becomes clear, pursuit of the petition would be an abuse of process, and this court would restrain its presentation or advertisement. Indeed, I understood counsel for the second defendant to concede this proposition.*"

25. The Joint Liquidators characterise the Company's position as imposing a requirement that it be established that the petition, as originally presented, would have been *successful* before substitution will be permitted. The Company disputes this characterisation and contends that, on a substitution application, the court's task is "*simply to identify whether or not there is* prima facie *evidence of the status of creditor company or contributory, one of the three parties identified at section 571?*" Rather than imposing a requirement that the party seeking to be substituted establish that the petition would have been successful, without substitution, it argues for a less onerous requirement, that it be shown that the petition was not bound to fail.

26. The Company relies on the decision of the High Court (Butler J) in *Re Bayview Hotel (Waterville) Limited* [2022] IEHC 516. In that case, an application was brought to wind up the company by a creditor. Another creditor had indicated that it was prepared to be substituted for the original petitioner should the original petitioner's petition not succeed. Butler J concluded, with some reluctance, that the debt of the original petitioner was *bona fide* in dispute, and therefore, the failure to pay that debt was not grounds to wind up the company. However, she concluded that the evidence established that the company was unable to pay its debts as they fell due, and therefore, she made an order placing the company in liquidation. She nonetheless addressed the suggestion that the original petitioner might be substituted:

"***74.*** *It seems to me that the terms of s. 572(5) and O. 74, r. 18 are specifically directed at circumstances where the petition brought by the original petitioner does not proceed to a conclusion, most usually because the debt claimed by the original petitioner is satisfied by the company before an adverse decision can be reached by the court. In those circumstances, it clearly serves the interests of all creditors that another creditor be allowed step into the shoes of the petitioner. However, if the petition is pursued to an unsuccessful conclusion by the original petitioner, it does not necessarily follow that another petitioner should be allowed to take up the cudgels and to re-agitate matters. In this instance, were I to have reached the conclusion that I was not satisfied the company was unable to pay its debts or, equally, that the other ground relied on, the just and equitable one, was not satisfied on foot of the original petitioner's arguments, I do not think that it would be fair to the company to simply allow another petitioner step into the shoes of the unsuccessful petitioner. If that was what the Oireachtas had intended, then not doubt s. 572(5) would have been framed differently as would the consequential provisions of O. 74, r. 18.*"

* emphasis added

27. The Company emphasises the words underlined above as supporting its proposition that another petitioner cannot step into the shoes of a petitioner whose petition was bound to fail. The Joint Liquidators argue that this portion of the judgment simply recognises that a petition which has already failed cannot be re-animated by the substitution of the petitioner.

Discussion

28. The Joint Liquidators correctly identify that there is nothing in the wording of either section 572(5) or Order 74, rule 18 which reflects the restrictions on substitution proposed by the Company. However, the Joint Liquidators also accept that the court's power to substitute a petitioner is a discretionary one. It cannot be the case, therefore, that a court is *obliged* to permit substitution merely where the requirements of the statutory provision and/or rule are met, *i.e.* the original petitioner does not wish to proceed and the party wishing to be substituted has a right to present a petition.

29. There is little guidance in those provisions on the factors that a court should consider in exercising its discretion. In an Australian authority, relied on by the Company, *South East Water Limited v Kitoria Pty Ltd* [1996] 14 ACLC 1328, the Victorian Federal Court (Ryan J) suggested the following in relation to a similar (though not identical) statutory power to substitute:

> "*In my view, the proper exercise of the discretion conferred by s. 465B of the* Law *requires the Court to weigh in the balance two competing policies. The first is that an insolvent company should not be permitted to continue to trade to the detriment of its existing and future creditors but should be wound up as expeditiously as possible. If the achievement of that objective is jeopardised by the inaction or lack of diligence of the petitioning creditor, another creditor should be substituted as contemplated by s. 465B(1)(a) to allow the winding up proceedings to continue in the interests of the generality of creditors, some of whom may have refrained from initiating those proceedings in the knowledge that the original petition had been instituted. On the other hand, the Court should not allow winding up proceedings to be used as a debt-collecting mechanism or an instrument of oppression to be held over the head of a company otherwise trading satisfactorily by a creditor whose debt is the subject of a genuine dispute.*"

30. I am satisfied that the policy considerations identified in that judgment apply in this jurisdiction pursuant to the Irish jurisprudence regulating the winding up of companies.

31. In this case, the Company contends that the court should exercise its discretion by refusing substitution where to permit the substitution of the petitioner would constitute an abuse of process. The abuse of process, in this case, was, on the Company's analysis, the presentation of a petition by a party who was not a creditor of the Company. It is clear that the court should not countenance an abuse of process, but it could not be the case that the court is required to determine the entitlement of a petitioner to present a petition, in circumstances where that petitioner does not wish to proceed with the petition, simply in order to determine whether another party should be permitted to be substituted. That would be to require the court to embark on an enquiry which is no longer relevant for the purpose

of determining the ultimate issue which the court must decide, whether the company in question should be wound up on foot of the winding-up petition.

32. Rather, it seems to me, that the focus of the court, when exercising its discretion, should be on whether the substitution of the petitioner would amount to an abuse of process, rather than on whether the original presentation of the petition constituted an abuse of process. It may be, in another case, that a court might conclude that it would be an abuse of process to permit substitution in a petition which is manifestly bad on its face because, for instance, it does not purport to have been presented by a creditor, or where the original petitioner has accepted that it was not, at the time of the presentation of the petition, a creditor of the company. However, that is not the situation in this case.

33. Mr Finneran has positively averred that he is a creditor of the Company and that the sum of €300,000 is due and owing. He served a notice under section 570(a) of the Act to which he got no substantive response. The effect of the Company's failure to respond is that the Company was deemed to be unable to pay its debts. Moreover, it meant that prior to the presentation of the Petition, the Company had not set out any basis to dispute Mr Finneran's contention that he was a creditor of the Company.

34. In its replying affidavits, the Company asserts two bases for contesting Mr Finneran's entitlement to present the Petition. First, it contends that any money owed to Mr Finneran has not yet fallen due. Second, it argues that money due to Mr Finneran, if any, is not owed by the Company, but by another, unspecified, entity. It appears that the Company is suggesting that it is Blackbee Alternatives to whom Mr Finneran should look for the recovery of the monies he invested in the bonds issued by the Company. But as counsel for the Joint Liquidators points out, it was the Company who issued the bond; Blackbee Alternatives was simply the "arranger".

35. Thus, the question of whether Mr Finneran is a creditor of the Company is a matter which is disputed on affidavit. In light of the decision in *RAS Medical Ltd v The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63, this is not a dispute which could be resolved without cross-examination. It may be that, as the Company contends, Mr Finneran is not, and never was, a creditor of the Company, but the court cannot conclude on the basis of the disputed evidence that this is so, still less that Mr Finneran knew or ought to have known that he was not a creditor of the Company, such that his presentation of the

Petition was done in bad faith or constituted an abuse of process. In this regard, the failure by the Company to respond to the demand made pursuant to section 570(a) is fatal to the Company's contention that it was an abuse of process for Mr Finneran to have presented the Petition on the basis that he was a creditor of the Company. Counsel for the Company suggested that for substitution to be permitted, there must be at least a *prima facie* basis for contending that the original petitioner was entitled to present the petition. Mr Finneran's affidavit evidence, together with the Company's failure to respond to the statutory demand, constitute such *prima facie* evidence.

36. As appears from the decision in *Re Bayview Hotel (Waterville) Limited*, on which the Company relies, a conclusion that a particular debt is genuinely disputed is not, in any event, determinative of an application to wind up a company by a creditor. In that case, the court concluded that the petitioner's debt, the subject of the statutory notice served pursuant to section 570(a), was genuinely disputed by the company and therefore refused to wind up the company on the basis that the company was deemed unable to pay the debt the subject of that notice. However, Butler J concluded that, nonetheless, the evidence established that the company was unable to pay its debts and, accordingly, made an order winding up the company. Thus, it could not be said that the Petition in this case, as originally presented, was bound to fail, even if Mr Finneran failed to establish that he was owed an undisputed debt by the Company.

37. Crucial to the exercise of the court's discretion is an understanding of the effect of a decision to exercise that discretion one way or the other. In this regard, the Joint Liquidators and the Company both submitted that proceeding on the basis of the original petition may impact on transactions entered into by the Company since the date of presentation of the Petition. In this regard, section 602 of the Act (equivalent to section 218 of the Companies Act 1963) is of some relevance.

38. Pursuant to that provision, certain transactions engaged in by a company, including the disposition of property, after the commencement of a winding up are deemed void unless the court orders otherwise. Transactions entered into after the presentation of a petition come within the scope of this provision (see, for instance, *Van Dessel v Connolly* [2020] IEHC 663). If the Company is wound up on foot of the Petition, then disposal of assets by the

Company following the presentation of the Petition will, therefore, be deemed void unless otherwise ordered by the court.

39. In exercising its discretion whether to permit substitution, the court should, therefore, consider whether any injustice would be done by exposing the Company to the risk of having transactions entered into since the date of presentation of the Petition rendered void by the operation of section 602 of the Act. It is difficult to see what prejudice or injustice the Company would suffer if the application to wind up the Company were to proceed on the basis of the original petition. If the Company is not wound up, then section 602 will have no impact on it at all. If, by contrast, a decision is made to wind up the Company, on the basis that it is unable to pay its debts or otherwise, it is difficult to see why the Company should be permitted to avoid the ordinary consequences of section 602. There is no suggestion that Blackbee is seeking to gain an advantage which would otherwise have been unavailable to it had Mr Finneran not presented the Petition when he did. In any event, section 602 of the Act permits a court to make orders declaring that particular transactions are not void. Should the Company have any basis for contending that transactions post the presentation of the Petition should not be treated as void, whether by reference to the substitution of the petitioner or otherwise, then it can advance those arguments in due course.

40. The evidence on this application does not suggest that Blackbee's application to be substituted as petitioner is oppressive of the Company or is being used as a debt-collecting mechanism in an attempt to recover a genuinely disputed debt. Blackbee's interest, as averred to by the Joint Liquidators, is in gaining access to the books and records of the Company. Whether they can establish a sufficient basis to have the Company wound up will be a matter for the hearing of the Petition.

41. The Petition, on its face, was presented by a person purporting to be a creditor of the Company. A notice was served by that person under section 570(a) to which there was no substantive response, whether denying that the debt was due or that Mr Finneran was a creditor. The Company was thus deemed unable to pay its debts as they fell due. To borrow the language of Needham J, cited in *Re Lycatel*, " *a prima facie right to the winding up of a company*" had arisen.

42. The Company has failed to establish that it was an abuse of process for Mr Finneran to have presented the Petition or that the Petition was bound to fail. In the circumstances, I am satisfied that the interests of justice favour the court exercising its discretion to permit the substitution of Blackbee as petitioner in these winding-up proceedings.

Conclusion

43. I will, therefore, make an order substituting Blackbee Investments Limited (in liquidation) as petitioner in place of Mr Tom Finneran in the Petition presented in these winding-up proceedings. I will hear the parties as to the terms on which that substitution will be permitted. As previously indicated, I will list the matter on 10 October 2024 at 10.30 a.m. for that purpose and for the purpose of finalising all ancillary matters including the question of costs.