THE HIGH COURT

[2021 53 COS]

IN THE MATTER OF BAYVIEW HOTEL (WATERVILLE) LIMITED

AND IN THE MATTER OF THE COMPANIES ACT, 2014

JUDGMENT of Ms. Justice Butler delivered on the 8th day of September, 2022

Introduction

1. By petition filed on 19th March, 2021 the petitioner, Williams Holding Ltd. ("the petitioner") seeks that Bayview Hotel (Waterville) Ltd ("the company") be wound up by the court either on the grounds that it is unable to pay its debts (s. 569(1)(d) of the Companies Act, 2014) or, alternatively, on the basis that winding up the company would be just and equitable (s. 569 (1)(e) of the 2014 Act). As its name suggests, the company is the owner of and previously operated a hotel in Waterville, County Kerry. The company has not traded, save for a very limited extent, since a lockdown was imposed due to the outbreak of Covid 19 in March 2020, but the issues giving rise to this petition largely predate those events.

2. The petitioner claims that a sum of €479,249 was advanced by it to the company in 1986 which sum is secured by a mortgage debenture over the company's assets. Two additional creditors support the petition. The combined sum claimed to be owed by the company to these three creditors is some €1,514,200. The petition is opposed by two other creditors who between them claim to be owed a total of €489,565. According to the company's accounts there are also some smaller, trade creditors who have not responded to the petition. The fault line between the two groups of creditors lies in their respective association with or allegiance to one of the two men involved in taking over the Bayview Hotel in 1986, Mr. Robert Noonan and Mr.

Michael (Haulie) O'Shea. These groups have been described by counsel appearing on the petition as the Noonan interests and the O'Shea interests respectively. Whilst not entirely legally exact, I will adopt this as a useful description of the competing interests.

3. In due course I will examine the case made against the petitioner's claim to be owed the sum claimed. In very broad terms those opposing the petition (the O'Shea interests), who are coincidentally largely unsecured creditors, accept that the company's property will have to be sold to meet the company's indebtedness. However, they assert that a forced sale by a liquidator will impair the value of the company's main asset, the hotel, resulting in less funds becoming available to discharge the amounts owed to them. They argue that a voluntary sale by agreement *"between the parties"* would be financially more productive. The petitioner contends, for reasons that may become apparent as I describe the history of the interactions between the parties, that the extent of the falling out between the two groups is such that agreement on the voluntary sale of the company's property is completely unrealistic. It is also contended that court supervision will in any event be required to deal with the conflicting claims being made on the proceeds of sale.

History of Interactions between the Parties

4. It is difficult to describe the history of the interactions between the Noonan and the O'Shea interests for a number of reasons. Firstly, there was clearly a significant level of business dealings between Mr. Noonan and Mr. O'Shea over an extended period of time in respect of other ventures which had a bearing on the way they interacted as regards this company. Secondly, there is considerable disagreement between the parties as to the terms of many of the key transactions. Thirdly, and most surprisingly from the court's perspective, there was a striking lack of formality and a consequent lack of any documentary record of much of what was allegedly agreed between the two men. As some of the disputed events took place

over 35 years ago, the task facing any court attempting to ascertain exactly what was agreed is a challenging one. The following account therefore is not definitive, and it is acknowledged that many of its elements are disputed. Nonetheless it is intended to provide a sufficient overview to enable the arguments made by the parties to be understood.

5. The company was incorporated by third parties in 1957 and has operated a hotel at Waterville since that date. Historically the business ran into some difficulty as a result of which the petitioner effectively acquired the company in 1986. The petitioner is a company incorporated in the Isle of Man and is owned and/or controlled by Mr. Noonan and members of his family. The circumstances in which the petitioner acquired the company are the subject of some dispute, to which I shall return, but the petitioner is now the sole registered shareholder in the company. Originally the petitioner nominated the company's directors but when those nominees retired in 2002 they were replaced by Mr. O'Shea and his wife. The investment made by the petitioner in the company in 1986 enabled the company to clear its then existing debts. In exchange the company executed an *"all sums due"* mortgage debenture in favour of the petitioner on 6th June, 1986 which was registered on 23rd June, 1986. I will return to the terms of this debenture. It is not disputed that the petitioner advanced the sum of €479,249 to the company nor that the company is liable to repay that sum to the petitioner. As shall be seen, the issue is whether that sum is currently due or may only be claimed by the petitioner after the hotel has been sold.

6. Mr. O'Shea contends notwithstanding that the petitioner owns 100% of the issued share capital of the company, himself and Mr. Noonan agreed in 1986 that the hotel was to be a joint venture in which Mr. O'Shea was entitled to 50% of the equity. Mr. O'Shea's claim to 50% of the shares in the company is the subject of proceedings taken by him against the petitioner in 2018 (Record No. 2018/10899P). Much of the factual evidence in this case is derived from affidavits in the 2018 proceedings which have been exhibited by Mr. O'Shea in his replying

affidavit to the petition. Mr. O'Shea claims that his 50% beneficial interest in the company reflects working capital he provided for the company and the fact that he ran the hotel business for the company without payment. The amount of working capital allegedly provided by him is not specified nor is it the subject of any claim in response to the petition. I do not propose in this judgment to attempt to disentangle the basis upon which Mr. Noonan and Mr. O'Shea agreed that the hotel business should be operated. It seems to be accepted that Mr. O'Shea was not paid a salary for his role, but it is suggested by the Noonan interests (in the 2018 proceedings) that significant consideration was nonetheless provided to him through his rent-free use and/or occupation of other Noonan property, including commercial property, in the area. Given that Mr. Noonan and Mr. O'Shea were involved in multiple businesses together over many years it is impossible in the context of this petition to determine whether this was referable to his work at the hotel or to some other business arrangement.

7. Related to his claim to be entitled to 50% of the company, Mr. O'Shea claims that advances made by the petitioner to the company in 1986 and thereafter were of a capital nature and would only be discharged on the sale of the hotel. He also claims that this agreement or understanding applies to all subsequent funds introduced to the company by the petitioner and by any company related to the petitioner. Interestingly, although Mr. O'Shea relies on an affidavit sworn by an accountant (Mr. Slye) in the 2018 proceedings to corroborate his claim that it was agreed he would get a 50% equity in the company, he has not produced any third party confirmation of his assertion that it was agreed the petitioner would not be repaid the monies owing to it until the hotel was sold at a time to be agreed between Mr. Noonan and himself nor that this agreement applied to advances made by any person or company associated with the petitioner.

8. The two claims made by Mr. O'Shea are somewhat incompatible. In the first of the two affidavits sworn by Mr. O'Shea in the 2018 proceedings and in Mr. Slye's affidavit, the case

made is that Mr. O'Shea would be allocated a 50% shareholding in the company once the moneys advanced by the petitioner had been repaid by the company. No reference was made at this point to those sums not being repayable until after the hotel was sold. Indeed, as the hotel is the company's only major asset, once it is sold presumably there will be no business for the company to run nor for Mr. O'Shea to have a 50% interest in. When this additional qualification was introduced in his second affidavit, Mr. O'Shea attempted to explain how his initial statement that the 50:50 equity would apply following the discharge of various advances by *inter alia* the petitioner and its related entities could be reconciled with his later statement that his entitlement to 50% of the equity was not predicated on the prior discharge of the sums owed to the petitioner. In my view, these explanations are not very convincing. It is perhaps notable that Mr. Noonan's position has remained consistent – he has refused to agree to the transfer of any of the company's shares into Mr. O'Shea's name because the debts owing to the petitioner remain outstanding. The issue was raised at a meeting between the two men and Mr. Slye in 1994 and again by Mr. Slye in 2002 when Mr. O'Shea and his wife were being appointed directors. At that time the company's memorandum and articles of association required that directors also be shareholders and it was suggested by Mr Slye that it was an opportune time to transfer shares to Mr. O'Shea. Instead of doing this, the memorandum and articles of association of the company were changed to remove the requirement that the directors also be shareholders and the small shareholding that had been held by the Noonan nominee directors reverted to the petitioner.

9. The hotel purchased by the petitioner in 1986 was in substantially the same premises as it had been since 1957. After carrying out some initial refurbishment in the late 1980s, the company embarked upon a major expansion and redevelopment in the 1990s. The petitioner purchased a number of houses adjacent to the hotel and an application was made for planning permission for a significant extension to the original premises. In 1994 planning permission

was granted for a two-storey extension with 40 additional bedrooms. This permission was subsequently varied in 1998 to allow for the construction of a third floor with an additional 19 bedrooms. It seems that much of the company's current indebtedness arises as a result of these works, including finance provided by a Noonan company, BuildHi Properties Ltd. and through works carried out by a company of which Mr. O'Shea and his wife are the shareholders and directors namely TTC Landscaping Ltd. In addition, the company increased its borrowings from Bank of Ireland. Bank of Ireland already had an *"all sums due"* debenture registered over the company's assets which was created and registered in 1989. In the course of argument, it emerged that central to Mr. O'Shea's concerns is the fact that the land upon which the company built the extension to the hotel was and remains owned by the petitioner/the Noonan interests subject to a lease at a nominal rent to the company. Consequently, Mr. O'Shea believes that the Noonan interests will exploit this aspect of the title to the hotel property to force a sale at an undervalue to a business associated with the Noonan interests. Although no issue was taken with the qualifications, skill or experience of the person nominated by the petitioner to act as liquidator if an order is made to wind up the company, Mr. O'Shea suggests that a liquidator would not have the requisite background knowledge and experience of the business to achieve an optimum price for the hotel.

10. The papers before the court do not indicate how or why relations between Mr. Noonan and Mr. O'Shea broke down. No doubt the economic crash in 2007/2008 placed a strain on business relations based, as much of Mr. Noonan's and Mr. O'Shea's were, around property development. In any event it seems that by 2011 or 2012 the Noonan interests, under pressure from the bank, were seeking a purchaser for a group of three hotels they held in Kerry including the Bayview at Waterville. In 2013 a Mr. Peter Rickenberg, then of a London based company called Lesley Marsh Ltd. which was involved in the purchase and sale of development properties, travelled to Kerry to view these properties. Mr. Rickenberg describes himself as a

close acquaintance of Mr. and Mrs. Noonan. In the event two of the three hotels were sold to a US investor and have since been redeveloped and rebranded as an upmarket golf resort. The Bayview was not part of the sale.

11. By 2013 the company was experiencing serous financial difficulties. The directors' report attached to the company's accounts for the year end 31st December, 2013, signed by Mr. and Mr. O'Shea, notes that "*due to the difficult economic environment, the company was unable to make the scheduled repayments to the bank in 2013*." The report also noted that nearly €900,000 was owed to other group companies and went on to state "*the company does not currently have the financial resources to repay these finance facilities should the fellow group companies seek payment of the full amounts*." Although the directors stated that they were not aware of any possible cessation of loan facilities nor plans by fellow group companies to seek repayment of the loans within twelve months, it is clear that by this point the company was *de facto* insolvent.

12. The bank's forbearance did not continue and in early 2015 the Bank of Ireland called on the guarantee that had been provided by the petitioner in respect of the company's indebtedness. On 21st May, 2015 Bank of Ireland appointed a receiver under the mortgage debenture. At this point Mr. Rickenberg intervened. He states that following negotiations with Bank of Ireland, Lesley Marsh & Co. Ltd. acquired both the company's debt to the bank and the related debenture. Lesley Marsh & Co. Ltd. subsequently changed its name to Thursley Developments Ltd. which company is supporting this petition. Due to a delay on the part of the bank, the deed of assignment of the debenture was not executed until 30th May, 2017. There is no document before the court evidencing assignment of the debt itself. However, it is undisputed that as of 30th July, 2015, the amount of €645,600 which had been owing by the company to the bank was discharged and the debt to the bank was cleared. Although Mr. O'Shea in his affidavit characterises this payment as one made following a call on the petitioner

as guarantor of the company's indebtedness, all of the evidence before the court confirms that the payment was made by Lesley Marsh & Co. Ltd and not by the petitioner. As Mr. Rickenberg suggests, it is clear from a note to the financial statements for the company for the year ended 31st December, 2016 that from documents lodged with the CRO the company was aware of this assignment although the note continues "*the directors have not to date been presented with adequate evidence in support of this assignment*".

13. On 30th May, 2017 Lesley Marsh & Co. Ltd. purported to appoint joint receivers under the debenture to replace the receiver that had been appointed by Bank of Ireland in 2015. The steps subsequently taken by the receivers prompted the institution of proceedings by the company at Mr. O'Shea's instigation (reference no. 2017/5813P) challenging the validity of the appointment on the grounds, *inter alia*, that the debt to which the debenture related had been discharged in 2015 before it was assigned to Lesley Marsh & Co. Ltd. in 2017. An interim settlement was reached in those proceedings on 17th July, 2017 under which the receivers were discharged on a without prejudice basis. A timetable for the exchange of pleadings was agreed which was to lead to an application for a hearing date in November 2017. The court is unaware of the progress of the 2017 proceedings, but they do not appear to have been litigated further and no hearing of the substantive action has taken place. Mr O'Shea describes these proceedings as being *"in abeyance"*.

14. The events of 2017 led to the petitioner issuing a requisition under s. 178 of the Companies Act, 2014 calling on the directors of the company (i.e., the O'Sheas) to convene a meeting for the purpose of removing the O'Sheas as directors and replacing them with nominees of the petitioner. In response, Mr. O'Shea asserted a 50% beneficial interest in the petitioner's shareholding in the company and sought to instruct the petitioner to vote 50% of its shares against the motion. When the petitioner refused to give an undertaking to this effect, the 2018 proceedings between Mr. O'Shea and the petitioner were issued. In the context of

those proceedings Mr. O'Shea secured an interlocutory injunction preventing the proposed meeting from going ahead and consequently preventing the removal of the O'Sheas as directors of the company. Instead, in December 2018 Mr. Noonan's wife and daughter were appointed as additional directors. Given the extent of the breakdown of relations between the Noonan and the O'Shea interests, this means that now the board of the company is effectively deadlocked.

15. Subsequent to the appointment of the Noonan directors in December 2018 there has been extensive correspondence between Mrs. Noonan, the accountants who had previously been responsible for filing the company's returns, Mr. O'Shea and the solicitors acting for Mr. O'Shea and TTL Landscaping Ltd. Much of this correspondence is circular in nature. On realising that 2016 was the last year for which company accounts had been filed, Mrs. Noonan sought to bring matters up to date. In looking for the information necessary to do this she found herself being referred by the accountants to Mr. O'Shea and by Mr. O'Shea back to the accountants. Because of the period of time since accounts were last filed, she was advised by the accountants that a full audit of the company would be necessary but that they would be unable to do an independent audit because they are the reporting accountants for Mr. O'Shea's trading activities. The explanation given for the non-filing of draft 2017 accounts, which had been prepared, was that the directors (i.e., the O'Sheas) had not approved of them because they were unable to satisfy themselves of a number of significant matters. This apparently refers to the claim by Lesley Marsh & Co. Ltd. to have acquired the company's debt to Bank of Ireland and its related security. Mr. O'Shea in a letter to Mrs. Noonan dated 18th May, 2020 describes this as "*a sum of money which was gifted/loaned to [the company] by you or your associates*". In the same letter he notes that the appointment of auditors has to be discussed as does "*provision to pay them, as the company has no funds to pay*". This is relied on by the petitioner as further evidence of the company's insolvency.

16. The annual accounts for the company for year ending 2016 show that the company made a loss of -€52,063, an increase over the loss made the previous year, 2015 of -€33,202. Liabilities at year end 2016 stood at €2,157,074 and the company's assets were valued at €566,934. Mr. O'Shea contends, probably correctly, that this is an undervalue as it does not take account of the full market value of the hotel. The director's report attached to the 2016 accounts notes "*there is a material uncertainty over the going concern of the company and that, therefore, the company may be unable to realise its assets and discharge its liabilities in the normal course of business*". The picture presented in the 2016 accounts appears to be similar to that for the immediately preceding years. The draft accounts for year end 31st December, 2017 (which were not approved by the O'Shea directors) show the loss for that year as having increased to -€66,999. The company continued trading until March 2020. It is not suggested by any of the parties to the petition that the financial situation of the company improved as a result of those trading activities. It seems that since the first lockdown was imposed in March 2020 the hotel opened for only a limited period and on a limited basis during the summer of 2020 in order to use up its existing stock and to avail of continued government subsidies for staff.

The Petition

17. On 25th February 2021 the petitioner served a letter of demand on the company under s. 570 of the Companies Act, 2014 seeking payment of the sum of €479,249 allegedly due by the company to it. Under s. 570 a company will be deemed to be unable to pay its debts if a creditor serves a written demand on the company to pay a sum allegedly due and that amount is not either paid or secured to the reasonable satisfaction of the creditor within 21 days. No response was received by the petitioner to its demand within a statutory 21 day period. Consequently, on 19th March, 2021 the petition was filed in the High Court seeking an order

that the company be wound up by the court under s. 569(d) or 569(e) of the 2014 Act. The petition was advertised in the national press on the 31st March, 2021 and published in Iris Oifigiúil on 2nd April, 2021. It was also served on the company and all four of its directors.

18. Under s. 569 the court has a discretion to wind up a company in the event one or more of the circumstances set out in eight sub-paragraphs to the section exists. The sub- paragraphs relied on by the petitioner are (d) that the company is unable to pay its debts and (e) that the court is of the opinion that it is just and equitable that the company should be wound up. In contending that the company is unable to pay its debts, the petitioner relies both on the non-payment of its debt on foot of the s. 570 notice and also on the general insolvency of the company as evidenced, inter alia, in its 2016 accounts. I note that s. 570(d) also allows a company to be deemed to be unable to pay its debts where "*it is proved to the satisfaction of the court that the company is unable to pay its debts*" and in forming its view, the court may take account of contingent and perspective liabilities of the company. It is not quite clear why this sub-paragraph is framed as a deeming provision in circumstances where the company's inability to pay has to be proved in any event. The only ground advanced on the face of the petition in respect of the just and equitable ground is the inability of the company to continue as a going concern.

19. The powers of the court in hearing a petition are set out in s. 572. Under s. 572(1) the court may in principle dismiss the petition, adjourn the hearing or at sub paragraph (c) "*make any interim order, or any other order that it thinks fit*". There is an express power under s. 572(5) to substitute another petitioner. That subsection 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*."

This is to a large extent mirrored on O.74 r.18 of the Rules of the Superior Court which provides as follows:

> "*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.*"

20. The petition is grounded on an affidavit of Mrs. Elaine Noonan, who as well as being a director of the company is also a director of the petitioner. Her affidavit confirms the matters set out in this petition and exhibits certain corporate documentation. It includes the following averment:

> "*Furthermore, in the interests of uberrima fides, a named director of the company is engaged in separate litigation in his personal capacity as plaintiff against the petitioner as defendant under High Court Record 2018/10899. Such proceedings concern a dispute as to the share ownership of the company and the ownership of other properties unrelated to the company. I have been advised by my solicitor that those proceedings have no bearing on the merits of the within application*."

Ms. Noonan also avers that in circumstances where the company, its servants or agents have not responded to the letter of demand it was clear that "*the company has not sought to defend its indebtedness to the petitioner and has not in good faith or on substantial grounds disputed any liability in relation to the said debt*".

21. Mr. O'Shea, who has sworn a number of lengthy affidavits, takes exception to the fact that the claim made by him on affidavit in 2019 to the effect that it had been agreed by Mr.

Noonan that the advances made by the company were of a capital nature and would only be discharged on the sale of the company is not set out in Mrs. Noonan's affidavit. Consequently, he characterises the petition as a manifest abuse of process. He asserts that it was *"wholly incorrect"* for Mrs. Noonan to have averred that the liability claimed was not disputed by the company on *bona fide* or substantial grounds. He also asserts that the petition has been brought for an improper purpose in circumstances where the same ultimate outcome (namely the sale of the hotel premises) could be achieved by agreement between the parties and would likely result in a higher purchase price.

22. Mr. O'Shea does not explain why the company (of which he is a director) did not respond to the formal demand made of it under s. 570. Solicitor's correspondence was subsequently sent to the petitioner on behalf of Mr. O'Shea and his company, TTC Landscaping on 24th March and 19th April, 2021. This correspondence was not sent on behalf of the company which has, to date, not responded to the claim. Further, the correspondence sent on behalf of Mr. O'Shea post-dates the filing of the petition. All of this leads to an issue considered further below as to who, if anyone, is entitled to speak on behalf of the company.

The Company's Creditors

23. Five of the company's creditors appeared or were represented at the hearing of the petition. In addition to the petitioner, two other companies supported the petition. These were BuildHi Property Ltd, a Noonan company and Thursley Development Ltd., being the current name of the company formerly known as Lesley Marsh & Co. Ltd. The combined amount owed by the company to these creditors is approximately €1,500,000. Two creditors opposed the petition namely TTC Landscaping, an O'Shea company, and Tor Tionscal Caol Teoranta, a company previously run by Brian (Boru) O'Riordan, now deceased, who had a long-standing business and social relationship with both Mr. O'Shea and Mr. Noonan. I propose to look

briefly at the amount and the basis of the claim made by each of those companies. I appreciate that at this stage it is not a matter for the court to make definitive findings as to whether the sums claimed by creditors are properly due from the company. If an order is made to wind up the company, this is an exercise to be carried out by the liquidator. If an order is not made to wind up the company it remains open to each of the creditors to seek to recover the amounts claimed from the company. However, the amount of the claims and the identity of those making them are of relevance to the question of the company's solvency, the justice and equity of making an order to wind up the company and, more generally to the exercise of the court's discretion.

24. The circumstances of the petitioner's claim and the basis on which it is disputed by Mr. O'Shea have been set out above. In summary, the sum claimed represents money advanced by the petitioner to the company in 1986 or shortly thereafter which was secured by a mortgage debenture over the company's assets. Mr. O'Shea claims that there was an agreement between himself and Mr. Noonan that this money was in the nature of a capital advance and would not be recoverable by the petitioner until the hotel was sold by agreement between Mr. Noonan and Mr. O'Shea. As previously noted that claim is somewhat inconsistent with Mr. O'Shea's parallel claim that Mr. Noonan agreed that he was to have a 50% equity in the company such that he is currently entitled to a 50% beneficial interest in the shareholding currently held by the petitioner in the company. As originally framed Mr. O'Shea's claims were slightly different in that his entitlement to 50% of the company would not arise until the company's debt to the petitioner had been discharged. Commercially, this would be a more logical approach as it would allow the petitioner to maintain control of the company until the debt to it had been discharged. The contention that Mr. Noonan agreed that Mr. O'Shea should have 50% interest in the company and that the debt to the petitioner would not be repayable until the hotel was sold would mean that Mr. Noonan effectively agreed to give Mr. O'Shea control over the

company's repayment of its debt to the petitioner. It also seems to me inherently unlikely that Mr. Noonan agreed in 1986 that all funding to be provided to the company by any Noonan company indefinitely into the future would be in the nature of a capital advance and that the timing of the repayment of such moneys would be subject to the control of Mr. O'Shea. Nonetheless this is what Mr O'Shea claims was agreed.

25. Although Mr. O'Shea relies on an affidavit sworn by Mr. Slye in the 2018 proceedings to support his contentions, in my view the affidavit is not as supportive as Mr. O'Shea seems to believe. Firstly, Mr. Slye describes his association with the hotel and its previous owners and being introduced to Mr. Noonan, Mr. O'Shea, and Mr. Brian O'Riordan in connection with the proposed sale of the hotel by its previous owners. However, neither he nor his firm were party to the negotiations between those persons, and he treats of this matter by stating simply that his firm was subsequently advised that a deal had been agreed. He then describes a meeting subsequent to the deal being completed between himself, Mr. Noonan, and Mr. O'Shea in the reception of the Bayview Hotel. Some of what he recalls is not relevant to the issues on this petition. What is relevant is that he states he was told by Mr. Noonan that the company was in reality a 50/50 partnership between himself and Mr. O'Shea and that Mr. O'Shea or his nominee would ultimately be registered as a 50% owner. Crucially, Mr. Slye reports having been told by Mr. Noonan that the share ownership structure would be officially changed to reflect Mr. O'Shea's 50% ownership once his (i.e. Mr. Noonan's) initial investment had been repaid. He also describes his contacts with Mr. Noonan in 2002 when Mr. O'Shea and his wife were taking over as directors. Mr. Noonan rejected his advice that this would be an ideal time to regularise the shareholding of Mr. O'Shea. Mr. Slye does not offer any support for the contention that Mr. Noonan had agreed the petitioner would not be repaid the monies advanced by it until after the sale of the hotel nor that a similar arrangement applied to any funding provided by any company associated with the petitioner.

26. The only documentary evidence available is the mortgage debenture made between the company and the petitioner on 6th June, 1986 and registered in the CRO a number of weeks later. That mortgage debenture was formally drawn up by a firm of solicitors instructed by Mr Noonan and is signed by a director and secretary on behalf of the company. The first paragraph of that mortgage recites that in consideration of the petitioner making and continuing to make advances or giving credit to the company, the company covenanted "*on demand or otherwise as may be agreed from time to time, to pay or discharge to the lender all monies, obligations and liabilities whether present, future, actual and/or contingent which are now or may at any time hereafter be or become due owing or incurred to the lender by the company ...*" . Further, clause 4 of the mortgage debenture deals with the events of fault. It provides "*without prejudice to the lender's right to make demand at any time pursuant to clause 1 hereof*" that the lender would cease to be under any further commitment and that all moneys would become repayable in the event of certain events of default occurring. As it happens arguably a number of those events have already occurred such as the appointment of a receiver over the whole or any part of the property, undertaking or assets of the company (at para. c), the company being deemed to be unable to pay its debts within the meaning of the precursor to s. 570 of the 2014 Act (at para. b), the company ceasing or threatening to cease to carry on its business or substantially the whole thereof (sub para. e).

27. Both of these clauses are predicated on the monies advanced by the petitioner to the company being, in principle, repayable on demand. Mr. O'Shea points to the phrase "*or otherwise as may be agreed from time to time*" but that would seem to entail an agreement between the parties to the mortgage debenture, i.e., the company and the petitioner, not an agreement between Mr. Noonan and Mr. O'Shea especially in circumstances where at the material time Mr. O'Shea did not have an interest in either the company or the petitioner. Indeed prior to 2002 Mr O'Shea was not a director of the company and could not have

purported to make such an agreement on its behalf. It also seems unlikely that Mr. Noonan would have instructed solicitors to draft documentation to secure the petitioner's interests in relation to the moneys advanced by it to the company which did not reflect the terms of the agreement which had been reached between the petitioner and the company. It is significant that Mr. O'Shea himself was not party to any of these agreements and did not have an interest in the entities between whom the agreements were made. At best, he had a contingent entitlement to 50% of the equity in the company most likely once the moneys advanced by the petitioner had been repaid (although this qualification is not accepted by Mr. O'Shea).

28. I will return to the question of whether the petitioner has discharged the burden of proof upon it in light of the averments made by Mr. O'Shea.

29. No information has been provided to the court in relation to the claim of €389,291 made by BuildHi save that, like the petitioner's claim, it is acknowledged as an amount owed under the heading "*related party transactions*" in the company's annual accounts for the year ending 2016. The notes record that there is no formal agreement in place in respect of this debt and therefore the amount is included in "*current liabilities*". Mr. O'Shea contends that because BuildHi is a company associated with the petitioner, advances from it to the company were subject to the same agreement as pertained in respect of the petitioner, i.e., such advances would be treated as a capital advance repayable only when the hotel was sold.

30. The third company supporting the petition is Thursley Development Ltd, formerly Lesley Marsh & Co. Ltd. The amount claimed by Thursley reflects the debt owed by the company to Bank of Ireland in 2015 which Thursley/Lesley Marsh claims to have purchased from Bank of Ireland along with its related security. The entitlement of Thursley to make this claim is strenuously challenged by Mr. O'Shea. He contends that Thursley has not established that it purchased the debt, that the directors of the company were not on notice of the assignment of the debt nor the assignment of its security and did not approve of such

assignments and that by the time the security was assigned to Thursley in 2017 the debt to which it related had already been cleared. He makes a number of technical arguments about the drafting of the deed of assignment. More generally Mr. O'Shea asserts that Thursley is or must be a front for the petitioner and was used by the petitioner when the bank called on the guarantee provided by the petitioner to avoid the consequences of the alleged agreement that all advances made by the petitioner would be capital in nature and repayable only after the hotel was sold.

31. Those allegations, for which no supporting evidence was provided, are in turn strenuously disputed by Mr. Rickenberg on behalf of Thursley. He points out, correctly, that the prior approval of a borrower is not a precondition to the valid assignment of a debt and that there is no obligation on Thursley to provide commercial justification for its business decisions to either the company or to the O'Sheas. He describes Mr. O'Shea's allegation that monies from the petitioner were diverted through Thursley to repay the loan the petitioner had guaranteed as being speculative and no more than conjecture. He identifies the source of the funds used to acquire the loan as being 50% from Bective Lesley Marsh, an estate agent owned by Mr. Rickenberg at the time and 50% from a Swiss investor.

32. Finally, Mr. Rickenberg points to clause 2.1 of the deed of assignment from Bank of Ireland of 30th May, 2017 to which both he and Lesley Marsh & Co. Ltd were parties. This provides that the bank as assignor "*in consideration of the acquisition by the Assignee of the liabilities (receipt and sufficiency whereof is hereby acknowledged by the Assignor), hereby ASSIGNS, GRANTS, TRANSFERS AND CONVEYS absolutely to the Assignee*" *inter alia* the security documents and all rights under the security documents including, at clause 2.1.3 rights acquired prior to the date of execution of this deed. Thus, according to Mr. Rickenberg the entire premise on which the security document was assigned in 2017 was the prior acquisition by Lesley Marsh of the liabilities which in turn are defined as moneys which the assignee (i.e.,

Lesley Marsh) claims are owed by the borrower (i.e., the company) to the bank, in particular the sum of €654,660.11.

33. At this point it might be noted that in addition to supporting the petitioner's application, Thursley contended that in the event the petitioner's application did not succeed, (especially as regards the issue whether the debt claimed by the petitioner was disputed on *bona fide* grounds), then Thursley would apply to be substituted as petitioner in its place. This application was opposed by Mr O'Shea.

34. Moving to the two companies opposing the petition the first of these is Tor Tionscal Caol Teo (TTCT) which claims the sum of €189,565. TTCT is a company which provides a business, bookkeeping and office administration service to clients. The company was run by Mr. Brian O'Riordan who is now deceased, and an affidavit has been sworn on its behalf by his son Eoghan O'Riordan, who is now a director of the company. I found this affidavit to be of very little assistance. Despite making the usual averments as to his knowledge, Mr. O'Riordan does not identify how matters relating to his father's business affairs going back to 1986 are within his knowledge. He does not state when he became a director of the company nor what role, if any, he played in the management of the company prior to the death of his father. He makes a number of statements as to his understanding of the legal basis of the relationship between Mr. O'Shea and Mr. Noonan as regards the hotel – a matter to which he is undoubtedly a stranger. He cites both the 2018 and 2017 proceedings, to which neither he nor his company are a party, to make arguments in favour of Mr. O'Shea's position and against that of the petitioner and Thursley. In my view no weight can be attached to any of this material.

35. More pertinently Mr. O'Riordan describes TTCT as having provided bookkeeping and office administration services to the company since 1986. He states that between 1986 and 2003 the company discharged the fees due to TTCT for these services as they fell due. He then states that from 2004 onwards the company experienced trading difficulties and became unable

to discharge those sums. However, because of the long-standing business and social relationship between his father and "*the various parties involved*" he claims it was agreed that TTCT would continue to provide these services and that the outstanding debt would be discharged at a later date to be agreed between the parties. He immediately qualifies this by saying that although the debt was never demanded by TTCT "*between 2004 and 2021 various sums were paid towards the outstanding debt on an ad hoc basis but it was always understood the debt would be discharged at a later date to be agreed between the parties*". The precise person or party with whom it is alleged that TTCT made this agreement is not identified nor is any documentation exhibited to evidence this agreement.

36. It seems extraordinary that a business would agree to continue providing services to a company which was unable to pay it for doing so over a period of seventeen years. No indication is given by Mr. O'Riordan as to the amount or frequency of the *ad hoc* payments made by the company to TTCT. Instead, a bundle of invoices is exhibited dating from 2004 to 2020. These do not appear to have been provided to the company on a continuous basis as the charges fell due but instead have all been provided in the latter years. Strikingly, all of the invoices – bar one – are for an identical amount, namely €5,000. The one exception is an invoice from 2018 covering work related to the company being in receivership. Oddly, between 2004 and 2010 each invoice covers a four-month period generating an annual fee for the services provided by TTCT to the company of €15,000. Without any explanation being provided by Mr. O'Riordan, from 2011 there is only one invoice each year. This is still for the sum of €5,000 thus marking a two third reduction in the fee charged for the provision by TTCT of the same services to the company. Each invoice appears as a stand-alone document without any reference to a running total of the amount due and no allowance is made for the *ad hoc* payments which Mr. O'Riordan has averred TTCT received from the company from time to time. Of course, the court does not have to determine the validity of this claim for the purposes

of deciding the issues raised on petition. Nonetheless it is potentially significant that the claims made by those opposing the petition are ones which cover services provided over an extended period of time but for which round figure claims and invoices have been submitted only in recent times.

37. The second company opposing the petition is TTC Landscaping Ltd. In his affidavit Mr. O'Shea identifies the potential liability of the company to TTC Landscaping in the sum of €300,284. Mr. O'Shea states that the development works carried out to the hotel in the 1990s were carried out by TTC Landscaping on the instructions of Mr. Noonan. These works were financed in part by funding which had been obtained from the Bank of Ireland. However, that funding was not sufficient to construct the additional third floor for which planning permission was subsequently obtained. Mr. O'Shea states that TTC Landscaping constructed the third floor at the behest of Mr. Noonan on the understanding that it would be paid quantified rates and that the €300,000 due and owing to TTC Landscaping represents monies owed for these construction works which were never discharged. Although the works were carried out in the 1990s the invoice in respect of them issued in 2014, according to Mr. O'Shea because the dining room was not completed until 2014. Again, it seems extraordinary for a building company to carry out extensive works in 1999 and to hold off invoicing its client for those works for a period of fifteen years.

38. The treatment of monies owing to TTC Landscaping in the 2016 annual accounts is difficult to follow. Under the heading related party transactions, it is noted that an amount of €20,501 is owed to TTC Landscaping Ltd. Subsequently it is stated that in normal course of business TTC Landscaping Ltd invoiced the company an amount of €8,200 during the course of the year – it is not clear if this amount is already included in the €20,501. Finally, it is stated that the balance due to TTC Landscaping on 31st December, 2016 was €300,000 and that this was held in trade creditors at the year end. It is unclear whether the amounts of €20,501 and

€8,200 are included in the round figure of €300,000 – which would not be consistent with Mr. O'Shea's affidavit evidence that the entire sum due arises as a result of works done by TTC Landscaping on the redevelopment of the hotel in the 1990s. No claim for an additional €28,701 was made in response to the petition.

Preliminary Issues – Abuse of Process

39. A number of preliminary issues are raised by Mr. O'Shea in opposing the petition. Firstly, it is contended generally that the petition is an abuse of process. This argument appears to be made on two separate but related grounds. The first takes issue with Mrs. Noonan's failure to advert to the case made on affidavit by Mr. O'Shea in the 2018 proceedings that the monies now claimed by the petitioner were a capital investment not repayable until the hotel was sold. This failure is contended to be significant in a petition framed in terms of there being no *bona fide* defence to the debt. On the basis of the contention that there is a *bona fide* defence to the debt claimed by the petitioner which was first raised as long ago as 2019, Mr. O'Shea then argues both that the claim is unfounded and that it is an abuse of process to seek to recover the debt by the appointment of a liquidator and without awaiting the outcome of the 2018 proceedings. It is also contended that the petition has been brought for an improper purpose when, according to Mr O'Shea, a better sale price could be achieved through an agreed, voluntary sale of the hotel premises. He asserts that by proceeding by way of petition, the petitioner is attempting to deprive him of the benefit of the entitlements he asserts in the 2018 proceedings.

40. In response to these arguments, the petitioner raises a fundamental issue as to whether Mr. O'Shea is in a position to speak on behalf of the company. Counsel neatly replied that he must be so allowed as, without his involvement, the application would be unopposed. In an adversarial legal system, there is certainly merit in this approach as a court is generally in a

better position to adjudicate where there is a *legitimus contradictor* contesting the correctness and legal merit of the arguments being made by the person presenting the case. Nonetheless, I have serious concerns at treating the company's interests as being aligned exclusively with those of Mr. O'Shea and his company in circumstances where there has been a long-standing rift between the Noonan and the O'Shea interests as regards the company. Mr. O'Shea's claim to be entitled to a 50% shareholding in the company is contingent on the outcome of proceedings initiated by him in 2018. Apart from securing an interlocutory injunction to prevent the removal of himself and his wife as directors, those proceedings do not appear to have been prosecuted with any particular vigour in the four years that have elapsed since their initiation. Consequently, Mr. O'Shea's claim to a 50% shareholding in the company remains contingent and has not yet been determined by the High Court.

41. There is an additional and potentially significant issue as to when Mr. O'Shea would become entitled to the 50% interest in the company claimed by him. As previously noted, the claim as initially framed (and supported by Mr. Slye's evidence) was that a 50% shareholding in the company would be transferred to Mr. O'Shea after the monies advanced by the petitioner to the company had been repaid. The position now adopted by Mr. O'Shea is that he is entitled to a 50% shareholding prior to repayment of those monies. Thus, he relies on his claim to a 50% interest in the company to prevent the petitioner seeking to recover the monies advanced by it to the company, notwithstanding that such recovery was originally accepted by him as being a condition precedent to the transfer of the shareholding to him. Whatever the rights or wrongs of the case made by Mr O'Shea in 2018 proceedings, it is certainly not clear to the court that it is necessarily aligned with the company's interests.

42. It is perhaps telling that although he is the director of the company, Mr. O'Shea did not respond on the company's behalf to the s. 570 notice served by the petitioner on the company. The solicitor's correspondence subsequently sent to the petitioner's solicitor was sent on behalf

of Mr. O'Shea and TTC Landscaping and not on behalf of the company. Mr. O'Shea's affidavit is sworn on behalf of himself and his wife (both of whom are identified as directors of the company) and also on behalf of TTC Landscaping Ltd but, again, not on behalf of the company. Therefore, prior to the hearing of the petition, Mr. O'Shea's opposition was expressed as being referrable to himself, his wife and their company, but not as being opposition on behalf of the company itself. It is evident that he personally has much to gain if the court were to accept the arguments that he now purports to advance on behalf of the company.

43. In circumstances where the board of the company is deadlocked between the two rival interests and the ownership of 50% of the company is disputed, I think that it would not be in the interests of justice to allow one of the two competing factions to speak on behalf of the company. This is particularly so where the party seeking to speak on behalf of the company has, at best, a contingent interest subject to the outcome of litigation whereas the other party is the registered owner of 100% of the shares in the company. This does not prevent Mr. O'Shea objecting to the petition on behalf of his own company, TTC Landscaping Ltd. The mandatory public notices under O. 74, r. 10 published in newspapers and in Iris Oifigiúil invited any creditor or contributory of the company who wished to support or oppose the petition to provide written notice of their intention to do so. Such parties are then entitled to appear at the hearing and to support or to oppose the petition as they see fit.

44. There is however a difference between the role of a creditor or contributory opposing the petition and that of the company itself. In considering whether a company is unable to pay its debts, the case law concerning s. 570 looks to whether the company in good faith and on substantial grounds disputes liability in respect of the alleged debt (see *In Re Pageboy Couriers Ltd* [1983] ILRM 510 approving *Stonegate Securities v. Gregory* [1980] 1 All ER 214). It is less clear that a third party can dispute a debt which has not been formally denied by the company nor, if a third party does so, what weight should be attached to the grounds advanced

by the third party. Equally, it is unclear whether those grounds can be imputed to a company and the company then characterised as acting *"in good faith"* on those grounds when the company has not, in fact, acted at all. The resolution of these issues is, in my view, linked in part to the second preliminary issue raised by Mr. O'Shea which concerns the status of the evidence before the court.

45. Before I turn to this, I should rule on the allegation of abuse of process raised by Mr. O'Shea. In circumstances where, firstly, the company did not formally respond to the s. 570 notice nor dispute the debt and, secondly, where I have held that Mr. O'Shea is not entitled to speak for the company (and indeed he did not purport to do so prior to the hearing of the petition), I am reluctant to treat Mrs. Noonan's failure to refer to the case made by Mr. O'Shea on affidavit in 2019 as a material non-disclosure on her part. Undoubtedly, it would have been preferable for her to have done so and it would have provided the court with a more complete picture of the background to this petition. However, the case made by Mr. O'Shea on affidavit in 2019 was one made on his own behalf in litigation taken by him against the petitioner in respect of his claim for shareholding in the company. Assertions made by Mr O'Shea on his own behalf in litigation to which the company is not a party cannot, in my view, be imputed to the company so as to characterise the company as having denied or disputed the petitioner's claim. That litigation is expressly referred to by Mrs. Noonan as being separate litigation taken by Mr. O'Shea *"in his personal capacity"*. Therefore, Mrs. Noonan was technically correct in her averment that the company had not sought to defend its indebtedness to the petitioner nor to dispute any liability in respect of the said debt.

46. I am also not prepared to treat the petition as an abuse of process on the basis that the petitioner has an improper motive in issuing it or that it has done so to avoid the outcome of the 2018 proceedings. Mr. O'Shea is the plaintiff in that case and, therefore, is in prime position to advance those proceedings. In circumstances where he has not done so – or at least has not

done so sufficiently to have the issue ready for trial – he cannot rely on the existence of those proceedings to preclude the petitioner taking any other steps that might be open to it to protect its interests. Apart from anything else, the position of the company has deteriorated since the 2018 proceedings were instituted in that it is not now conducting any business at all. Equally, the fact that the petitioner served a previous s. 570 notice, but did not proceed to issue a petition, does not affect its entitlement to do so now. The petitioner must make out its case on this application. The fact that it chose not to pursue the matter earlier or that it could have held off until other litigation had been resolved does not alter the onus it faces on this petition, nor its entitlement to bring it. Consequently, bringing the petition at this stage is not an abuse of process on the part of the petitioner. The assertion that the petitioner has an improper motive in bringing the petition has not been made out on the evidence before me. In this regard I will address the contention that it would be preferable for the parties to agree a voluntary sale further below.

Preliminary Issues - Evidential Issues

47. The second preliminary issue raised by Mr. O'Shea concerns the status of the evidence before the court and whether the issues in dispute between the parties are capable of being disposed of in a hearing on affidavit. On 28th May 2021, Mr. O'Shea's solicitor swore affidavit in which she stated that, on the next occasion the petition was due to be returned in the Chancery list (i.e. 3rd June 2021), her client intended to apply for a date for a preliminary hearing to dismiss the petition *in limine* on the basis that, in circumstances where there was substantial and genuinely disputed facts concerning the existence, nature and terms of the indebtedness, it should not be entertained by the court. Alternatively, directions would be sought as regards discovery, interrogatory (sic) and cross-examination of deponents. Although the affidavit proceeded to set out the grounds which could be relied on in support of these

reliefs, it does not appear from the papers that any formal application was made in this regard. There is a procedure under O. 40, r. 36 through which a party seeking to cross-examine the deponent of an affidavit may file a notice requiring the production of the deponent at trial. It does not appear from the papers that any such notice was served. Equally, the papers provided to the court do not include any order from the judge in charge of the Chancery list either allowing or refusing the applications which the solicitor stated it was intended to make. Therefore, I can only presume either that the application flagged in the affidavit was not moved or that it was dismissed *in limine* by the judge. Nonetheless, Mr. O'Shea continued to assert the unsuitability of the issues raised in the petition for disposal on affidavit. Undoubtedly the court has jurisdiction to adjourn any matter for plenary hearing where it is not appropriate to determine it on affidavit. However, I am reluctant to do so where an intention to make a formal application in this regard was flagged but, apparently, not pursued and the petition itself has been listed for a two day hearing. Proceeding on affidavit may have consequences as to how the court must handle the evidence before it, most particularly for the petitioner being the party bearing the onus of proof. However I do not think that the petition intrinsically requires a plenary hearing such as to preclude the court reaching a decision on the issues raised.

48. Mr. O'Shea points out that he swore affidavits in the 2018 proceedings in which he had made averments as to the basis on which the petitioner advanced money to the company in 1986. Those averments were not disputed - although it might be noted that the affidavits were sworn in the context of an interlocutory injunction to prevent the removal of Mr. O'Shea and his wife as directors of the company and the 2018 proceedings are plenary proceedings which will presumably be heard on oral evidence in due course. Mr. O'Shea exhibited the affidavits from the 2018 proceedings in his affidavit opposing the petition and formally adopted them as his evidence in these proceedings. Although Mrs. Noonan disputed his account in her second affidavit and exhibited the mortgage debenture of 6th June 1986, Mr. O'Shea asserts that, as

she was not a party to the agreement, it is not a matter within her direct knowledge. He asked the court to draw inferences from the fact that Mr. Noonan has not sworn an affidavit.

49. In asserting that his is an undisputed account which must be accepted by the court, Mr. O'Shea relies, in particular, on two authorities. The first of these is the decision of Hardiman J. in the Supreme Court in *In Re Tara Mines Pension Plan*; *Boliden Tara Mines ltd v. Cosgrave* [2010] IESC 62 in which he observed that the case was one tried on affidavit and none of the witnesses whose affidavits were relied on by the plaintiff were cross-examined on behalf of the defendant. He also found that evidence showed an unusual degree of cogency and unanimity. Hardiman J. regarded the fact that the witnesses were not cross-examined as *"a salient feature going to the weight of the evidence"*.

50. The second authority is the more recent decision of the Supreme Court in *RAS Medical Ltd v. Royal College of Surgeons in Ireland* [2019] 1 IR 63. In that case the applicant in judicial review proceedings had exhibited correspondence obtained from the respondent in discovery which suggested that a certain course of action had been adopted. The respondent's deponent swore an affidavit to the effect that a cause of action different to that contended for by the applicant had been adopted. That deponent was not cross-examined. The Supreme Court held that it was inappropriate that sworn affidavit evidence should be rejected by reference either to other sworn affidavit evidence or to documentary material without giving the deponent concerned an opportunity to address any issue as to the credibility or reliability of their sworn evidence. Two particular passages from the judgment of Clarke C.J. were relied on:-

> *"88. Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not*

be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question…

92. But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact."

51. The implications of *RAS Medical* are far reaching. Whereas Hardiman J. in *Tara Mines Pension Plan* regarded a failure to cross-examine a deponent as going to the weight to be afforded to the evidence and, by implication, to any objection to it, *RAS Medical* positively

requires a deponent to be cross-examined whenever evidence is objected to on grounds of credibility or reliability and even where the affidavit evidence is contradicted by other documentary evidence. Indeed, at para. 90 of the same judgment, Clarke C.J. goes so far as to say that it is impermissible to ask a decider of fact to determine a contested fact on the basis of affidavit evidence or documentation alone. Therefore, in a case being tried on affidavit where the facts are disputed, the failure to cross-examine an opposing deponent can, and generally will, be fatal to the party bearing the onus of proof on the issue to which that deponent's evidence is relevant.

52. Of course, matters are rarely as straightforward as this proposition suggests. Not every contested fact will be crucial to the issues the court has to determine. Clarke C.J. recognised that apart altogether from the reliability or credibility of evidence, there may be other factors which have a bearing on the attitude a court might take to evidence which is, *prima facie*, disputed. Much will depend on exactly what the court is required to determine and on the extent to which and the basis on which the evidence is challenged. Thus, at its most simple, the contents of a statement or a document may be disputed but not the fact that the statement was made or the document served and received. The making of a statement or the existence of a document may have evidential significance independent from their contents.

53. In this case, one of the grounds upon which the petitioner seeks to wind up the company is that it is unable to pay its debts. In support of that ground, the petitioner relies on the service by it of a s. 570 notice on the company and the failure of the company to pay the sum in question or to secure it to the satisfaction of the petitioner. Consequently, the petitioner contends that under s. 570 the company should be deemed to be unable to pay its debts. Mr. O'Shea contends that the sum of which payment was demanded in the s. 570 notice is not currently due by the company. He contends that it was agreed between *"the parties"* that the company's indebtedness to the petitioner would be discharged from the sale of the hotel, such that for as

long as the hotel remains unsold, the debt is not actually due. He made an averment to this effect in an affidavit sworn in April 2019 for the purposes of seeking an interlocutory injunction in the 2018 proceedings which averment was not challenged by the petitioner. He relies on the same averment in this petition. Although it is challenged on affidavit by Mrs. Noonan, Mr. O'Shea contends that as she does not have personal knowledge of the agreement, her averment carries little evidential weight despite it been supported by the terms of the mortgage debenture executed in support of the loan.

54. So where does this leave the court as regards the status of the evidence before it on the issue of the company's inability to pay its debts? It is important to bear in mind that although the petitioner places significant reliance on the deeming provisions of s. 570 following the service of a statutory notice, it is only one of two planks in the petitioner's case that the company is insolvent. In fact, s.570 provides three separate mechanisms through which a company can be deemed to be unable to pay its debts only one of which is dependent on the service of a statutory notice. In addition, s.569(1)(d) does not seem to limit the circumstances in a court can be satisfied that a company is unable to pay its debts to those in which it has been so deemed under s.570, although this may be a moot point in light of the terms of s.570(d) which involve the matter being proved to the satisfaction of the court. I will consider the question of the company's general insolvency further below.

55. In the context of the deeming provisions of s. 570, the onus of proof is undoubtedly on the petitioner to establish the existence of the debt, the service of the notice and the non-payment of the debt in response to that notice. The case law recognises that a petition should be dismissed if the company disputes liability for the debt in good faith and on substantial grounds (see *In Re Pageboy Couriers* (above), *Stonegate Securities v. Gregory* (above) and *Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd* [1996] 1 IR 12). However, it does not follow that the petitioner bears the onus of proving the negative proposition that the

company does not have substantial grounds for disputing a debt and cannot do so in good faith. In normal course, it is a matter for the company to put forward any grounds on which a debt is disputed. It is not necessary that the company establish that it will succeed in avoiding liability for the debt on those grounds, merely that there is a *bona fide* dispute which warrants the court refusing to wind up the company for non-payment of that debt.

56. I have already held that in the circumstances of this case Mr. O'Shea is not entitled to speak on behalf of the company for the purposes of this petition. Therefore, strictly speaking, the debt the subject of the s. 570 notice is not disputed by the company itself, but rather by a third-party creditor and by a person claiming to be entitled to a shareholding in the company. However, I do not think that the court can ignore the fact that an issue has been raised as regards the company's liability for the debt which is the subject of the s. 570 notice.

57. Leaving aside the difficult issue as to the extent to which it can be said that the company has disputed liability in respect of the alleged debt because a third party has done so, were I to determine this issue on the basis of the evidence before me, I would be driven to conclude that Mr. O'Shea's evidence is neither convincing nor coherent. Crucially, the agreement relied on by Mr. O'Shea seems to have been one made personally between himself and Mr Noonan. He was not a party to the agreement between the petitioner and the company regarding the loan made by the petitioner to the company. In that regard, his position is not dissimilar to that of Mrs. Noonan who is equally a stranger to that agreement. His introduction of this alleged term of the agreement between himself and Mr. Noonan at a relatively late stage in the affidavits sworn in the context of the interlocutory application in the 2018 proceedings sits uncomfortably with the main thrust of his claim in those proceedings. I have already adverted above to the inconsistencies in his position

58. In a similar vein, if I were to determine this issue on the basis of the evidence before the court, I would regard the strongest piece of evidence as being the 1986 mortgage debenture

executed between the company and the petitioner contemporaneously with the original loan and registered in the CRO within a short time after its execution. This clearly reflects terms under which the loan was repayable *"on demand"* and also repayable on the occurrence of certain events of default. The company's accounts support this position showing the monies owed to the petitioner under the heading of *"Amounts falling due within one year"* and not as a capital investment to be repaid only on the sale of the hotel.

59. However, the logic of the *RAS Medical* decision is that the court cannot conduct the type of exercise outlined in the two preceding paragraphs. Instead, because there is a dispute on the affidavits as to whether this alleged term formed part of the agreement between Mr. Noonan and Mr. O'Shea (and presumably the impact that agreement might have had on the separate loan agreement between the petitioner and the company), the issue as to whether the monies lent by the petitioner are only repayable after the sale of the hotel cannot be determined as a question of fact in the absence of cross-examination of the deponents of the respective affidavits.

60. Therefore, with some reluctance, it appears to me that I must hold that the petitioner has not discharged the evidential burden on it as regards proof of the debt the subject of the s. 570 notice. I should be clear that in reaching this conclusion I do not necessarily accept the contention advanced by Mr. O'Shea: indeed, were I to be in a position to determine the matter, on the evidence available I would probably reject it. Instead, I acknowledge that were Mr. O'Shea to be cross-examined on the affidavits he has sworn on this petition and, by extension on the affidavits sworn in 2018 proceedings which he has exhibited and relied on, then he might be in a position to establish the basis for his claimed knowledge of the terms of an agreement to which he was not a party; to support his assertion that those terms are materially different than those reflected in the debenture executed in support of the loan agreement and to clarify the inconsistencies between the first and second affidavits sworn by him in the 2018

proceedings. *RAS Medical* requires that he should be afforded the opportunity to do this before his evidence is rejected as being either incredible or unreliable.

61. A final matter arises in relation to the evidence before the court. Counsel on behalf of Thursley made arguments similar to those made by Mr. O'Shea in relation to the evidence regarding the debt claimed by Thursley. Mr. Rickenberg gave an account on affidavit of the circumstances in which a company of which he is the principal acquired the debt owed by the company to Bank of Ireland in 2015 and, subsequently, an assignment of the related security documents and all rights relating thereto in 2017. He has deposed to the sources of finances used by the company to acquire the debt in question. Although Mr. O'Shea has purported to call into question the *bona fides* of Lesley Marsh/Thursley and, indeed, of Mr. Rickenberg, he has not sought to cross-examine Mr. Rickenberg on the contents of his affidavits. It cannot be said that there is a conflict of evidence between Mr. Rickenberg and Mr. O'Shea because Mr. O'Shea is a stranger to and has no direct knowledge of most of the matters to which Mr. Rickenberg avers. The one exception to this is the circumstances in which the two men met when Mr. Rickenberg visited Waterville in 2013, an encounter to which Mr. Rickenberg deposes but which Mr. O'Shea cannot remember. I do not regard this particular aspect of the evidence as crucial either way.

62. The suggestion in Mr O'Shea's written legal submissions that there are factual disputes as to the theory underlying the company's indebtedness to Thursley and as to whether there is a connection between Thursley and the petitioner such that advances from Thursley are subject to the same condition as to repayment alleged to apply to the petitioner is not technically correct. He cannot impute a dispute on the facts which have been deposed to by Mr. Rickenberg simply by refusing to accept them or by speculating as to various counter-factual scenarios which he believes might apply but for which there is no evidence. Crucially, refusing to accept a fact which has been deposed to does not create a factual dispute. Insofar as Mr.

O'Shea wishes to make legal arguments on those issues he must do so on the basis of the only evidence before the court which is that of Mr. Rickenberg. Perhaps ironically, the position of Thursley as regards the challenge to Mr Rickenberg's evidence is in my view stronger than that of Mr. O'Shea as regards the dispute between himself and Mrs Noonan as Mrs Noonan has exhibited documentary evidence which supports challenge to Mr. O'Shea's affidavits thus taking it out of the realm of simple denial, speculation or conjecture. Nonetheless, if, despite the existence of contrary documentary evidence, *RAS Medical* requires that Mr O'Shea be cross-examined before his averments can be rejected, then it certainly requires that Mr. Rickenberg be cross-examined before his evidence can be rejected simply because Mr. O'Shea does not accept it. The submission made by counsel for Thursley to the effect that Mr. Rickenberg's evidence must be accepted as it has not been challenged and he has not been subjected to cross-examination is, in my view, correct.

Is the Company Unable to Pay its Debts?

63. The petitioner's case that the company is unable to pay its debts is not based solely on the non-payment of the sum demanded on foot of the statutory notice. Both the petitioner and Thursley argue that independently of whether the company is deemed unable to pay its debts because of its failure to respond to the s. 570 notice, the company is, in any event, *"hopelessly"* insolvent. I have noted above that the provisions of s. 570(d) which provide that a company will be deemed to be unable to pay its debt if it is proved to the satisfaction of the court that the company is unable to pay its debts are, in essence, tautologous. However, there is one feature of s. 570(d) which is potentially relevant, namely the final clause which provides that in determining whether a company is unable to pay its debts *"the court shall take into account the contingent and prospective liabilities of the company"*. This means that even if Mr. O'Shea is correct in asserting that the company is not currently liable to repay the monies lent by the

petitioner, liability to repay those monies contingent on the sale of the hotel is nonetheless a matter to be taken into account in deciding whether the company is unable to pay its debts.

64. Briefly put, the position of each side on this issue is as follows. The petitioner and Thursley point to a number of matters in arguing that the company is *de facto* insolvent. Firstly, the annual accounts for the company for 2016 and preceding years from at least 2013 and the draft accounts for 2017 show that, even before Covid-19, the company was operating at a loss. The directors' report accompanying the 2016 accounts, signed by Mr. O'Shea and his wife, notes that the company is reliant on the continued support from a group company (i.e. the petitioner) and third parties and that there is material uncertainty over the going concern of the company such that it may be unable to *"realise its assets and discharge its liabilities in the normal course of business"*. The accounts themselves show a surplus of liabilities over assets. The notes to the accounts repeat the uncertainty stated by the directors in their report as to the future viability of the company including due to High Court proceedings already instituted at that point. The accounts acknowledge the debts claimed by the petitioner, BuildHi, TTC Landscaping and TTCT as well as a number of trade creditors but query the transfer of Bank of Ireland's security to Lesley Marsh & Co. Ltd. Secondly, the company has been unable to service its bank borrowings since at least 2015. Thirdly, the total amount due to creditors who responded to the petition exceeds €2,100,000. Fourthly, the hotel, which is the sole business of the company, has not traded since 2020 and traded only on a limited basis and for a limited period in that year. The hotel has not re-opened despite the lifting of public health restrictions. Finally, other aspects of the evidence before the court are relied on to confirm the picture as to the company's insolvency evident from its accounts. These include the statement of Mr. O'Riordan in his affidavit that the company has been unable to pay TTCT regularly for the provision of routine bookkeeping and office administration services since 2004 and the letter sent by Mr. O'Shea to Mrs. Noonan on 18th May 2020 indicating that the company did not have

sufficient funds to pay for an auditor to prepare the accounts required to be submitted to the CRO in order for the company to maintain or retain its status as a registered company.

65. As against this, Mr. O'Shea argues that the picture presented in the accounts to the effect that the company's liabilities exceed its assets is misleading, because the value of the hotel itself is seriously understated. In effect, and notwithstanding that he signed the accounts as a director, he argues that the value attributed to the hotel is a book value which has been subjected to a standard rate of depreciation whereas its actual value is far greater. A valuer's report is exhibited which places an estimated value of €2,750,000 on the hotel. I accept that that is a more realistic estimate of the true value of the hotel property than the €500,000 or so ascribed to in the accounts. However, in fairness to the professional who has provided this report, it is clearly stated to be based on a number of assumptions, most notably that there is good marketable title to the hotel. The petitioner argues that the hotel comprises two blocks of which only the old block is owned by the company and that the new block built in the 1990s is owned by the petitioner. This is a contention which may or may not ultimately be borne out – and it is disputed by Mr. O'Shea - but it indicates that there is a serious dispute as to the ownership of part of the premises the subject of the valuation. At very least, this may undermine the valuer's assumption of a good marketable title and, at its height, would reduce the share of the anticipated value of the hotel to which the company would be entitled in the event the premises were sold.

66. The other argument made by Mr. O'Shea and supported by TTCT is that a voluntary sale would produce a better outcome for all concerned compared to an enforced sale through a liquidator. In principle this is correct, but it is heavily dependent on whether the parties are capable of reaching agreement on the basis on which the hotel is to be sold which appears highly unlikely. In my view, apart from the extent to which the value of the company's main asset might be reduced by an enforced sale, this is not really a matter going to the ability of the

company to pay its debts, but rather goes either to the just and equitable ground under s. 569(1)(e) or, more generally, to the exercise of the court's discretion under s. 569(1).

67. The test for insolvency in this jurisdiction is relatively well established. In *Crowley v. Northern Bank Finance* [1981] IR 353, Kenny J., in the Supreme Court, stated as follows:-

> *"'Solvent' and 'insolvency' are ambiguous words. It has now been established by the decided cases that, for the purposes of s. 288 of the Act of 1963, the test to be applied in determining this question is whether immediately after the debenture was given, the company was able to pay its debts as they became due. The question is not whether its assets exceed in estimated value its liabilities, or whether a business man would have regarded it as solvent: Ex Parte Russell; In re Patrick and Lyon Ltd. The question whether a company was solvent on a specified date is one of fact and it involves many difficult inferences. If there is, or is likely to be, a large deficiency of assets when the liquidation starts, the temptation to hold that the company was not solvent when the charge was given is strong. But the deficiency may have been caused by some change in economic or market conditions happening after the charge was given. So an examination of the financial history of the company, both before and after the charges were given, is necessary."*

68. This passage was approved by Laffoy J. in *Re Connemara Mining Company Plc* [2013] 1 IR 661 specifically in the context of the precursor provision to s. 570(d). She also cited and approved an earlier High Court judgment of Barron J. *in H. Albert de Bary & Co. NV v. O'Mullane* (Unreported, High Court, 2 June 1992) as follows:-

> *"Insolvency is essentially a matter of assets and liabilities. If liabilities exceed assets, the position is one of insolvency. But the reverse is not necessarily true. A company is not solvent because its assets exceed its liabilities. It cannot for example take into account assets which it requires to remain in existence save in so far as they may be*

used as security to raise finance. The test is ultimately, can it pay its debts as they fall due…"

Laffoy J. was reluctant to prescribe the exclusive application of either a *"cash flow test"* or a *"balance sheet test"*. She did, however, accept that the court should have regard only to *"readily realisable assets"* to determine a company's solvency. It seems logical that a company should not be readily treated as solvent if it is required to sell the substantial asset which it requires to conduct its business in order to pay its debts.

69. In light of these observations, the following are my conclusions. Firstly, I have declined to deem the company unable to pay its debt in consequence of the non-payment of the amount demanded in the s. 570 notice in circumstances where, albeit with some reluctance, I have accepted that there is an issue raised as to the current liability of the company to pay that particular debt. In circumstances where the petitioner has not sought to cross-examine Mr. O'Shea on his affidavit evidence, I cannot resolve that issue in favour of the petitioner.

70. Secondly, I am nonetheless satisfied that the petitioner and Thursley have proved that the company is unable to pay its debts. In reaching this conclusion, I have had regard to the company's accounts and the directors' reports attached thereto and to the total of the debts claimed by the creditors who have responded to this petition. I have taken into account the sum claimed by the petitioner on the basis that, even if Mr. O'Shea is correct in his assertion that the company is not liable to pay this amount until the hotel is sold, it is nonetheless an admitted, contingent liability to which regard can be had. The same applies to the sums claimed by BuildHi. I have also taken into account the debt claimed by Thursley in circumstances where Mr. Rickenberg has given clear evidence as to the acquisition of that debt by Thursley's predecessor in title and his evidence has not been challenged nor has he been cross-examined on it. I should, however, note that, even without taking the sum claimed by Thursley into account, I would, in any event, be satisfied that the company was unable to pay its debts given

the very substantial amounts which are claimed to be due from the company to the petitioner, TTC Landscaping Ltd, BuildHi and TTCT which together amount to nearly €1,500,000.

71. Thirdly, I accept that the value of the hotel is greater than that shown in the company accounts although, for the reasons set out above, the value may be somewhat less than the estimate provided in circumstances where there are potentially serious issues to be resolved as to the title to part of the hotel premises of which the valuer was unaware. Fourthly, taking the valuation of the hotel at its height, it may well be the case that the company's assets exceed its liabilities. However, the asset base of the company is largely comprised of the hotel property and it cannot continue to conduct its business if it has to realise that property in order to meet its debts. Finally, the practical situation is that, in recent years, the company has operated continuously at a loss and has been unable to meet relatively routine expenses such as bookkeeping, office administration and auditors' fees. It was unable to meet repayments on its bank loan as long ago as 2015. This is before the impact of Covid-19 is taken into account and, of course, the fact that the hotel has not reopened since 2020. As a consequence of this inability to pay routine expenses the company has not made annual returns to the CRO since 2016 and is now at risk of being struck off the registrar of companies as a result of this failure. For all of these reasons, the petitioner has satisfied the court that the company is unable to pay its debts within the meaning of s.569(1)(d) of the 2014 Act.

Substitution of Petitioner

72. Notwithstanding that I have declined to deem the company unable to pay its debt on foot of the s. 570 notice, I am satisfied on the evidence that the company is unable to pay its debts. Consequently, it is unnecessary for me to proceed to consider whether I should substitute Thursley for the petitioner. I might observe on an *obiter* basis that, had I been required to decide this issue, I would have been reluctant to conclude that I could do so. Section 572(5) of the

2014 Act expressly provides that where *"a petitioner does not proceed with his or her winding up petition"* the court may substitute another petitioner who wishes to proceed with the petition. Order 74, rule 18 is more expansive in describing the circumstances where a petitioner does not proceed with their petition identifying that a petitioner may consent to the withdrawal of the petition, or allow it to be dismissed, or have the hearing adjourned, or fail to appear in support of the petition or may fail to apply for an order in terms of the prayer on the petition. In those circumstances, the court may, on such terms as it should deem just, substitute an alternate petitioner who wishes to prosecute the petition.

73. The issue dealt with by Laffoy J. in the authority relied on by Thursley, namely *Re Lycatel (Ireland) Ltd. [2009] 3 I.R. 736* was whether an alternate petitioner could be substituted in circumstances where the original petitioner withdrew the petition having failed to advertise it. The substitution was opposed by the original petitioner. Laffoy J. concluded that the procedural scheme under O. 74 provided a structure within which all parties who might be affected by the exercise of the court's discretion under s. 569 of the 2014 Act are put on notice of and afforded an opportunity to express their views on the petition. This is because the court is exercising a discretion which will inevitably affect persons other than just the petitioner and the company. Consequently, she identified the purpose of the power of substitution as being to ensure that once a *prima facie* right to the winding up of a company had arisen, the company should not be able to avoid the consequences by paying the debt owed to the petitioning creditor and leaving the other creditors unpaid. Whilst the balance of the judgment certainly confirms that a creditor might be substituted in circumstances where that creditor has not itself served a s. 570 notice or complied with other formalities attaching to the bringing of the petition, it does not, in my view, operate so as to create a general jurisdiction to substitute a petitioner in all and any circumstances.

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.

75. In oral argument, counsel for Thursley directed my attention to s. 572(1)(c) which allows the court, on the hearing of a winding up petition, to make *"any other order that it thinks fit"*. Whilst this provision certainly confers a broad discretion on the court, I would be reluctant to construe it in a manner which contradicts or obviates the express terms of other subsections of the same section. Consequently, since s. 527(5) gives the court a power to substitute a petitioner where the original petitioner does not proceed with their winding up petition, I do not think that s. 572(1)(c) can be read as giving the court a more general power to substitute a petitioner in circumstances where the original petitioner has proceeded unsuccessfully with its petition, such that the terms of s. 572(5) would not be met.

76. As noted, these observations are necessarily *obiter* in circumstances where I am satisfied that the company is unable to pay its debts an argument made by the petitioner and supported by Thursley.

Section 569(1)(e) – Just and Equitable

77. In circumstances where I am satisfied that the company is unable to pay its debts, it is also unnecessary for me to proceed to decide whether it is just and equitable that the company should be wound up. Under s.569(1) where the court is satisfied as to any one of the eight sub-paragraphs, that is sufficient to ground the exercise of its jurisdiction to make an order to wind up the company, although presumably if multiple grounds are satisfied this would strengthen the case that the court should exercise its discretion to make the order sought. I will, however, briefly outline my views on this issue lest the matter be taken further.

78. It is clear from the evidence as outlined above that there has been a complete falling out as between the Noonan interests and the O'Shea interests such that the company has effectively become inoperative. There is a deadlock on the board of directors comprising two members of the O'Shea family and two members of the Noonan family. Although all of the shares are registered in the name of the petitioner, a Noonan Group company, there are extant proceedings in which Mr. O'Shea claims an entitlement to a 50% shareholding in the company. He has obtained an interlocutory injunction in the context of those proceedings to preclude the petitioner, as the sole shareholder, from taking action to remove himself and his wife as directors of the company. The reasons behind the breakdown of relations between the Noonan interests and the O'Shea interests have not been made known to the court. At a minimum, it is clear that there is a serious dispute between the parties, not just as to the ownership of the company, but as to the ownership by the company of the entire of the hotel premises. Mr. O'Shea is of the view that his interests will be adversely affected if the hotel is sold without, in

effect, his being in control of the sale. Although not expressly set out in the affidavits, it seems that the Noonan interests take the view that if Mr. O'Shea retains control of the sale of the premises, he will use this advantage as leverage in his negotiations with the Noonan interests as to what his share of the proceeds of sale, if any, should amount to.

79. Although Mr. O'Shea professes to be in favour of a voluntary sale by agreement between the parties, there is nothing in the affidavits which suggests that such an agreement could be reached. Therefore, holding off the liquidation of the company on the basis that a voluntary sale of the hotel by agreement could achieve a better outcome looks to be a wholly unrealistic proposition. As things stand, the hotel has remained idle for the last two years. It was operating at a loss for an extended period prior to that. Basic steps required to achieve mandatory regulatory compliance have not been taken by the company and indeed the company is in danger of being struck off the register for failing to make annual returns which have not been made since 2016.

80. In normal course, on the basis of this evidence, I would have no hesitation in finding that it was just and equitable that the company would be wound up. As observed by Kenny J. in *In Re Irish Tourist Promotions Ltd* (Unreported, 22 April 1974) *"the petitioner is still a director so no business will be transacted at any meeting at which the two of them are present"*. Insofar as Mr. O'Shea describes the arrangement between himself and Mr. Noonan in the 2018 proceedings as being intended to be a 50:50 partnership, then as Murphy J. observed in *In Re Vehicle Buildings and Insulations Ltd* [1986] ILRM 239, it would be just and equitable to wind up a company in the same circumstances in which a partnership would be wound up. Indeed, in circumstances where Mr. O'Shea's own company, TTC Landscaping Ltd, is owed a large sum which the company is unable to pay, it is difficult to see Mr. O'Shea's opposition to the petition as anything other than tactical.

81. Apart from contending that both the petition and the actions of Thursley in supporting the petition constitute an abuse of process (a proposition which I do not accept), Mr. O'Shea has not engaged with the various issues set out above, nor proffered any basis upon which the court could be satisfied that the parties would or could work together within the company structure. Instead, his opposition to the court making an order under s. 569(1)(e) is largely based on a technical argument on the pleadings to the effect that the breakdown of relations between the Noonan and the O'Shea interests is not pleaded as a ground in the petition itself nor in Mrs. Noonan's affidavits.

82. Strictly speaking, it is correct that the petition does not expressly plead the breakdown of relations as a ground under the just and equitable heading. Instead, it is pleaded, very generally, that *"it is not viable for the company to continue to trade and it is just and equitable that the company should be wound up"*. Mrs. Noonan's grounding affidavit, which is relatively brief and formal, does not address relations between parties, save to note that a director of the company (i.e. Mr. O'Shea) is engaged in separate litigation in his personal capacity against the petitioner in relation to a dispute as regards the share ownership of the company.

83. However, Mr. O'Shea's complaint that he has not been given a proper opportunity to address the deadlock and its causes ring somewhat hollow in circumstances where he introduced the acrimonious history between the parties in his replying affidavit. He positively avers to the deterioration of his relations with Mr. Noonan (para. 26 of his replying affidavit), to the fact that the board of the company is split 50/50 between the Noonan and the O'Shea interests, as a result of which *"it was not possible for me to procure the company to take action"* (para. 42) and, in the context of *"the ongoing difficulties with the Noonan family"*, that a sale of the hotel by agreement should take place (para. 92). It is clear from the affidavits to the 2018 proceedings that a significant factor in the breakdown of relations between the parties (although unclear as to whether it is a cause or an effect) is Mr. Noonan's refusal to transfer to Mr. O'Shea

the 50% shareholding in the company to which he claims to be entitled. As previously noted, even on Mr. O'Shea's affidavits, there is an issue as to whether that entitlement is contingent on the company having discharged its debt to the petitioner prior to any such transfer. Those affidavits also evidence the intention of the petitioner to remove Mr. O'Shea and his wife as directors of the company in December 2018, a step which was prevented by the grant of an interlocutory injunction in the 2018 proceedings.

84. I accept that the authorities relied on by Mr. O'Shea establish that a party cannot rely on a breakdown in relations within a company as the basis for seeking to have the company wound up on the just and equitable ground if that breakdown is due to his own misconduct and the other parties to the dispute wish the company to continue (see *Re Westbourne Galleries Ltd* [1970] AC 360, as approved by Murphy J. in *Re Vehicle Buildings and Insulations Ltd* [1986] ILRM 239). However, in this case Mr. O'Shea does not wish the company to continue. On his own evidence, he accepts that the breakdown in relations is such that this is not a feasible option. Rather, his purpose in opposing the petition is to ensure that the sale of the hotel property is done by agreement between the parties on a voluntary basis. This would ensure that Mr. O'Shea personally maintains control of the sale of the hotel on a joint basis with the Noonan interests. In my view, there is a material difference in refusing relief at the behest of a party who is guilty of misconduct in order to allow the company continue as a going concern and refusing that relief in order to allow a party whose interest in the company is merely contingent to control the disposal of the company's assets. Therefore, even though Mr. O'Shea claims not to have had the opportunity to establish misconduct on the part of Mr. Noonan, it is difficult to see how the authorities relied on are relevant to the particular circumstances of this case.

85. Consequently, in principle, I would in all of the circumstances be minded to also grant this petition on the basis that it is just and equitable to wind up the company. However, I do

not think that it is necessary to formally do this, as in the earlier part of this judgment, I have set out why I am satisfied that the company is unable to pay its debts.

Section 569(1) -Exercise of Discretion

86. Even though I am not granting this petition on the basis of s. 569(1)(e), many of the matters discussed in the preceding section of the judgment are relevant to the exercise of the discretion the court undoubtedly has to refuse a petition to wind up a company even where one of the grounds set out at s. 569(1)(a) to (h) has been made out. As I have previously observed in *Lestown Property Ltd* [2021] IEHC 513, even where satisfied the company is unable to pay its debts, the court nonetheless has a discretion as to whether the winding up order should be made. In this case, the breakdown of relations between the parties and the deadlock in the management of the company's affairs are undoubtedly factors which support the exercise of the court's discretion in making the order sought. So too is the likely inability of the parties to reach agreement on the only alternate solution proffered to the court.

87. The main argument made against the exercise of the court's discretion is that a voluntary sale would likely yield a higher purchase price than an enforced sale through a liquidation – although there is no evidence before the court as to what the differential is likely to be. Mr. O'Shea in his affidavits goes significantly further than this and contends that there is an improper purpose behind the petition in circumstances where the petitioner is not amenable to his proposal that the parties should agree a voluntary sale or allow a sale be handled by joint agents. For the reasons set out above, I think that the proposal made by Mr. O'Shea is not realistic. There is a complete breakdown of relations between the parties and also clearly a significant dispute between the parties as to the extent to which the company is the owner of the entire of the hotel premises. Including this petition, there are now three sets of proceedings in existence in relation to the company. In circumstances where I do not believe

Mr. O'Shea's proposal to be realistic, it cannot be improper for the petitioner to have declined to act on foot of it.

88. Whilst Mr. O'Shea believes that the Noonan interests will use this uncertainty to orchestrate a sale at undervalue to a Noonan company or a related entity, there is no reason to believe that a liquidator would allow a sale at undervalue to take place. Insofar as there is a dispute between the parties as to the title of part of the hotel premises, this will be a matter for the liquidator to resolve. If the liquidator feels that the assistance of the court is required to reach a resolution, there are statutory provisions which enable him to seek that assistance. On the other hand, a situation where Mr. O'Shea had joint control over the sale of the hotel property in circumstances where he has not yet established his entitlement to the shareholding in the company which he claims, would undoubtedly give him unwarranted leverage as against the Noonan interests as regards all matters relating to the company and its assets. It is likely that the ultimate distribution of any surplus after the company's debts have been discharged will be subject to the outcome of the litigation taken by Mr. O'Shea in 2018. Until then, it would be open to the liquidator to consider and determine the validity of the claims made by the various creditors against the company, all of which will be subject to the creditor's right of access to the courts and the protections afforded to them under the Companies Act 2014.

89. Consequently, I will grant the petition under s. 569(1)(d) on the grounds that the company is not able to pay its debts and I will appoint Mr. Tom Murray of Friel Stafford Accountants as official liquidator of the company. I will further make an order that the directors of the company prepare a statement as to the affairs of the company pursuant to s. 593(1) of the Companies Act.