

THE HIGH COURT

[2022] IEHC 88
[2020 No. 192 COS]

IN THE MATTER OF DOONBEG INVESTMENT HOLDING COMPANY LIMITED (IN LIQUIDATION)

BETWEEN

TOM KAVANAGH, AS LIQUIDATOR OF DOONBEG INVESTMENT HOLDING COMPANY LIMITED (IN LIQUIDATION)

APPLICANT

AND

ALFRED GIULIANO, AS TRUSTEE IN BANKRUPTCY OF KIAWAH DOONBEG LLC (IN BANKRUPTCY)

NOTICE PARTY

JUDGMENT of Ms. Justice Butler delivered on the 16th day of February, 2022

Introduction

1. This judgment deals with an application by the liquidator of Doonbeg Investment Holding Company (“the company”) under s. 631 of the Companies Act, 2014 and should be read in conjunction with my earlier judgment in the same case [2021] IEHC 382.
2. The application seeks the directions of the High Court on the question of whether a debt claimed by the notice party should be admitted to proof in the liquidation. The application does not raise any specific legal issue as to the admissibility of the debt; rather, it identifies ambiguities or shortcomings in the evidence presented in support of it. In addition, in justifying the making of an application in this form the liquidator points to the likelihood that the notice party will appeal if the debt is not admitted and expresses concern as to his personal liability to the other creditors if he were to wrongly admit the debt. Thus, not only has the liquidator declined to make a decision as to whether the debt should be admitted to proof, he has studiously avoided expressing any view on the issue in the application he has made to court under s. 631.
3. In my earlier judgment, I expressed a concern that in circumstances where the liquidator was not prepared to assist the court by offering a view either way on the issue raised by him, the notice party was effectively being presented with an open goal to argue in favour of the admissibility of the debt. The notice party argued that the fact that none of the other creditors were objecting to the debt being admitted to proof was, of itself, significant. I accepted that if that were the case, then it would be a significant Consideration. However, it transpired that the creditors of the company had not, as a group, been informed of the liquidator’s application in respect of the notice party’s claim which, if admitted, will significantly reduce the amount available for distribution in respect of their claims. The liquidator had served half of the creditors with the application. None of those served had sought to participate in the proceedings. However, the other half of the creditors were entirely unaware that the application was brought. Had there been a *legitimus contradictor* before the court to dispute the notice party’s claim, then the fact that many creditors remained unaware of the application would have been of less concern since the notice party’s claim would, in any event, be contested on an adversarial basis.

4. In circumstances where there was no *legitimus contradictor* before the court, where the liquidator was declining to offer a view on the question raised and half of the creditors were not aware of the application, I adjourned the application to allow for the service of those creditors who were not previously on notice of it. Those persons were duly served and none of them have sought to appear on the application nor to dispute the claim. Consequently, I will now proceed to rule on the issue raised.

Factual Background

5. The factual background to this application has been set out in some detail in my earlier judgment but I will repeat the key elements here for ease of reference.
6. The issue underlying this application arises from a complex set of relationships between the company, its Irish subsidiaries and its US parent and that parent's parent. Very briefly, the company was incorporated in 2004 as the holding company in respect of three Irish subsidiary companies which developed, owned and operated a golf course and hotel at Doonbeg, County Clare ("the Irish subsidiaries"). The company was a wholly owned subsidiary of a US based company called Kiawah Doonbeg LLC ("Kiawah"). Kiawah was in turn part of a larger group of companies, its immediate parent being KRA Doonbeg LLC ("KRA") and the flagship company at the apex of the group being KRA LP. The Irish subsidiary companies were financed in part by funding from the company and also by commercial loan funding from Ulster Bank which was subject to various security including a charge. The company's activities were financed by advances from Kiawah, KRA and other US based entities connected to Kiawah and KRA. As the company was a holding company which did not otherwise trade, the effect of the transfers of cash from the US companies was to finance the activities of the Irish subsidiaries. The question before the court arises in part because of a lack of clarity as to whether these cash advances were formally paid to the holding company and transferred by it onwards to the Irish subsidiaries or were paid directly to the Irish subsidiaries by the US companies. There is also a lack of clarity as to whether the payments were made by Kiawah using money provided to it for that purpose by KRA or directly by KRA, albeit on behalf of Kiawah, and recorded as a payment by Kiawah in the US company documentation.
7. By 2014, KRA had been purchased by another US company called Coral Canary Land LLC and an affiliate of that company, Coral Doonbeg Holdings SARL (both of which I shall refer to for convenience as "Coral") acquired the Irish subsidiaries' loan balances and related security from Ulster Bank. Coral appointed a receiver over the assets of the Irish subsidiaries. The assets were sold and after the discharge of the secured debt, a surplus of €1,528,090 was remitted to the company. As the company was insolvent by this stage, its directors placed it into a creditor's voluntary winding up on 18th March 2014 and the applicant was appointed liquidator. Meanwhile both Kiawah and KRA were also placed into the US equivalent of liquidation, colloquially known as Chapter 7, on the same date, 18th March 2014. The notice party, a professional insolvency practitioner, was appointed trustee in bankruptcy for the purposes of Chapter 7.
8. The applicant, as liquidator, proceeded to ascertain the identity of the company's creditors and the amounts owing to each. The company had no secured creditors and no

preferential creditors. A statement of affairs prepared by the directors and dated 25th February, 2014 identified some twenty-one potential creditors including Kiawah. There is an issue as to the amount this statement records as being owed to Kiawah with two versions of the document showing different amounts being exhibited in the papers before the court. A number of the potential creditors did not offer proof of their debts to the liquidator and the proof of one creditor who was not listed in the statement of affairs has been provisionally admitted by the liquidator. Ultimately claims were made on behalf of sixteen creditors including by the notice party on behalf of Kiawah. Excluding the notice party's claim, the fifteen claims which have been provisionally admitted to proof amount to some €7,745,343. In light of the €1,528,090 available to the liquidator, this would allow for a dividend of approximately 20% of the amount due to each of these creditors.

9. The notice party claims that, as of the date of its liquidation, the company was indebted to Kiawah in the sum of €12,214,524 being the amount shown in the director's statement of affairs and also in the company's financial accounts for the year ending December 2012. The notice party has adduced evidence of Kiawah's bank account to show that this sum was not repaid to it between December, 2012 and the date the company went into liquidation in March, 2014. The applicant, as liquidator, does not suggest that he has identified any payments made by the company to Kiawah during this period. The admission of this claim to proof would have a significant effect on the amount that would be available for distribution to the other creditors reducing the likely return to those persons from some 20% to 7% of the amounts owing. Of course, Kiawah would achieve the same limited return on its debt and, if the sum is properly due, then the effect on other creditors is not a reason to refuse to admit it.
10. The essence of the concerns raised by the liquidator relate to whether, by whom and on what basis monies were advanced to the company from the US group. It is unclear whether monies were advanced by Kiawah or by KRA or by related entities; whether monies were advanced to the company or directly to the Irish subsidiaries and whether the monies advanced were by way of loan or by way of equity/capital advances. The recording of the transfers for accountancy purposes in the USA does not match the records available in Ireland, although the liquidator acknowledges this may simply reflect different accountancy practises rather than anything untoward.
11. In my earlier judgment, I record the practical difficulties faced by the liquidator in attempting to deal with these issues, largely arising from an absence of contemporaneous documentation in relation to the transfer of funds. It is notable that all of the relevant companies in Ireland (i.e. the company and its three subsidiaries) and in the US (i.e. Kiawah and KRA) went into liquidation/bankruptcy on the same day. The directors of the company who were in situ at the time the monies were advanced and received, most of whom are based in the USA, have not provided meaningful assistance either to the applicant as liquidator in this jurisdiction or, apparently, to the notice party as the trustee in bankruptcy in the USA. Thus, both the liquidator and the trustee in bankruptcy have had to try to piece together what occurred from less than perfect records and in the absence of direct assistance from those personally involved in the transactions.

12. A number of affidavits were sworn by the notice party and by the former director of finance of Kiawah for the purposes of the claim to admit the debt to proof before the liquidator. Those affidavits are both helpful and unhelpful. They are unhelpful because the claim initially made by Kiawah was substantially larger than that which is now made and, arguably, inconsistencies arise because of the manner in which the claim originally focused on the larger amount. This amount also varied over time. However, the affidavits helpfully set out the interrelationship between the Irish and the US companies and explain how the transfer of funds operated both as between the US companies themselves and from the US to Ireland (see, in particular, para. 7 to 11 inclusive of Ms. Clarkson's affidavit). A number of matters remain unclear due either to an absence of documentary evidence on both the Irish and the US side or because of apparent differences in treatment of payments as between the US and the Irish companies' accounts.
13. The difficulties can be summarised as follows. Firstly, there is no evidence of a loan agreement between the US and the Irish companies and, consequently, no evidence as to the terms on which any loan might have been made by Kiawah to the company. Counsel for the notice party argued that the absence of formal contracts is not unusual in the context of intra-company transfers. Secondly, the liquidator regards it as unclear whether the funding was provided directly by Kiawah to the company or whether KRA or one of its associates provided the money directly to the Irish companies bypassing Kiawah in the process. This issue is significant because the company's accounts record a debt owed to Kiawah but do not record a debt owed to any other company in the KRA group (now owned by Coral). Thirdly, it is unclear from the records whether the funding was provided to the company for onward distribution to its Irish subsidiaries or whether the funding was provided directly to the Irish subsidiaries. Some assistance in this regard is provided from the records of the Irish subsidiaries, all of which were placed in liquidation on the same date as the company. The financial records of the subsidiary companies do not show transfers being made directly by the US companies to them nor any monies owed by the Irish subsidiaries to the US companies.
14. Finally, in the absence of any loan agreement or other documentation in relation to the transfer of funds, it is unclear to the liquidator whether the funds were provided by way of loan or by way of equity/capital finance. In response, the notice party states that funding was provided by Kiawah to the company both by way of loan advance and by way of equity/capital funding. According to the notice party, the larger claim initially made represented the entire of the monies which had been transferred to the company and which remained outstanding at the time of the liquidation. Further investigations revealed that some of these monies were most likely provided by way of equity/capital funding and, consequently, the notice party is no longer maintaining a claim in respect of those monies. He strenuously contends that the amount of €12,214,524 which is shown in the company's accounts as being due to Kiawah as a creditor represents loan financing. Capital investment is shown separately in the company's accounts and in circumstances where the Irish company clearly makes a distinction between the two, there is no basis for treating monies which the company regarded as having been received by way of loan as being a capital investment.

The Law - Jurisdiction

15. There was little disagreement between the liquidator and by the notice party as to the basic law to be applied in considering this application and considerable overlap in the authorities opened by them.
16. The first issue dealt with by both sides was the jurisdiction of the court to give the ruling sought. This has been largely dealt with by me in my earlier judgment and I do not propose to restate the concerns I expressed in that judgment as regard the use of s. 631 by a liquidator to ask the court to make a decision whether to admit a claim to proof, particularly where the liquidator declines to offer any view on the issue which he has raised. I accept that the language of s. 631 which speaks of an application to court "to determine any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator)" is broad enough to confer on the court jurisdiction to deal with the issue raised in this application.
17. Nonetheless, I remain of the view that it is not really appropriate for a liquidator to invoke that jurisdiction so as to avoid making a decision of a type that is routinely made by liquidators in the course of liquidations particularly if the purpose of doing so is to prevent his own exposure to liability for getting a decision wrong. As it happens, none of the other creditors in this liquidation have made any submission to the court on the admissibility of the notice party's debt so the prospect that they would have sought to make the liquidator personally liable for admitting it must be regarded as slim. In circumstances where potential for personal liability is a real and pressing concern, it would be of more assistance to the court for the liquidator to posit the question together with his own view as to what the answer should be rather than simply requesting the court to stand in his stead and make the decision at first instance.
18. Further, many of the cases cited in which questions of this nature were referred to court involved circumstances where there was a clear legal issue as to the admissibility of the type of debt in issue as opposed to the question here which is whether the evidence is sufficient to admit the particular claim. For example, in *Government of India v. Taylor* [1995] AC 491 the issue was the application of a common law rule which precluded claims by a foreign state for taxes due under its laws being enforced by the English courts; *Re Brown (Official Receiver v. Thompson)* [1960] 1 WLR 692 involved the assertion that gaming debts were *prima facie* unenforceable and in *Polly Peck International Plc* [1996] BCC 486 the issue was whether the admission of a particular claim would infringe the rule against double proof. Here, there is no legal doubt but that monies due on foot of a loan made to the company are admissible in the company's liquidation but that funds advanced by way of equity/capital finance are not. The issue is an evidential one as to whether the nature of the transfers has been sufficiently established as loan funding rather than a legal one as to their admissibility in principle.

Onus and Standard of Proof:

19. The second issue addressed by both parties was who bears the onus of proof and standard of proof required to admit a debt to proof in a liquidation. The law as to the

admissibility of claims to proof in a liquidation is well settled at the level of general principle, although there are nuances in the different approaches adopted by the liquidator and by the notice party in their submissions particularly on the issue of the extent to which a liquidator is under a duty to enquire into all claims as opposed to the claimant bearing the onus of proving the claim that they advance.

20. The liquidator relies on the statement of Viscount Simonds in *Government of India v. Taylor* [1955] AC 491, as follows:-

"I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable."

The emphasis on legal enforceability is perhaps unsurprising given that the issue in *Government of India v. Taylor* concerned the application of a common law rule which precluded the English courts from enforcing a claim by the Indian state to monies due to it on foot of a revenue liability. As the claim was one which was not legally enforceable, the liquidator did not have a discretion to admit it. This statement of principle offers little assistance when it is less clear cut whether the claim is or is not legally enforceable. In making a decision in these circumstances, the liquidator is not exercising a discretion; rather he is making a judgment call as to whether, if pursued in litigation, a particular claim would be likely to succeed.

21. In contrast, the notice party relies on the adoption by Laffoy J. in *Re Unidare Plc* [2012] IEHC 114 of the following comments by Lord Denning MR in *Austin Securities v. Northgate* [1969] 1 WLR 529 at p. 523:-

"It is the duty of a liquidator to inquire into all claims so see whether they are well founded or not, to pay the good claim, to reject the bad, to settle the doubtful; or, if need be, to contest them. It is only in this way that a liquidator can fulfil his duty... of seeing that the property of the company is applied in satisfaction of its liabilities pari passu."

The duty of the liquidator to inquire into all claims seems to be a broader one than simply ruling on the claims advanced. Thus, while the onus is on a claimant to prove that a debt is owing by the company, the liquidator cannot ignore the possible existence of other claims and must be reasonably satisfied that all claims have been identified before moving to distribute the assets of the company. Further, this passage acknowledges that, in exercising his statutory function to administer the property of the company and, to that end, to ascertain the debts of the company, a liquidator will frequently be faced with claims that are not easily characterised as either "good" or "bad". Many claims will fall into the middle ground between these two definite categories either because there is some question as to the legal validity of the claim or, where there is no dispute in principle as to the legal admissibility of a claim, because of the frailty or even the absence of evidence to support it. In those circumstances, the role of the liquidator has been characterised as being quasi-judicial in nature. He must decide, on the basis of the

evidence before him, to admit, to compromise or to contest the claim. The reference to claims being settled reflects that a pragmatic approach may have to be adopted not only by the liquidator but also by the party making the claim and by the other creditors.

22. The notice party accepts that it bears the onus of proving the debt which it seeks to have admitted to proof in the liquidation. The standard of proof is a civil standard, namely on the balance of probabilities, and reflects the same principles which would apply in debt proceedings against a solvent company. Counsel for the notice party expressly rejected the possibility that standard of proof should mirror the threshold which must be met by a creditor seeking summary judgment, although I did not understand the liquidator to be contending that this somewhat higher standard applied. As counsel for the liquidator noted, in a contested summary summons application the threshold facing the defence is a low one, i.e. all that is required is to show the existence of a bona fide dispute as to any material fact or on the law in which case the matter will be adjourned for a full hearing. In an uncontested application for summary judgment, the plaintiff still has to satisfy the civil standard of proof as regards the claim before the court will allow it. Thus, it seems that both parties are agreed that that is the standard that I should apply.
23. In my view, on one level, it makes no difference whether the matter comes before the court on an appeal from a decision to admit or reject a claim made by the liquidator in the exercise of his functions or, as here, on foot of a request for directions by the liquidator under s. 631. In either case, the question to be addressed is whether the claim is legally enforceable against the company. As noted above, this is not always a black and white question capable of a binary answer. Where litigation proceeds to court the outcome is frequently uncertain as it will depend, *inter alia*, on which party bears the onus of proof and the evidence that is available to discharge that onus. However, the practical application of the evidential burden may be materially different in circumstances where the question comes before the court by way of a request for directions as opposed to an appeal. In the latter case, the party who bears the onus of proof, here the notice party, will expect their legal arguments to be challenged and the evidence they adduce to be tested by the opposing party, usually the liquidator defending his decision. Where the application is made by way of a request for directions the burden of proving the debt remains on the notice party but, as the liquidator in this case is deliberately maintaining a neutral position, the evidence advanced by the notice party is not being meaningfully tested nor are the notice party's legal arguments being directly challenged.
24. The liquidator has raised a number of issues concerning the notice party's claim but has not advanced a case, based on evidence, to counter that being made by the notice party. For example, if a claim is statute barred, it will not be legally enforceable against a liquidator and should not be admitted to proof. In normal circumstances, in *inter partes* litigation a defendant must specifically plead the Statute of Limitations and must establish an evidential basis for the court to rule that the plaintiff's claim is not admissible. In this case, one of the issues canvassed by the liquidator is whether some or all of the claim made by the notice party might be statute barred (i.e. relating to monies lent before March 2008). In circumstances where the liquidator does not seek to categorically raise

the defence that the claim is statute barred and does not adduce evidence that it is, but instead points to an absence of evidence that it is not, what is the court to do? It seems to me that, save in circumstances where the claim made is manifestly out of time, the court cannot decide of its own motion and based on the absence of evidence that a claim should not be admitted to proof for that reason.

25. The effect of all of this is notwithstanding that the legal test will remain the same, the onus of proof will remain on the notice party and the evidential standard will remain the same, in practice the task facing the notice party will be commensurately easier because the case it makes is not opposed by the liquidator. Whilst I have misgivings, which I have already expressed, about the manner in which this application comes before the court, the notice party cannot be faulted or, indeed, prejudiced for seeking to make out a claim on the evidence that is available to him (even if that evidence is incomplete) when that claim is not being opposed by any party. As previously indicated, I accept that some significance can and now should be attached to the fact that none of the company's other creditors are opposing this claim.
26. The liquidator also refers to case law establishing that the court should treat the application as a *de novo* consideration of the notice party's claim. In *Re Kentwood Construction Ltd* [1960] 1 WLR 646 Buckley J. considered whether, on an appeal from a liquidator's decision rejecting proof of a claimed debt, the court should consider the issue on the basis of the evidence that was before the liquidator or allow additional evidence to be filed for the purposes of the appeal. Buckley J. acknowledged that when an application is made to court to reverse the decision of a liquidator rejecting a proof, the evidence filed is frequently much fuller than that which was available to the liquidator. He held that the court was bound to approach the question *de novo* and to determine the extent to which the claim ought to be allowed on the basis of all of the evidence before the court and not merely the evidence which was before the liquidator. Whilst I do not doubt the correctness of this proposition, it is not especially relevant here as no decision has been made by the liquidator. Consequently the court is not considering the question *de novo* but is, in reality, considering it at first instance.
27. Finally, I accept the point made by the applicant that a liquidator is not bound by the director's statement of affairs and, by logical extension, is not bound by the financial statements of the company and may look behind these documents in order to ascertain the true position. However, given the statutory role of the directors of the company, particularly in the context of a voluntary winding up, and the statutory significance of the filing of annual returns, if any party is asserting that those documents do not reflect the true financial position of a company, I think there is an onus on that party to adduce some evidence in support of that position. Equally, the directors' statement of affairs and the company's filed accounts are not binding on the court, but they are certainly the starting point for any consideration of whether a debt is owed by the company and in the absence of contrary evidence considerable weight must be attached to their contents.

Application of these Principles to the Facts in this Case

28. The liquidator's concerns arise principally because although, as a matter of accounting practise the sums the subject of the claim were booked as loans from Kiawah to the company, it is not clear that this reflects how the monies were actually paid. In particular, the US accounts are unclear as to whether monies were transferred directly by KRA as opposed to Kiawah and whether they were transferred directly to the Irish subsidiaries as opposed to the company. As against this, it is noted that the directors' statements of affairs and the company financial accounts for the Irish subsidiaries do not show the US parent companies as debtors. Consequently, the sums in issue were not shown as sums due to creditors by the Irish subsidiaries nor claimed by the US parent companies in the context of the liquidations of those companies. There is also a lack of clarity in the accounts as to the precise amounts provided by the US company over a number of years and the precise basis on which they were provided. In circumstances where large capital contributions were also being made by the US companies, the US accounts do not appear to differentiate between loan funding and equity/capital funding. In presenting the case to court, counsel for the liquidator indicated that the facts raised a question as to whether the flow of intra-company debt was an accountancy exercise or whether money had actually flowed from Kiawah to the company.
29. Further, it emerged during the course of the proceedings that two different versions of the directors' statement of affairs had been produced. In one version, Kiawah is identified as a creditor of the company in the sum of €78,468,222. In the other, Kiawah is identified as a creditor of the company in the sum of €12,214,524, i.e. the sum now claimed. Both versions of the document bear the same date, 28th February, 2014 and the liquidator was unable to inform the court which version had been placed before the creditor's meeting. Looking at the company's accounts for 31st December, 2012, it seems likely that the sum of €78 million reflects the combined sum of €12 million plus due to Kiawah as a creditor and the €64 million plus shown in those accounts as a "*capital contribution*", although I note that the figures do not exactly coincide. Counsel for the liquidator acknowledged that the existence of two different versions of the list of creditors in the directors' statement may not be sinister and might simply reflect the fact that two versions of the document were prepared for the consideration of the directors and that somehow both found the way onto the liquidator's file.
30. Finally, I accept the argument made on behalf of the liquidator that insofar as email correspondence between his office and that of the notice party during the period when the notice party was maintaining a claim far in excess of that which is currently before the court might suggest that the smaller claim was not being disputed by the liquidator, this correspondence is not binding on the liquidator. The liquidator has a statutory duty under s. 624(1) to administer the property of the company and, to that end, has the power under s. 3(a) of the table attached to s. 627 to ascertain the debts and liability of a company. If a debt claimed is not one which is enforceable against the company, then an apparent admission of that debt in preliminary correspondence with the liquidator's office does not make the debt legally enforceable and the liquidator is not estopped from disputing it thereafter. In circumstances where I do not regard the liquidator to be legally bound by statements made in the course of exchanges of this nature, I do not propose to

analyse the particular correspondence and make no decision as to whether the contended for admission was made.

31. Before focusing on the particular items of evidence on which he relied, counsel for the notice party dealt with the fact that a considerably larger claim had been advanced by the notice party at an earlier stage. He noted that as the trustee in bankruptcy under Chapter 7 of the relevant US legislation, the notice party occupied a statutory position similar to that of the liquidator and had fiduciary duties as regards the companies over which he had been appointed. Consequently, he had a duty to gather in the assets of the US companies which would then be made available to their creditors. The view initially taken by him was informed by the statutory books and records available to the US entities. The initial claim of \$90 million was based on the Kiawah balance sheet which showed a debt of that amount, undifferentiated as between loan and capital investment, owed by the company to Kiawah. However, following further enquiries the notice party had taken a pragmatic approach and rather than argue about the recoverability of the larger figure was looking to prove the claim for €12 million which is still a substantial sum which would then be available to Kiawah's creditors. He also contended that in the context of these inter-company relationships it was legitimate for the payment of the transfers to bypass the subsidiary company, i.e. to go directly from Kiawah to the Irish subsidiaries or from KRA to the company.
32. The specific items relied upon by Kiawah to prove its debt were firstly, the director's statement of affairs dated 28th February, 2014. Insofar as there were two different versions of the creditor's list exhibited in the papers, he noted that Mr. Menton, a director at the time the statement of affairs was prepared, had confirmed in a letter to the liquidator dated 19th February 2019 that the company owed Kiawah the sum of €12,214,525, i.e. the sum now claimed. Secondly, he relied on the fact that the company's audited accounts for the year end 31st December, 2012 showed the same sum as being due to the company's creditors. Given that the company was a holding company which did not itself carry out any commercial activity, it was clear that this is the same sum as is referred to in the directors' statement. Thirdly, he pointed to Ms. Clarkson's affidavit and emphasised that she had particular knowledge of the structure and practices of the US companies by reason of her role as the director of finance of Kiawah. Her description acknowledges that the bank transfers bypassed some of the subsidiary companies within the group structure but maintains that the funds were nonetheless advanced by Kiawah to the company and are recorded in the US records as having been so advanced. Counsel argued that the recording of the debt for accounting purposes is an important factor in determining its enforceability and noted the company's accounts over a number of years recorded these monies as a debt due to a creditor. He also pointed to the fact that the company's accounts both for 2012 and for earlier years show a distinction between capital contributions and loans to the company. Further, the accounts over a number of years show a gradual build-up of both capital contributions and loans reaching, ultimately, the figures shown in the 2012 accounts.

33. In rebutting the possibility that these sums were repaid after 31st December, 2012 counsel points to Kiawah's bank account for that period (exhibited in the notice party's affidavit) and to the fact that Kiawah's ledger does not show any such repayment which would, by any standards, be a significant payment which would normally be recorded. In this regard I note also that the liquidator does not make the case that the company's accounts, financial records or bank accounts show any payment from the company to Kiawah over the same period. Further, Mr. Menton's confirmation of the company's position, signed by him in 2019, indicated not only that the amount in question was due but that it had not been paid between 31st December, 2012 and March 2014.
34. Finally, part of the documentation which was exhibited in the application was a letter dated 24th September, 2009 from a Mr. Townsend P. Clarkson who was at that time a director of the company and the Ulster Bank. That letter discussed the funding of what is described as the "*Doonbeg project*" by the KRA LP being the flagship of the Kiawah group and the parent company of KRA and in turn of Kiawah. The letter describes the Doonbeg project as having been funded primarily by KRA in the form of advances from KRA LP to KRA Doonbeg which in turn advanced the funds to Kiawah which in turn funds the company. I note that this description is broadly similar to that subsequently provided by Ms Clarkson. The letter suggests that this funding was by way of equity for financial reporting reasons. The funds received by the company are in turn loaned to its Irish subsidiaries. The letter expressed a concern as to the lack of security for the funding provided by the KRA group into the Doonbeg project and proposed that a number of fixed and floating charges would be granted by the subsidiaries in the form of fixed and floating charges over their real estate and other assets. Charges were executed by the Irish subsidiary companies in favour of KRA Doonbeg on 3rd March, 2010. Counsel for the notice party argues that the 2009 letter is not determinative of how advances were made post 2009.
35. Based on the evidence before the court and on the submissions made by the notice party I am satisfied that the claimed debt of €12,214,524 should be admitted to proof in the company's liquidation. This amount is shown as being due by the company in the company's own records prior to and at the time of its liquidation. The director's statement of affairs confirms that this amount is due and, insofar as there are two versions of that statement, the figure claimed is the lower of the two figures shown. The ambiguity in the records of the US companies is not, in my view, sufficient to dislodge the prima facie conclusion that the company owed Kiawah the sums indicated in the company's own records. My conclusion is not based on any purported admission of this debt in communications from the liquidator's offices.
36. I note that the evidence before the court was not contested by the liquidator although doubts were raised in a general sense and gaps and inconsistencies in the records were identified. I note also that none of the other creditors of the company whose claims have been admitted to proof in the liquidation have opposed the claim. Thus whilst there may be an arguable case that the debt should not be admitted, that case has not in fact been made to the court. The notice party has adduced sufficient evidence to establish on the

balance of probabilities that the sum now claimed is due and consequently I will direct the liquidator to admit the claim to proof in the company's liquidation.