THE HIGH COURT

CHANCERY

[2016 No. 282 COS]

IN THE MATTER OF SCLAD CONSTRUCTION LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

UNITED PRECAST CONCRETE ABU DHABI (L.L.C.)

PETITIONER

- AND -

SCLAD CONSTRUCTION LIMITED

RESPONDENT

JUDGMENT of the Hon. Ms. Justice Stewart delivered on 10th day of November, 2017.

1. The petition currently before the Court is dated 19th July, 2016, and seeks to have the respondent company put into liquidation, pursuant to s. 569(1)(d) and (e) of the Companies Act 2014, which respectively relate to an inability to pay debts and just & equitable grounds. With regard to the inability to pay debts, the petition engages s. 570(a) and (d), which respectively relate to neglect of a demand for payment and contingent/prospective liabilities. The petitioner also seeks a declaration that the respondent company's Centre of Main Interest is in this jurisdiction, that the EC Insolvency Regulation applies and that these proceedings are "the main proceedings" within the meaning of Art. 3.1 of the Regulation. SCLAD was incorporated in this jurisdiction on 27th August, 1999. Its registered office is located in Kilcock, Co. Kildare, and its objects relate primarily to the construction business.

2. On or about 13th September and 14th October, 2010, the parties entered into five sub-contract agreements covering the manufacture, supply and installation of precast concrete elements for a school construction programme in Abu Dhabi. These agreements were fully performed by the petitioner and the parties entered into a Final Account Agreement on or about 10th April, 2012, in which SCLAD agreed to pay the petitioner a sum of 9.8 million Emirati dirhams (hereon referred to as AED). Of that sum, AED 1,857,335.28 remains outstanding. On 6th August, 2015, the petitioner issued a letter of demand in respect of this sum and warned SCLAD that a petition would be issued seeking to wind it up if the debt was not paid in 21 days. Correspondence ensued between the parties regarding the existence of legal proceedings before the courts in Abu Dhabi related to the non-payment of debts held by SCLAD. The respondent advised the petitioner to engage with the Abu Dhabi proceedings and directed it to contact an employee of SCLAD at its Abu Dhabi Office (A series of enquiries made by the petitioner revealed that this person no longer works for SCLAD and, according to the former General Manager, the Abu Dhabi Office is completely vacant). A meeting took place between the parties' representatives on 9th November, 2015, at which the respondent stated that it was unable to pays its debts as they fell due, that it has ceased operations in Abu Dhabi and that it had no plans to re-commence trading. It also stated that a sum of money had been lodged with the courts in Adu Dhabi, which was being used to pay off creditors. By letter dated 4th January, 2016, solicitors for the petitioner set out the events of the meeting and demanded repayment of the debt, in the absence of which they would proceed with a petition.

3. Correspondence continued over the following months, including a further letter of demand dated 7th March, 2016. During that correspondence, the respondent made a number of statements, including that SCLAD Abu Dhabi is a stand-alone independent company with an identity within Abu Dhabi separate to that of the respondent. On that basis, it was alleged that SCLAD Construction Limited (i.e. the respondent) did not owe any sum to the petitioner. A Membership Certificate has been put before the Court confirming SCLAD's corporate standing in Abu Dhabi as a branch of a company incorporated in Ireland. The respondent also included documents intended to substantiate its claim that proceedings were in being against SCLAD Abu Dhabi in the Abu Dhabi courts. A translation of this document, paid for by the petitioner, revealed that it did relate to 2012 proceedings against SCLAD. However, it made no reference to ongoing proceedings or any monies held by the courts for SCLAD's creditors. The petitioner refers the Court to SCLAD's Abridged Financial Statements, as filed in the CRO on 2nd February, 2015, which state that SCLAD is unable to pay its debts as they fall due. It avers that SCLAD has not disputed that the debt is due and owing. The contents of the petition, as set out above, are reflected in the grounding affidavit of Matthew Palmer, General Manager of the Petitioner, dated 19th July, 2016.

4. On 28th September, 2016, Kieran Wallace, a partner in KPMG, swore an affidavit setting out his ability to serve as liquidator for SCLAD, should the Court accede to this petition. On 4th October, 2016, Tony O'Grady, a partner in Matheson, swore an affidavit setting out his belief that Mr. Wallace has the necessary expertise to serve as liquidator in this matter. On 7th October, 2016, Thomas O'Dwyer, a partner in Beauchamps (the firm representing the Petitioner), swore an affidavit confirming that the petition had been properly advertised and served on SCLAD. Correspondence from Miceál Sammon, a director of SCLAD, was exhibited thereto, in which he acknowledged that SCLAD held a deficit of €3,422,638 and affirmed its status as a dormant company with no assets. On that basis, the petitioner was urged to withdraw its petition because it would give rise to costs that could never be recovered.

5. On 7th October, 2016, Miceál Sammon swore a replying affidavit. He avers that this petition should be dismissed for three reasons:

> A) SCLAD has no funds outside the United Arab Emirates (UAE). A large proportion of its funds in the UAE are currently subject to court proceedings in Abu Dhabi, which stemmed from a protected dispute with one of its debtors. The petitioner should make its application in those proceedings, rather than attempting to skip ahead of other creditors and make this application.
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> B) SCLAD has established a Branch Office in the UAE, which is a separate legal entity operating under UAE law. The agreements giving rise to the debt relate to that Branch Office and include specific jurisdiction and arbitration clauses, which the petitioner has failed to adhere to in making this application.
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> C) In light of the above, the Branch Office is the proper debtor and the agreements are subject to UAE law. The Final Account Agreement (hereafter referred to as "the Agreement") is invalid under UAE law, as no power of attorney was filed with it and it was executed by a person who does not appear to have been vested with the requisite power of attorney on behalf of SCLAD and the Branch Office. The circumstances in which the Agreement came to be executed by persons

unknown remain unclear and it is the petitioner's duty to explain how it came to be signed and stamped.

For these reasons, Mr. Sammon avers that this petition is an abuse of process and has not been brought in good faith. Documents related to the Abu Dhabi proceedings were exhibited to Mr. Sammon's affidavit. With regard to any gaps in the paperwork submitted in these proceedings, Mr. Sammon avers that it has been difficult to gather the relevant documentation because all of SCLAD's books and records have been seized by the UAE courts. For the sake of clarity, Mr. Sammon disputes the petitioner's entitlement to collect the debt in full. He also offers an undertaking to lodge AED 1,857,335.28 with SCLAD's solicitor, should such monies become available in SCLAD's dispute with its debtor in the UAE. Those funds will then be held for two years, during which the petitioner can refer this dispute to arbitration.

6. Matthew Palmer swore a replying affidavit on 7th December, 2016, in which he expresses his consternation that the respondent has raised the above issues after seven years of contractual relations and months of detailed correspondence. He avers that Mr. Sammon's statements regarding recovery of the debt from the UAE court fund contradict his legal position that the agreement giving rise to that debt is invalid. He avers that a Martin Callaghan signed the agreement on behalf of SCLAD, acting in his capacity as Procurement Manager. Given that Mr. Callaghan had signed agreements on behalf of SCLAD in the past and that the Power of Attorney check box was filled in on the Agreement form, Mr. Palmer avers that it was reasonable for him to assume that Mr. Callaghan had the power to so act. He disputes the alleged need to file a Power of Attorney with the Agreement, having never come across such a requirement in his eleven years working in the UAE. With regard to the documents exhibited to Mr. Sammon's replying affidavit, which purport to evidence the ongoing Abu Dhabi proceedings, Mr Palmer notes that the document does not bear any stamp from the UAE Courts. He also exhibits a translation of the documents, which allegedly states that a distribution of all available funds took place in July, 2014 and there is no balance remaining for distribution amongst remaining creditors. In any event, Mr. Palmer avers that the seizure of assets in foreign proceedings, and the decision of other creditors to engage with those proceedings, does not impact the Irish courts' jurisdiction to wind up an Irish company. The allegation that the petitioner is seeking improper preference over its fellow creditors is wholly denied. The proposed undertaking is unsatisfactory to the petitioner because the proposed scenario is illegal, there is no serious prospect of further moneys being secured from SCLAD's debtor in the UAE and arbitration costs are inappropriate in circumstances where indebtedness is acknowledged and there is no bona fide dispute to be arbitrated.

7. On 7th December, 2016, Ali Ismail Al Zarooni, an Advocate in the UAE, swore an affidavit of laws. In that affidavit, he assesses the legal positions set out by the parties. Based on that assessment, he concludes as follows:

> A) It is impossible to say whether the Power of Attorney documentation exhibited to Mr. Sammon's replying affidavit constitutes an exhaustive list of all the individuals specifically granted power of attorney on SCLAD's behalf.
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> B) A director/manager of a foreign company would have sufficient authorisation to enter an agreement on behalf of that company and its branches, notwithstanding their lack of a specific Power of Attorney. There is no evidence to suggest that Mr. Callaghan lacked authorisation, given his position as Procurement Manager and his actions in signing various other agreements. Even if Mr. Callaghan did lack the power, that does not necessarily undermine the Agreement. UAE law states that the *bona fide* acceptance of ostensible authority is sufficient to maintain an agreement's validity. Legal authority from the Dubai Court of Cassation supporting this statement is exhibited. Further legal authority from that Court is exhibited, which states that the use of the branch stamp gives rise to a presumption that the person using it has the authority to bind the company. In light of the above, the Agreement would appear to be valid.

8. On 12th January, 2017, Abdel Qadir Ismail Mohamed swore an affidavit in which he avers that he has been instructed by SCLAD to compile information on all cases involving SCLAD Abu Dhabi before the Abu Dhabi Courts. He avers that there are over 60 cases filed that are seeking execution, which have been joined into one Group Execution Case (File No. 2089/2012). He avers that it remains open to creditors to seek an attachment order and be joined to the Group Execution. Using the monies seized from SCLAD's debtor, 54 creditors have reached execution stage, with a further six subject to attachment orders. He then refers to an exhibited schedule of payments showing a running balance of monies held by the Execution Court in the UAE. Documents related to ongoing disputes in the case are also exhibited. Mr. Mohamed avers that it is open to the petitioner to seek an attachment order to this matter and join the Group Execution case, at which point a percentage of the available monies will be set aside for it. Furthermore, he refers to a section of UAE Federal Law dealing with company authority and power or attorney.

9. On 23rd January, 2017, Mr. Sammon swore an affidavit replying to the above three affidavits. He avers therein that only five people ever held power of attorney on behalf of SCLAD. Allegedly, Mr. Callaghan was not one of these five. Mr. Sammon avers that Mr. Callaghan was a junior member of staff, acting as a purchasing officer before leaving the company after approximately one year. Thus, the Agreement is invalid and any sums the petitioner could hope to recover would be attained though arbitration and the proper legal channels in the UAE. Mr. Sammon also avers that the appointment of a liquidator is inappropriate because it would accrue un-necessary expense and undermine the work of the UAE Courts, on top of impeding efforts by SCLAD to secure unpaid monies from SCLAD's debtor. Mr. Sammon denies that there is any illegality in his proposed undertaking.

10. On 29th January, 2017, Mr. Palmer swore a third affidavit in which he refutes Mr. Sammon's characterisation of Mr. Callaghan's role in SCLAD. He avers that Mr. Callaghan held a senior managerial position, which is reflected in his initials being signed on numerous sub-contracts between the parties. A screenshot of Mr. Callaghan's LinkedIn profile is also exhibited, in which he states that he worked for SCLAD for two years as "Commercial and Procurement Manager". Mr. Palmer states that the relatively junior role of a "purchasing officer" is at odds with Mr. Callaghan's previous more-senior roles and his wealth of experience in this field.

11. Mr. Sammon swore a replying affidavit on 21st February, 2017. He avers that Mr. Callaghan was an employee of the Branch Office, acting in the role of procurement manager. He held no managerial/directorial role with the respondent, SCLAD Construction Ltd. Per Mr. Al-Zarooni's affidavit of laws, he would therefore need to be vested with a specific Power of Attorney to execute the Agreement, which he was not. Mr. Sammon exhibits a list of a Procurement Manager's responsibilities, which does not include executing agreements. He avers that even Mr. Callaghan's superior, the Commercial Manager, did not have that power. Mr. Sammon states that there is sometimes confusion in the UAE between "manager" & "director" and the mere use of the word "manager" as a job title does not constitute an automatic grant of signature authorisation. He also highlights some factual inaccuracies in Mr. Callaghan's LinkedIn profile. Mr. Sammon swore a final affidavit on 13th March, 2017, in which he states that Mr. Callaghan's initials appear on a specification of works that he was responsible for during his employment and not on the substantive document itself, which was signed and executed by an individual holding Power of Attorney.

Submissions

- Disputing the Debt

12. In assessing the challenge to its claim under s. 570(a) of the 2014 Act, the petitioner submits that the validity of the Agreement

is not disputed in good faith, within the meaning of Keane J.'s (as he then was) decision in *Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd* [1996] 1 IR 12. They submit that one of the factors to be considered is the timing at which the dispute arose. In this regard, they contrast Laffoy J.'s judgments in *Re Mares Associates Ltd* [2006] IEHC 73 and *Re Abbey Trinity Retail Ltd* [2010] IEHC 5. They submit that Mr. Sammon's failure to impugn the validity of the Agreement until after the petition was issued, despite months of legal correspondence and years of informal requests for repayment, is sufficient to undercut the *bona fides* of this dispute. It is submitted that the gravity of Mr. Sammon's claims (which include allegations of fraud and the application of duress to SCLAD's employees), is incongruous with the content of the preceding correspondence, particularly the invitations that the petitioner make an application to join the Group Execution case. Mr. Sammon has averred that he failed to raise this issue sooner because he assumed that the threat of a petition was a "try-on" to secure payment of the debt.

13. Regardless of its *bona fides,* it is also submitted that the dispute lacks substance because Mr. Callaghan clearly possessed the requisite authority to execute the Agreement. Even if he did not, the petitioner notes that no attempt has been made by the respondent to address the ostensible authority issue and the presumption outlined in Mr. Al-Zarooni's affidavit.

14. The respondent argues that they are disputing the debt on good faith and substantial grounds. To that end, they rely on a series of decisions by Laffoy J., including *Cotton Box Design Group Limited v. Earls Construction Company Ltd* [2009] IEHC 312 and *Re Kasam Investments Ireland Ltd* [2012] IEHC 553. They also repeat their assertion that Mr. Callaghan was an employee and not a director/manager, thus depriving him of the authority, or power of attorney, to execute the Agreement and bind the company. With regard to the ostensible authority argument, the respondent submits that this is a question for UAE law that cannot be resolved in the currency of a petition to wind up the company. According to the respondent, it does not oppose the petitioner making an application to join the Group Execution case but it does oppose any attempt to wind up the company based on a debt that is disputed as invalid under the law that governs it. In effect, the respondent argues that the debt is not due and owing until a decree to the contrary is secured from the Courts in the UAE, which settles the alleged dispute and holds against the respondent on the authority issue. At that point, the matter would be entirely defunct because the petitioner would be added to the Group Execution case and would recover as best they can, along with the other creditors.

- Indisputable evidence of the company's insolvency

15. Even if the Court were to find against the petitioner under s. 570(a), it is submitted that the Court should nevertheless find SCLAD to be insolvent under s. 570(d). In making this argument, the petitioner highlights numerous statements throughout the affidavits and exhibits outlining that SCLAD is insolvent. In particular, the Court's attention is drawn to the fact that SCLAD is not trading, has no assets and has not explained how it intends to pay off the AED 110,126,477.35 it owes its creditors in the UAE.

16. The respondent submits that the company will likely be solvent by the time proceedings in the UAE have run their course. The petitioner argues that any future prospect of further debt recovery is irrelevant, given Hogan J.'s decision in *Re Heatsolve Ltd* [2013] IEHC 399. The respondent submits that, while *Heatsolve* is good law, this is more of a matter where the Court is being asked to exercise its overriding and unfettered discretion, as outlined at para. 10 of the *Heatsolve* decision, to refuse to wind up the company. It is submitted that the interests of the creditors are a key factor in the exercise of that discretion.

- Proceedings in the UAE

17. Regarding SCLAD's repeated requests that the petitioner seek to be joined to the Group Execution case in the UAE, the petitioner submits that these proceedings have no impact on the matter currently before the Court. They rely on Laffoy J.'s judgment in *Re Burren Springs Ltd* [2011] IEHC 480, in which she found that a petitioner is ordinarily entitled to a winding up order as of right, once it has been established that the company is unable to pay its debts. Passages of Mr. Sammon's affidavits are highlighted, wherein he acknowledges that the fund in the UAE is insufficient to discharge the entirety of the petitioner's debt.

18. The respondent submits that the appropriate place for the petitioner to make their claim is in the UAE because: 1) it is not entitled to ignore contractual clauses related to jurisdiction and arbitration, 2) it cannot seek to do better than its other creditors, 3) it cannot disturb dividends/distributions already paid to creditors and 4) the respondent has no assets outside the UAE. It is submitted that granting this petition would undermine attempts to secure further payments from the respondent's debtor in the UAE. Furthermore, the respondent submits that a liquidator should not be appointed because his *locus standi* in the UAE proceedings has not been clarified. The respondent also argues that it owes no debt to the petitioner until the petitioner complies with the contractual clauses and engages with the process in the UAE. In making this argument, the respondent relies on *BAM Building Ltd. v. UCD Proper Development Co Ltd* [2016] IEHC 582 as a statement of the deference paid by the courts to arbitration agreements/clauses. The petitioner submits that *BAM* does not apply because there is no substantial contractual dispute in this matter. In oral submissions, the respondent stated that, under the Arbitration Act 2010, it is for the arbitrator and not the Court to determine whether a dispute exists. The respondent also relies on *Fairfield Sentry Ltd (In Liquidation) & Kenneth Khrys v. Citco Bank Netherland NV & Ors* [2012] IEHC 81 and submits that the Court should exercise the discretion set out therein to recognise a foreign insolvency proceeding, such as the Group Execution case in this matter.

- Ulterior Motive

19. The petitioner rejects the suggestion that its preference for liquidation over joining the UAE proceedings is indicative of an ulterior motive. They rely on Samad's views in "*Court Applications under the Companies Acts*" that the motive would probably have to be improper in nature, i.e. including some element of oppression, coercion, duress or fraud, before it can defeat a winding up petition. It is alleged that Mr. Sammon's affidavits fail to establish the presence of such a motive. On the contrary, it is submitted that the seizure of SCLAD's books by the UAE authorities, the attempts at an *ad hoc* winding up and the offering of illegal undertakings render a winding-up order the only proper remedy.

20. The respondent relies on the principles set out by McGuinness J. in the Supreme Court decision of *Meridien Communication v. Eircell Ltd* [2001] IESC 42, both in the context of its apparent insolvency and the presence of an ulterior motive. It is submitted that there is a suitable alternative remedy in this case (the Group Execution case) and the petitioner is seeking to subvert it by making this petition in the hopes of recovering more than it otherwise would. The respondent alleges that this is an improper purpose and the petition should therefore be restrained. The respondent underlines this point by arguing that the petitioner has refused to partake in an effective insolvency process that is in being. It is alleged that no greater benefit will be gained by appointing a liquidator and having the UAE distributions undone. This would be contrary to the interests of the other creditors and the petition should be refused on that basis (*Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 CH 102 is relied on in this regard). This approach might not even be entertained by the Courts in the UAE, who could refuse to recognise the appointment of the liquidator.

- The interests of the other creditors

21. The issue of other creditors' interests was more directly addressed during oral submissions and the Court requested supplemental legal submissions from the respondent to deal with this. The respondent relies on *Re Bula Ltd* [1990] 1 IR 440 and argues that the position held by a petitioner's fellow creditors may be sufficient be persuade the Court not to grant the petition, notwithstanding that indebtedness is undisputed and the company is clearly insolvent. This argument expands on another disagreement in the written submissions regarding whether the creditors stand together and benefit/suffer rateably, within the meaning of Harman J.'s decision in *Re a Company* [1983] BCLC 492. As to which party bears the burden of proof to establish the views or interests of the other creditors, the respondent relies on the Supreme Court's decision in *Bula*. They submit that, where a petitioner is prima facie entitled to a winding up order, they do not have to prove that the order is to the benefit of their class of creditors unless a case has been made that the petition has been brought for an ulterior, but not necessarily improper, purpose.

22. The petitioner has argued that the *Bula* decision is distinguishable from this matter. In their submission, the *Bula* petition was not granted because the petitioner had filed it for the ulterior motive of preventing another creditor from gaining priority in the hierarchy of creditors under a judgment mortgage. This assertion transferred the burden of proof back to the petitioner, who had failed to satisfy that burden and the petition was therefore refused. *Bula* should not apply to this case because, in the petitioner's view, no such ulterior motive has been asserted. The respondent argues that the petitioner's attempt to "skip the queue" is an improper purpose. In any event, they also submit that this is a distinction without a difference, as the Court must keep the interests of the creditors in mind when dealing with any insolvent company, per Keane J.'s decision in *Truck and Machinery Sales.* It is submitted that the Court should have regard to the wishes of the company's creditors and contributories, as established by evidence, under s. 566 of the 2014 Act. The respondent highlights that the only evidence before the Court on this matter is the actions of the 78 creditors who are currently engaging with the Group Execution case in the UAE and have not sought to have the company wound up in Ireland.

Decision

23. In correspondence and in his initial affidavit, Mr. Sammon averred that SCLAD's branch office was a separate legal identity to that of the respondent and that the petitioner's debt is not due on that basis. This argument was not seriously advanced at hearing. As stated in the petitioner's oral submissions, a branch office is not a separate company, but a limb through which the main body corporate carries out its business. This is reflected in the Membership Certificate exhibited before the Court.

24. The respondent has repeatedly referred to choice-of-law terms, arbitration/jurisdiction clauses and the location of assets as reasons why this petition should not be granted. The cumulative logic behind these arguments is that the company can in some way organise its affairs so as to prevent or dis-incentivise the Irish High Court from winding up an Irish company. The Court rejects those arguments, as no authority has been opened to the Court to support them.

25. Speaking particularly to the arbitration issue, the respondent relied on *BAM (supra)* and the provisions of the Arbitration Act 2010 to submit that the Court cannot even assess whether a real and genuine dispute exists, as that is a matter for the arbitrator. An arbitration clause operates in relation to the contract housing it. In order for it to be effective in a court, contract proceedings must be in being. This is not a contract proceeding, but a winding up petition. The Companies Act 2014, which was obviously passed after the Arbitration Act 2010, made no attempt to incorporate arbitration into the winding up process and neither will this Court. Should the Court conclude that the debt is disputed *bona fide*, the arbitration clause might come into operation in proceedings brought to settle that dispute. But that is a matter to be determined at another time, as it has no bearing on the decision this Court must make.

26. Before finally dealing with the substantive elements of this case, I will quickly address the respondent's submission that the Court should stay its hand in light of the insolvency proceedings (the respondent does not deny that they are insolvency proceedings) currently taking place in the UAE. Unlike the defendants in *Fairfield (supra),* the respondent has not sought a declaration to have those proceedings formally recognised by the Court. It simply asks the Court to have regard to them. It should be noted that Fairfield Sentry Ltd was a company incorporated in the British Virgin Islands that was being wound up pursuant to the laws of that jurisdiction. In this case, the respondent is an Irish company that will continue to exist, no matter what happens in the UAE, until such time as it is wound up pursuant to Irish law (be that through a court order or otherwise). If the respondent is going to resist this petition, it must convince the Court that Irish law provides some basis for not granting the petition. The existence of the UAE proceedings does not constitute such a basis.

27. In resisting the application under s. 570(a), the respondent disputes its liability for the debt on grounds that the contract giving rise to it is invalid, as Mr. Callaghan lacked the authority to sign it. There are two heads to this dispute: actual and ostensible authority. Per *Truck and Machinery Sales*, the Court must examine the good faith and substantive nature of these arguments. The Court would have significant reservations regarding the good faith nature of this dispute. The Court has taken a similar approach to that of Laffoy J. in Ely *Property Group Limited & the Companies Acts* [2013] IEHC 81 in assessing the respondent's *bona fides* against its actions *vis-à-vis* the petitioner. The petitioner sought repayment on several occasions over the approximately three years that passed between the execution of the Agreement and the issuance of the first letter of demand. During that time, the respondent made payments to the petitioner totalling roughly 80% of the original debt. A further eleven months passed before the petition was file and the parties were in regular contact during that time. At no point in that roughly four year period did the respondent ever seek to challenge the validity of the Agreement. The Court has also taken a disfavourable view of the respondent's characterisation of Mr. Callaghan. In his affidavit of 23rd January, 2017, Mr. Sammon averred that Mr. Callaghan was employed as a purchasing officer, clearly implying that Mr. Callaghan did not hold a position that could be construed as a position of authority. However, when the evidence exhibited by both parties clearly indicated otherwise, he averred at para. 11 of his affidavit of 21st February, 2017, that Mr. Callaghan held the position of Procurement Manager. This deliberate attempt to undersell Mr. Callaghan's position in the company not only has implications for the good faith nature of this dispute, but also for the substance of the submission that Mr. Callaghan lacked ostensible authority.

28. In assessing the substance of this dispute, the Court has paid significant regard to Mr. Al-Zarooni's affidavit of laws, the accuracy of which was not seriously challenged by either party. The respondent is correct in submitting that the Court cannot perform an in-depth examination and resolve a dispute of the debt during the currency of a winding up petition, especially in circumstances where the parties' relationship is governed by a foreign body of law. An application to resolve the alleged dispute is not before the Court. But the Court must be satisfied that there is substance to the dispute. At the very least, this means that there should be an issue to be tried and determined. For these purposes, the Court has taken the respondent's case at its height. The Court is satisfied that, based on the evidence currently before the Court, which does not include a document vesting power of attorney in Mr. Callaghan, a dispute of substance has been made out with regard to challenging Mr. Callaghan's actual authority to execute the Agreement.

29. However, the petitioner is also arguing that Mr. Callaghan held ostensible authority. A dispute as to actual authority is effectively moot if there is no substance to the claim that Mr. Callaghan also lacked ostensible authority, as the Agreement would still retain its validity. The Court is of the view that there is no substance to such a claim. The height of the respondent's claim is: 1) a linguistic kink exists in the UAE regarding the use of the words "manager" & "director", 2) Mr. Callaghan's "managerial" role related to the branch office of the foreign company and not the foreign company itself (i.e. the respondent), and 3) Mr. Palmer's knowledge of this

undercuts his good faith acceptance that Mr. Callaghan held the requisite authority. The respondent has failed to set out in any way how Mr. Palmer could or should have known this, other than to baldly state that Mr. Palmer knew that he should have been negotiating with the General Manager of the Branch Office. The respondent has also failed to take any account for the presumption set out by Mr. Al-Zarooni beginning at para. 10.3 of his affidavit:-

> *"…I beg to refer to the judgment (provided in Arabic original with a certified English translation) upon which marked with the letters and number "AAZ-4" I have signed my name prior to the swearing hereof. This demonstrates that in circumstances in which an individual gives the impression that he has the requisite authority and a third party acting in good faith accepts that person is the company's representative and this is not called into question at the time, then it is as if the principal (i.e. SCLAD) had performed the act in question (i.e. signing the Settlement Agreement).*
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> *10.4 This position is further supported by the use of SCLAD's branch company stamp by the individual who signed the Settlement Agreement. I beg to refer to the judgment and judicial reasoning (provided in Arabic origin with a certified English translation) upon which marked with the letters and number "AAZ-5" I have signed my name prior to the swearing hereof. The SCLAD branch stamp bears the company name and, as such, the use of this stamp gives rise to a presumption that the person signing the document is doing so on behalf of the company or in its name. In these cases, it is the company that bears responsibility for the signature and must perform the contract."*

None of the material put before the Court by the respondent addresses the operation of this presumption. While the Court cannot make a definitive determination at this juncture as to whether or not the presumption definitively applies to the Agreement, the respondent must provide an argument of substance to potentially rebut the presumption or provide some reason why it might not operate in the manner that the petitioner submits that it does. The Agreement clearly bears the branch company stamp and the respondent has failed to substantially dispute why this would not affirm Mr. Callaghan's ostensible authority to execute the Agreement. On foot of this failure and the Court's concerns as to the good faith of the dispute, I am of the view that the debt is not *bona fide* disputed. The provisions of s. 570(a) have therefore been satisfied.

30. Even if the Court had found otherwise in regard to s. 570(a), it nevertheless would have found that the provisions of ss. 570(d) and 569(1)(e) of the 2014 Act have also been met. With regard to s. 570(d), it is quite clear that the respondent is unable to pay its debts, taking into account its contingent and prospective liabilities. Even if 100% of the monies owed to the respondent by its debtor in the UAE were paid, this would be insufficient to discharge the debts catalogued (a catalogue that may not even be a comprehensive list of all the respondent's creditors) in the Group Execution Case. In correspondence dated 6th September, 2016, agents for the respondent acknowledged that SCLAD holds a significant deficit of shareholders' funds, is a dormant company and has no assets. In its Abridged Financial Statements, it is stated that the respondent is reliant on the forbearance of its creditors to continue as a going concern. With the issuance of this petition, that forbearance has come to an end.

31. As for s. 569(1)(e), it would seem that, even if the Agreement were invalid, the five sub-contracts that the Agreement purported to settle remain binding. They appear to have been properly executed and no challenge has been made to their validity. Significant sums would be due and owing under those agreements that cannot be repaid due to SCLAD's undeniable insolvency. The respondent has also acknowledged in the submissions that it is the subject of insolvency proceedings in another jurisdiction. The authorities in that jurisdiction can never definitively wind up the company, as it is an Irish entity subject to Irish law. Given the above background facts, it is clearly just and equitable that the respondent's affairs be put in order by a duly appointed liquidator and that it be wound up. To conclude otherwise on the grounds of allowing the UAE proceedings to run their course would be to abuse the winding-up process as a form of pseudo-examinership, as condemned by Hogan J. in *Heatsolve (supra).* While it is true that the respondent is not looking for time to trade out of its difficulties, as was the case in *Heatsolve*, the respondent is effectively urging the Court to allow matters to meander along until they reach whatever conclusion they may whenever they may reach it. Based on the evidence before the Court, there is a possibility that it could take fifteen years for the UAE proceedings to formally conclude. I have not been provided with reason to believe that, at the end of those fifteen years, SCLAD would not still be insolvent and awaiting a liquidator to formally wind it up. Such a scenario cannot be tolerated.

32. For reasons similar to the above, I am also of the view that the Group Execution Case does not serve as a suitable alternative remedy to the granting of this petition within the meaning of McGuinness J.'s decision in *Meridian (supra).* Even if it is assumed that the 43% recoverable under the Group Execution Case is the maximum the petitioner would recover in a winding up, the evidence before the Court suggests that these are protracted proceedings with no end in sight. It is in the interests of all parties that this matter be brought to a timely and effective end.

33. As should be apparent from the above, the petitioner is entitled to a winding up order *ex debito justitiae*. However, as outlined at para. 10 of *Heatsolve*, the Court retains an overriding and unfettered discretion to refuse to wind up the company and it has been asked to exercise that discretion in this case, in light of the best interests and wishes of the creditors as a whole. There is no evidence before the Court to indicate what the wishes of the other creditors are, so the Court will not consider that matter, or s. 566 of the 2014 Act, in further detail. The evidence before the Court regarding the creditors' interests is likewise slim to non-existent. Indeed, there is no evidence before the Court to suggest that the other creditors are even aware of these proceedings. Therefore, the Court has no choice but to carry out this exercise in a more generalised sense.

34. At the hearing, a disagreement broke out between the parties as to who bore the burden of proof on this issue. *Bula (supra)* is the primary authority in this regard. As the right to a winding-up order has been established, the burden has shifted to the respondent. But the burden shifts back to the petitioner if the case is made that it presented the petition for an ulterior, but not in itself improper, object. In opening the case, counsel for the petitioner made reference to its right to "skip the queue". The respondent submits that this is evidence of the petitioner's ulterior motive to present the petition for the purposes of recovering ahead of, and out of step with, its fellow creditors. Counsel for the petitioner clarified his comments by submitting that creditors have a right to jostle for position but that is not what is occurring here, as the appointment of a liquidator does not enhance the petitioner's position in the *parri passu* distribution of SCLAD's assets.

35. Effectively, the respondent's argument is that the petitioner wishes to be repaid in full and has no great concern for whether or not its fellow creditors are also fully repaid. If this constituted an ulterior motive, the burden of proof would shift back to the petitioner almost as a matter of course, for what creditor does not focus on its own interests ahead of others in a commercial setting? An ulterior motive should seek to bring about a specific turn of events. The only such motive attributed to the petitioner by the respondent is an alleged attempt to undermine the proceedings in the UAE. The respondent has submitted no evidence, other than bald assertion, to substantiate its claim that this is the petitioner's intent, nor has it even been established that the grant of the petition would have that effect. Thus, the burden of proof remains with the respondent.

36. As should be apparent from the above, there is no evidence before the Court to suggest that the grant of a winding-up order

would be contrary to the creditors' interests. While the undoing of the distributions made in the Group Execution Case could be contrary to their interests, there is no evidence that this will necessarily follow from the grant of the petition. It should also be noted that, unlike *Ilfracombe (supra),* the UAE proceedings are a set of ongoing and formal distributions made on foot of a court order. They are not an improper distribution of assets, which liquidators often have to undo in the performance of their duties. It is possible that the liquidation could proceed without seeking to overturn the orders of the court in the UAE. The UAE authorities have clearly seen fit to take action in the interests of protecting creditors, notwithstanding that no insolvency proceedings were in being in this jurisdiction. But if Mr. Wallace believes it necessary to seek to have those distributions undone, then the operation of the Group Execution case, the best interests of the creditors in the UAE and concerns over Mr. Wallace's standing are matters for Judge Ghalib Al-Rebai to determine, as he is the judicial authority overseeing those proceedings. Mr. Wallace will be just as subject to that authority's jurisdiction in those proceedings as he is subject to this Court's jurisdiction in these proceedings. I am therefore of the view that this is not a situation in which it would be appropriate for the Court to exercise its discretion to not wind up the respondent.

37. For the reasons set out above, the Court accedes to the petition and grants the winding-up order sought.