THE HIGH COURT

THE COMMERCIAL COURT

(1)

Record No: 2018 No. 18 FJ

BETWEEN

INFRONT PARTNERS SPA

PLAINTIFF

AND

MEDIA PARTNERS & SILVA LIMITED

DEFENDANT

AND

(2)

Record No: 2018 No. 403 COS

IN THE MATTER OF MEDIA PARTNERS AND SILVA LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

On the Petition of M & P SILVA LIMITED (IN LIQUIDATION)

PETITIONER

JUDGMENT of Mr. Justice Robert Haughton delivered on 15th day of May, 2019

1. This combined judgment covers two separate but competing applications. The first is an application by the Plaintiff to have a conditional order of garnishee granted by Ms Justice Pilkington on 23 October 2018 made absolute in order to discharge the debts owed by the Defendant company to the Plaintiff, to the value of €18,033,014.12 ("the Garnishee application"). The second is a Petition by the liquidators of M & P Silva Limited (in Liquidation) ("the Petitioning Creditors") – a company registered in the UK but part of a group of companies of which the Defendant is one – to have the Defendant company ("the company") wound up ("the Petition"). The Petitioning Creditors are both members of PwC (UK) and were appointed liquidators of M & P Silva Limited on 19th October 2018.

2. In effect, in the Garnishee application the Court has been asked to decide whether a conditional order of garnishee can be made absolute against a company which is insolvent and/or facing an imminent application for winding-up. There is no dispute between the parties that the Garnishee application and conditional order of garnishee came first in time.

3. Having commenced hearing the Garnishee application the Court determined that the Petition should be brought into the Commercial Court so that both matters could be heard and determined together. Following further written and oral submissions, including brief submissions from certain other creditors of the defendant company supportive of the petition, the court indicated that it would deliver judgment first dealing with the Garnishee application and thereafter with the Petition.

Factual Background

4. In 2014, the Serie A Professional National League in Italy ("the League") began a tender process in which the Plaintiff acted as an advisor. The Plaintiff was given full entitlement to collect sums due to the League on the League's behalf. The Defendant, who is part of a worldwide media group involved in the distribution of television rights associated with various football leagues, was the successful tenderer. The Defendant entered into a contractual relationship with the League, a term of said contract being that they would furnish all payments arising on foot of their agreement with the League to the Plaintiff. The Plaintiff and Defendant also entered into a number of service agreements. The first tranche of agreements were entered into on 4 February, 2016, 4 March, 2016, 10 May, 2016 and 16 May, 2016 to the value of €13,861,254.82. The second agreement related to the costs of the delivery of the assigned audio visual rights and was to the value of €4,171,888.30.

5. After a default of payment under the said agreements, the Defendant wrote to the Plaintiff by way of letter dated 1 June, 2018, acknowledging their indebtedness and setting out a provisional payment plan. It seems that up until this point there had been a good working relationship between the parties and all sums due and owing were paid when requested. The Plaintiff accepted the proposed payment plan however the Defendant defaulted once more and despite attempts to engage, the Plaintiff was unable to obtain payment for the outstanding debts. The Plaintiff sought, and was granted, two European Orders for Payment ("EPOs") from the Court in Milan, the first dated 12 June 2018 in respect of the first tranche of agreements and the second dated 9 May 2018 in relation to the second agreement. The current debt owed to the Plaintiff is €18,033,014.12.

6. It is of note that in July of 2018, a number of newspaper and media reports surfaced as to the potential insolvency of the Defendant and in October of 2018, petitions for winding up were granted against two companies within the group, those being the Moroccan company on 4 October 2018 and the UK company on 17 October 2018. Both of these winding up petitions received widespread media attention.

Procedural History

7. On foot of the EPO's, the Plaintiff made an application to Ms Justice Costello on 16 October 2018 seeking various orders in aid of execution. The reliefs sought included a *mareva* injunction preventing the Defendant from reducing, dissipating, transferring, divesting or distributing its assets below the sum of €18,033,143.12 as well as an order of garnishee pursuant to Order 45, rule 1 of the Rules of the Superior Courts to attach and garnish all sums due and owing on foot of the EPO's to the Defendant. This garnishee was to attach to an Irish AIB bank account, IBAN: IE93AIBK93110107722048, Swift: AIBKIE2D. The Plaintiff was granted these interim orders, including the conditional order of garnishee. The Plaintiff gave an undertaking to the Court not to enforce the garnishee order without

further application to the Court.

8. On 23 October 2018, the Plaintiff applied to Ms Justice Pilkington to continue the *mareva* and to have a conditional order of garnishee, an order *nisi*, made by the Court. This application was acceded to and the application for an order of garnishee absolute was made returnable to the 1st November, 2018. Both AIB and the Defendant were served with orders of the Court and put on notice of the application to be made on the return date. On 31 October 2018, the Plaintiff was contacted by the UK Company liquidators seeking confirmation of the garnishee application return date. This was confirmed and counsel appeared for the UK Company liquidators on the return date.

9. During the course of argument counsel differed somewhat as to what exactly passed between them and Ms. Justice Pilkington on the 1 November, 2018 and the Court indicated that it would review the DAR (Digital Audio Recording) for the application in question. The Court has done so and the following is an accurate summary of what took place:

• When the court sat counsel for the Plaintiff (Mr. Jarlath Ryan BL) indicated that his client was ready to proceed with its application for the conditional garnishee order to be made absolute. It was submitted that the Plaintiff was anxious to proceed with the application that day, that AIB were not objecting and that the matter would take no more than 20 minutes. Counsel then indicated that there was an appearance or "semi-appearance" by Mr (Edward) Farrelly BL for the liquidators of the UK Company and that counsel was undoubtedly intending to apply for some kind of adjournment. Mr. Ryan submitted that this was a matter for the trial judge and that the Garnishee application was urgent.

• Mr Farrelly was then asked to address the Court. He submitted the following:

"I appear for the liquidators of a UK company, it's a related company, the company is part of a group of companies. There are 13 companies around Europe, 2 of them have already entered into an insolvency process and the rest of them will. The UK company which I appear for is owed US$37 million dollars by the Irish company. We are simply seeking a week to put in a replying affidavit and *present a petition for the winding up* on the basis that the group winding up should be done on an orderly basis. I don't think that Mr Ryan is prejudiced by that, he can still make the arguments that he's going to make, that he's the first in time essentially on the Garnishee application. However if it goes ahead today, the Court won't have had the opportunity of knowing what the background situation is in relation to other creditors and indeed of other companies in the group so I'm simply asking for a week to put in my affidavit." [Emphasis added]

• Ms Justice Pilkington indicated that she approved of this approach. Mr Ryan objected on the basis that the Plaintiff was the first in time and that AIB were not objecting, but Ms Justice Pilkington indicated that, be that as it may, she wished to see matters deposed to on affidavit. Mr Ryan then submitted:

"Well what I was going to suggest Judge is I could make my application for an order of garnishee absolute and put a stay on that for 10 days to allow the Bank to come in and make whatever application or indeed to apply for a provisional liquidator. I think that's fair in the circumstances."

Ms Justice Pilkington refused this application and adjourned the matter for a week to allow the UK Company liquidators to put in an affidavit.

• Mr Farrelly then asked to be served with a copy of the papers for the purposes of preparing their affidavit. Mr Ryan submitted that although this seemed reasonable, the UK Company had no standing and so a Court order would be required for such service. Said service was directed.

10. On 5 November 2018 the Plaintiff applied to have the Garnishee application entered into the Commercial Court. It was admitted and adjourned for a week to allow the parties to agree directions. On the adjourned date, 12 November 2018, AIB made an appearance in order to update the Court as to their position. They stated that they were not objecting to the application and would abide by any order made by the Court. The Court stated that AIB need not appear at the hearing and they took no further part in either of the applications before the Court. The Garnishee application was listed for hearing on the 5 December, 2018. The Petition was issued on 8 November, 2018. The Garnishee application was opposed by the Petitioning creditors, and was part heard on that day, and adjourned for the Petition to be brought into the Commercial Court and for further argument which took place on 12 December, 2018 and the 26 February, 2019. On the 26 February the Court also heard from six other creditors of the company who were supporting the petition. These creditors claim to be owed in the order of €5 million and are in the process of obtaining EPOs. A seventh creditor owed €724,000 was neither supporting nor opposing the petition.

The Liquidation Process

11. As stated above, the Defendant is part of a wider group of companies with a complex management structure. The Group is controlled by two sets of investors, 65% by Chinese investors and 35% by a group of European Companies. The Petitioning Creditors in this case are a member of this group, being the UK Company. The UK Company was placed into liquidation on 17 October 2018 and the Petitioning Creditors, Zelf Hussain and Mike Jervis, were appointed as liquidators on 19 October 2018. The liquidators aver that the entire group of companies are hopelessly insolvent and that the inter-company debt amounts to USD $44,151,553.00 with the overall liabilities estimated at $62,644,500.00. Due to the significant indebtedness and the number of companies in the group, the [Organisational Chart in attachments] liquidators aver that they are using their position as either creditor or shareholder in the various other group companies to try and effect an orderly winding-down of the group. In a table exhibited by Mr. Hussain the relevant inter-company relationships are illustrated thus:

12. The Defendant in this action is indebted to the UK Company in the amount of USD $37,543,553.00. The Defendant has circa USD $4.9m cash in AIB and no other identifiable assets. The Defendant currently has no management structure in place as its sole Irish director, Seán Kavanagh, resigned on 16 October 2018. According to the CRO, the Defendant has two other directors, Zhao Jun and Xin Feng. Zhao Jun resigned from the company on 1 June 2017. Xin Feng, who was also a director in the UK Company, resigned from his position from the UK Company on 23 October 2018 and is no longer involved in the management of the Defendant. The Defendant Company also no longer carries out any trade.

13. Subsequent to their appointment, the liquidators instructed counsel and solicitors to represent them in the Garnishee application, and seek the adjournment granted by Ms Justice Pilkington on 1 November, 2018. The liquidators then issued the Petition for winding-up on the 8 November, 2018. The grounds for this application are set out in the affidavit of Mr. Hussain dated 9 November, 2018. In that affidavit, the Petitioning Creditors seek to wind the Defendant Company up pursuant to s.570(d) of the Companies Act, 2014 and to have a provisional liquidator appointed as a matter of urgency. The urgency lies not only in the significant indebtedness of the Defendant, but also, as averred to at paragraph 22 of Mr Hussain's affidavit, "In circumstances where the management are unlikely to

defend any proceedings or indeed actively comply with any Court order, I am advised and believe that it is appropriate that a Provisional Liquidator is appointed to deal with the Company's assets."

14. Mr Hussain avers that PwC (UK) was first engaged by the CEO of one of the Group companies, MP & Silva Holding SA, in June of 2018 for the purposes of restructuring the Group. The proposed restructuring put forward by management required immediate cash investment to deal with substantial losses the Company had suffered. These losses included onerous contracts causing losses of USD $90m, losses incurred due to the acquisition of the FIFA Italian World Cup contract in the amount of USD $45m and the loss of the Serie A rights contract. The losses were such that the restructuring would only have been feasible if the Group received in excess of USD $100m by way of cash investment. Such investment was not forthcoming and as a result, PWC were appointed as liquidators of the UK Company with "the support of several creditors".

15. The Petitioning Creditors seek the winding up of the Defendant, and the appointment of Mr Declan McDonald of PwC (Ireland), a sister firm of PwC (UK), as provisional liquidator given the involvement of PwC (UK) with the UK company and the Petitioning Creditors' knowledge of the Group.

The Law

Jurisdiction to grant garnishee orders
16. The basis of the Plaintiff's garnishee application are two EPOs granted in May and June of 2018. Article 19 of the European Order for Payment Regulations ("EOP Regs"), which is directly effective, states:

> "A European Order for Payment which has become enforceable in the member state of origin shall be recognised and enforced in other member states without the need for a declaration for enforceability and without having the possibility of opposing its recognition."

Article 21(1) of the EOP Regs provides that –

> "Without prejudice to the regulation itself, enforcement procedures are governed by the law of the member state of enforcement."

17. The Plaintiff is entitled to enforce their EPO's both pursuant to the above EPO Regs, SI No. 551 of 2008 and Order 42C of the Rules of the Superior Courts. The jurisdiction for the attachment of debts via garnishee stems from section 63 of the Common Law Procedure Amendment Act (Ireland) 1856 which states:

> "LXIII. It shall be lawful for a Judge, upon the ex-parte Application of a Judgment Creditor, and upon Affidavit by himself or his Attorney stating that Judgment has been recovered, and that it is still unsatisfied, and to what Amount, and that any other Person is indebted to the Judgment Debtor, and is within the Jurisdiction, to order that all Debts owing or accruing from such Third Person (herein-after called the Garnishee) to the Judgment Debtor shall be attached to answer the Judgment Debt;, and by the same of any subsequent Order it may be ordered that the Garnishee shall appear before the Judge or Master, as such Judge shall appoint, to show Cause why he should not pay the Judgment Creditor the Debt due from him to the Judgment Debtor, or so much thereof as may be sufficient to satisfy the Judgment Debt."

18. This provision is reflected in Order 45 of the Rules of the Superior Courts. The relevant rules under Order 45 state:

> "1.(1) The Court may, upon the *ex parte* application of any person who has obtained a judgement or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgement or order (hereinafter called the judgement debtor), and upon affidavit by himself or his solicitor stating that judgement has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgement or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or an officer of the Court, as such Court shall appoint, to show cause why he should not pay to the person who has obtained such judgement or order, the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgement or order.
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> …
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> 3. If the garnishee does not forthwith pay into Court the amount due from him to the judgement debtor, or an amount equal to the judgement or order, and does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear, then the Court may order execution to issue, and it may issue accordingly, without any previous order or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgement or order, together with the costs of the garnishee proceedings."

The validity of the EPO's was not in dispute, nor was the prima facie entitlement of the Plaintiff to enforce such orders. The parties were, however, at odds as to the level of discretion which can be exercised in the granting of a garnishee order.

Garnishee orders and the exercise of discretion
19. The Plaintiff in this case claims that Order 45 of the RSC leaves little room for discretion. In support of this contention, the Plaintiff relies on the judgment of Hogan J in *Response Engineering Ltd v Caherconlish Treatment Plant Ltd* [2011] IEHC 416 wherein at para 27 he states:

> "[27] While it is true that the making of an order under O45 remains in the discretion of the court, it would generally require special circumstances before the court would decline on discretionary grounds to make an order in favour of a judgment creditor who had otherwise satisfied the necessary proofs. It is probably fair to say that the approach of the court in relation to such orders is more direct and somewhat less nuanced than might obtain in cases, for example, of an application for an injunction or an application for judicial review."

On this basis the Plaintiff contends that as their proofs are in order, an Order nisi has been obtained and AIB is willing to consent to any Order of the Court, the only issue which remains before the Court is whether the position of the Petitioning Creditors is such as to amount to "special circumstances."

20. However, the Court finds *Response Engineering* to be of little assistance in the present case. First, the case can be distinguished

on its facts in that it did not concern a potentially insolvent company who was seeking to be wound up while subject to an order *nisi*. In fact, the case related to competing interests of a judgment creditor and a bank who had secured an interest in the assets of the proposed garnishee. A more pertinent case, and the only similar Irish authority, is that of *Kanwell Developments Limited v Salthill Properties Limited* (In Receivership) [2008] IEHC 3, where the Court had to consider the competing interests of the party seeking a garnishee versus the party seeking to have the company wound-up. In considering the level of discretion which attaches to the making of such orders, Clarke J stated at para 5.6:

> "It is also clear that the making of a garnishee order is discretionary. It is, therefore, possible that the existence of a petition to wind up a proposed garnishee could be a material factor in the exercise of the Court's discretion."

21. Secondly, and of more significance, is the fact that the present case does not seek the refusal of the garnishee absolute on the basis of "discretionary grounds". The Petitioning Creditors contend that the present case is very clearly covered by statutory provision via s.606 of the Companies Act 2014. In this regard the Court finds that the granting of a garnishee order absolute is not merely a procedural matter and is one in which the Court retains a high level of discretion. The Court is also of the view that this is not a case where the garnishee order is sought to be refused on the basis of discretion alone but is primarily based on the interpretation of a statutory provision.

22. Further, counsel for the Petitioning Creditors submitted, and the Court accepts, that garnishee applications are a two-stage process and the intended garnishee and also any other creditors are entitled to attend and make submissions before any irrevocable order is made. It follows that another creditor is entitled to apply for an adjournment to facilitate their opposition to the making absolute of a conditional order. This right is particularly important having regard to the fact that, unlike petitions, conditional orders of garnishee and a return date for the application to make absolute are not required to be advertised.

Kanwell and "the first in time"
23. As to the approach that should be taken when seeking a garnishee order against a potentially insolvent company, the Plaintiff submits that the main issue to be determined is 'which party was the first in time?'. The point in time at which the Plaintiff gained priority over all other creditors is referred to as the "priority point." In determining the relevant priority point for a garnishee order, the Plaintiff relies on *Gough on Company Charges,* 2nd Edition, Butterworths London at page 13 wherein it is stated:

> "At the relevant priority point, the execution is said to 'bind' the property of the debtor taking an execution or, more loosely, to 'charge' or provide 'security' for the debt. The relevant priority point varies according to the mode of execution…In respect of Garnishee proceedings, the relevant point is service of the order *nisi*."

24. It is submitted that the order of *nisi*, or conditional order, was made by Ms Justice Pilkington 16 October, 2018. An undertaking was given on the day of this order not to enforce the garnishee and this undertaking was formally withdrawn on 23 October, 2018, when the Plaintiff sought to have the conditional order of garnishee made absolute. It is submitted that the latest date which could be deemed to be the priority point is the 23 October, whereas the petition issued by the Petitioning Creditors was not issued until the 8 November, 2018.

25. The Plaintiff further submits that the granting of the conditional order of garnishee created an "equitable charge" in favour of the Plaintiff on the assets of the Defendant in this jurisdiction. In this regard, the Plaintiff relies on Ellinger, *Modern Banking Law*, 5th Edition, 2011, Oxford University Press. At page 460, Ellinger describes the process of obtaining an interim garnishee and the effect of obtaining such an order, stating:

> "The service of an interim order gives rise to a number of disclosure obligations on the part of the bank, operates to freeze the sum in the hands of the bank that is equivalent to the amount of the debt, and 'creates an equitable charge on the debt' in favour of the judgment creditor."

The Plaintiff submits that there is no legal basis upon which the Defendant or Petitioning Creditors can dislodge the application for the Garnishee Order to be made absolute. As the Plaintiff is first in time, they should be entitled to their order of garnishee.

26. Moreover, the Plaintiff relies on the judgment of Mr Justice Clarke, as he then was, in *Kanwell Developments v Salthill Properties (in receivership)* [2008] IEHC 3. In *Kanwell*, the Plaintiff claimed that it was owed the sum of €5,229,000 from the Defendant and the Defendant claimed that it was owed €103,505.09 from a debtor, Porterridge Trading Limited. The Plaintiff had obtained judgment against the Defendant and made an *ex parte* application for an order *nisi* on 26th November 2007 to attach to the account of Porterridge. However, Salthill Properties Limited sought to wind-up Porterridge and issued a winding-up petition on 25th September, 2007. The sum which formed the basis of the liquidation petition was the same sum as that of the garnishee application.

27. The Plaintiff submits that the *Kanwell* decision is similar to the case at hand in that the Court was faced with a winding-up petition and a garnishee application almost simultaneously. There Clarke J, as he then was, applied the priority rule and found that the petition came first in time. The Plaintiff submits that this decision is directly applicable to this case as the underlying debt which triggered the insolvency process is the same debt which is the subject of the Garnishee application, albeit with the addition of inter-company debt and other specified creditors owed only about €150,000. In particular, reliance is placed on paragraph 6.8 wherein it is stated:

> "6.8 Very many questions concerning the entitlements of parties to payments in case of difficulty of recovery do, ultimately, depend on timing. A party who by diligence or chance registers a judgment mortgage in advance of the competing creditor may well get paid in circumstances where the competing creditor may not. Other examples could be given. There is nothing, therefore, wrong in principal (*sic*) with entitlements in relation to insolvency, or difficulty obtaining actual payment, being determined on the basis of who got in first. On that basis, I am satisfied that the ordinary position which should pertain in case (*sic*) of competing winding up and Garnishee applications, is that a prior petition to wind up a company should take precedence over a subsequent application to invoke the Garnishee process. On that basis the prima facie position in this case is that the winding up petition in respect of Poterridge should take precedence over the Garnishee application…

28. In contrast, the Petitioning Creditors submit that Kanwell is distinguishable first, as it can be confined to its unusual facts and second because it dealt with the applications in reverse order, that is, it was presented with the winding-up petition prior to the garnishee application. It is worth noting at this point before exploring the findings of Clarke J, as he then was, that this case is particularly unusual and involved assertions on both sides that neither the garnishee application nor the liquidation petition were *bona fide*. First, the case stemmed from a series of complex litigation arising out the collapse of the Cunningham group. Second, the company from which both parties were seeking to obtain sums due and owing, Porterridge, had no assets of its own. If a garnishee

absolute was granted to the receiver, Porterridge would have had to borrow from other companies within the Cunningham group, use these funds to discharge all of Porterridge's debts to Salthill and a portion of Salthill's debt to Kanwell. Effectively, Porterridge's liabilities would move from being to Salthill, which was controlled by the receiver, to another company within the control of Mr Cunningham which was not in receivership. In contrast, it was submitted that to grant the petition for winding-up would be to allow the liquidator to take control of the substantive claims maintained by Porterridge in the overall proceedings or to give effect to a termination of leases which Porterridge holds which would advance the position of the receiver.

29. It is also of significance that the House of Lords decision in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 (which will be discussed in due course) was not opened to the court in *Kanwell* and did not feature in the judgment of Clarke J. Perhaps this is not surprising as the winding-up petition had been presented some two months before the application for the order *nisi*. It means, however, that the situation that arises in the present case has not been fully considered by an Irish court, the reasoning and decision in *Robert Petroleum* (and other UK cases) has not previously been argued or considered in context in this jurisdiction, and the *obiter* comments of Clarke J must be read in the light of the different case before him. Moreover his own observation was that where the garnishee order is first in time "the situation is more complex", and at para.6.6 he stated that "… a court should, generally, lean against permitting the invocation of a garnishee procedure in respect of a company's assets at a time when the company is subject to an, as yet undetermined, petition for its winding-up."

30. Insofar as the "first in time argument" is advanced in Kanwell, it is somewhat different to the present case as the petition for winding-up issued almost two months before the garnishee application was brought. In approaching the question of the competing garnishee and winding up petition, Clarke J considers that as the effect of both applications will effectively be the same as they relate to the same debt, then the pragmatic approach is to determine which application came first in time. The Plaintiff claims that this is the test which should apply in this jurisdiction and that in applying that test, the garnishee order should be made absolute as it is the first in time. However, the judgment in Kanwell is not so clear-cut. In discussing the possible effects of making either order, those being a winding-up order or a garnishee absolute, Clarke J at 6.6:

> "6.6 The approach is technically correct irrespective of which process is initiated first. As soon as a petition to wind up a company has been presented all of the assets of the company are contingently subject to the possibility that the petition will be successful and that intervening dispositions will, retrospectively, be treated as invalid. It would, in my view, be wholly inappropriate for a court to intervene during such a period (in the absence of the sort of good reason that would have entitled the court to prospectively validate a transaction in exercise of the jurisdiction identified in *Joyce v. Wellingford Construction* [2005] IEHC 392) so as to interfere with the orderly disposition of the company's assets in accordance with insolvency law. In those circumstances it seems to me that a court should, generally, lean against permitting the invocation of a garnishee procedure in respect of a company's assets at a time when the company is subject to an, as yet undetermined, petition for its winding up.
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> 6.7 Likewise it seems to me that a court should lean against winding up a company solely on the basis of a debt owed to a petitioner where that debt had, prior to the presentation of the petition, been the subject of an order nisi of garnishee. I fully appreciate that this latter situation is more complex, in that the rights and entitlements of other creditors of the company and, indeed, its members come into play in the exercise of the court jurisdiction in relation to winding up. The making of a winding up order does not, therefore, in most cases, involve only a consideration of the debt of the petitioner. Indeed it is clear that even if the debt of the petitioner has been discharged in the period between the presentation of the petition and same coming on for hearing, the court may nonetheless be constrained to wind up the company if it is, in all the circumstances, appropriate so to do having regard to the interests of the other creditors. However where the only party pressing for a winding up order is a creditor whose debt had, prior to the presentation of the petition, been the subject of a garnishee order nisi, which, if made absolute, would lead to the debt being extinguished by a requirement to pay a creditor of the petitioner, then it seems to me that those circumstances would amount to a weighty factor which would lean against the winding up of the company.
>
> 6.8 Very many questions concerning the entitlements of parties to payment in cases of difficulty of recovery do, ultimately, depend on timing. A party who by diligence or chance registers a judgment mortgage in advance of a competing creditor may well be paid in circumstances where the competing creditor may not. Other examples could be given. There is nothing, therefore, wrong in principle with entitlements in relation to insolvency, or difficulty of obtaining actual payment, being determined on the basis of who got in first. On that basis I am satisfied that the ordinary position which should pertain in the case of competing winding up and garnishee applications, is that a prior petition to wind up a company should take precedence over a subsequent application to invoke the garnishee process. On that basis the prima facie position in this case is that the winding up petition in respect of Porterridge should take precedence over the garnishee application. In that context it is next appropriate to consider whether either of the matters advanced on behalf of Kanwell are sufficient to require the court, in equity, to alter that situation. I turn first to the contentions made by the parties as to the lack of bona fides in the respect of applications."

31. The Petitioning Creditors conceded that the Plaintiff was the first in time. This is confirmed by Mr Hussain at paragraph 21 of his affidavit where he states "for the avoidance of doubt, I acknowledge that the plaintiff is the creditor who moved first in time." The Petitioning Creditors submit that the real issue before this Court is the interpretation and application of section 606 of the Companies Act.

Section 606 of the Companies Act, 2014

32. Whereas the Plaintiff places its reliance on Kanwell and the first in time argument, the Petitioning Creditors base their case on s.606 of the Companies Act which states:

> "(1) Subject to subsections (2) to (4), where a creditor has—
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> (a) issued execution against the goods or lands of a company, or
>
> (b) attached any debt due to the company,
>
> and the company is subsequently wound up, the creditor shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless the creditor has completed the execution or attachment before the commencement of the winding up.
>
> (4) Notwithstanding subsection (1), the rights conferred by that subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

(5) For the purposes of this section—

(b) an attachment of a debt shall be deemed to be completed by receipt of the debt…"

The commencement date referred to in this section is defined in section 589 of the Companies Act 2014 which states:

"(1) Save in a case falling within subsection (2), the winding up of a company by the court shall be deemed to commence at the time of the presentation of the winding-up petition in respect of the company."

The "commencement date" in this case is therefore 8 November 2018 when the Petition was filed. The Petitioning Creditors then rely on the wording highlighted in subsection (1) (b) above to argue that as the attachment of the debt via Garnishee has not yet been confirmed or made absolute it can be challenged by a potential liquidator.

33. The Petitioning Creditors submit that this is first and foremost a matter of statutory interpretation as to whether the Plaintiff has "completed the execution or attachment before the commencement of the winding up". If the Court finds that it has, then the order *nisi* may be made absolute. If it has not, then the Court can consider, as per s.606(4), whether the rights of the proposed liquidator should be set aside in favour of the creditor in a manner which the Court deems fit.

34. Unfortunately, there is little by way of Irish case law which provides guidance as to the interpretation of this section. For that reason, much of the case law opened to the Court was from the English courts and concerned an almost identical provision in that jurisdiction, section 226 of the Companies Act, 1948. Section 226 precludes a creditor to whom a company is indebted from taking steps against that company to secure their own position where the liquidation process has begun. It is also similar to section 325 of the Companies Act 1936. Section 325, as amended by section 36 of the Administration of Justice Act 1956, states:

"(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up:

provided that

(a) Where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding up;

(b) The rights conferred by this sub-section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.

(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by the receipt of the debt, and an execution against land shall be deemed to be completed by seizure or by the appointment of a receiver."

35. These provisions have been considered extensively in English case law, the most pertinent case being that of *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192.

36. In *Roberts Petroleum*, the Plaintiffs were suppliers of petroleum to the Defendant who owned two petrol stations. By October 1978, the defendants were significantly indebted to a number of creditors, including the Plaintiff. On 8 March 1979, the Plaintiff's issued a specially indorsed writ claiming £74,000.02 from the Defendants. The Defendants did not enter an appearance. A meeting took place between the Defendants' directors on 12 March 1979 at which instructions were given for a statement of affairs to be prepared. Notice was then given to creditors of an informal creditors meeting which was to take place on 26 March 1979. Creditors were asked not to take or continue any legal action against the Defendants. The Plaintiffs seemed to disregard this request and entered judgment against the Plaintiffs on 23 March 1979. They also sought and were granted a charging order *nisi* and a receiver was appointed. A number of steps were taken by both the Defendants and the creditors of the company which resulted in an extraordinary meeting being held on 2 April 1979 where a resolution was passed to wind-up the company and appoint a liquidator. On 4 April 1979, the Plaintiffs were granted an absolute order of garnishee however this was appealed and the order was eventually set aside by the House of Lords.

37. In his judgment, Lord Brightman was concerned with the potential knock-on effect of allowing the Plaintiffs to have their order made absolute in circumstances where a company is on the brink of insolvency. At p. 203 he states:

"The question is of importance to the commercial community. If the respondent is right, and an intervening voluntary liquidation does not inhibit the making absolute of a prior order *nisi*, there is every incentive for judgment creditors to issue execution at the last moment of an insolvent company's life in order to secure their position and gain an advantage over less agile or more patient creditors."

38. Lord Brightman then goes on to cite the Order 50 of the Rules of the Superior Courts and s.35 of the Administration of Justice Act 1956, which is almost identical in its terms to Order 45 of the Rules of the Superior Courts. The procedure is the same as that in this jurisdiction in that the creditor must apply for the order *nisi*, then they must put then judgment debtor on notice of their application to make the order absolute and at the hearing to make the order absolute, the judge may hear from both sides and decide whether or not to make the order absolute. It was emphasised by Lord Brightman that an order *nisi* does not have finality, nor is it beyond reproach. As stated at p.205:

"[The order *nisi*] created an immediate charge…But all this was subject to sufficient cause not being shown to the contrary on April 4. In other words, the order was defeasible, without prejudice to any acts of the receiver."

39. He further states at p.208: "The purpose of the further consideration of the order *nisi* is to enable the Court to review the position *inter partes*. At the date of the order *nisi* the court has made no irrevocable decision."

40. In addressing the core issue as to whether or not an order *nisi* should be made absolute where a liquidation occurs, or potential liquidation surfaces, after the order *nisi* but before the order is made absolute, Lord Brightman considered the revocable nature of the order *nisi* to be key. He stated at p.209: "I do not see why a creditor should gain an advantage merely because he has a revocable

order for security at the time when the statutory scheme comes into existence…Roberts had no more than a defeasible charge."

41. He goes on to consider section 226 of the Companies Act of 1948, which is broadly similar to s.606 of the Companies Act, 2014 and its application in a number of similar cases such as *D. Wilson (Birmingham) Ltd v Metropolitan Property Developments Ltd* [1975] 2 ALL ER 814 and *Rainbow v Moorgate Properties Ltd* [1975] 1 WLR 788. In both *Wilson* and *Rainbow* the garnishee orders *nisi* were made at a time when the companies were insolvent. After the orders *nisi* were granted, the debtor companies both presented petitions for winding up. Subsequent to the presentation of the petitions, the garnishee orders were made absolute. The Court of Appeal discharged the garnishee orders in both cases. Lord Brightman notes of all the case law considered, only one case involved an actual liquidation taking place before the garnishee was made absolute, in the majority of the cases "liquidation or a scheme of arrangement, was an imminent prospect but was not a fact."

42. Lord Brightman considers what the term "completed execution" means at page 213. He states that in his view there must be a "final order of the court". Specifically, in relation to the attachment of debt he states "there must be receipt of the debt. A debt due to the judgment debtor would not be paid to the judgment creditor under a garnishee order which was merely nisi." In conclusion, Lord Brightman finds that the imposition of a scheme of arrangement on an insolvent company for the purposes of liquidation is sufficient cause for not converting the order nisi into an order absolute. In support of this finding he states that this approach "may help to avert an unseemly scramble by creditors to achieve priority at the last moment." Roberts has been followed in cases such as *Clarke v Coutts* [2001] EWCA Civ 943.

43. In inviting this court to follow *Roberts Petroleum*, the Petitioning Creditors argue that this means that the Plaintiff would have had to have obtained by the 8 November, 2018 not only an order of garnishee absolute, but also actual receipt from AIB of the garnisheed monies in order for there to have been a "completed…attachment" within the meaning of s.606(1)(b). Without this completion it is submitted that this Court is not obliged to make the garnishee order absolute.

44. The decision in *Roberts Petroleum* was applied by UK Court of Appeal in *Clarke v Coutts & Co* [2002] EWCA Civ. 943 where Peter Gibson LJ stated:

> "…the ratio of Roberts is that it is wrong to allow a creditor who by an order *nisi* only has a defeasible right to steal a march on other creditors when liquidation has commenced. Liquidation initiates the imposition of a statutory scheme for the *pari passu* distribution of the assets of the debtor company."

45. The Petitioning Creditors submitted that this approach was taken even prior to the enactment of the Companies Act 1948 and in other cases where the section does not arise but issues of insolvency do. In support of this contention they referred to *Wood v Dunn* (1865) LR 1 QB 77; At p.83, Lush J states: "It has been held and must be taken as settled law, that if the bankruptcy of the judgment debtor intervenes at any time before the garnishee has paid over the money, the attachment must lapse, and the judgment creditor must come in with the other creditors and take his share of the assets." They also cited *George Lee & Sons (Builders) Ltd v Olink* [1972] WLR 216, where Russell LJ followed the decision in *Prichard v Westminster Bank Ltd* [1969] 1 WLR 547. The dicta of *Prichard* was essentially that where an estate is insolvent, regardless as to the provision which such insolvency comes under, an order *nisi* should not be made absolute as a garnishee is an equitable remedy and it is not equitable to prefer one creditor over another.

46. Counsel for the Plaintiff sought to distinguish *Roberts Petroleum Limited v Bernard Kenny Limited* [1982] 1 WLR 301 on the factual basis that the plaintiff in that case knew that the defendant's insolvency was in prospect when obtaining the order of garnishee *nisi* and was aware of the garnishee company resolution for a voluntary winding-up passed at an EGM two days before the High Court made the order absolute. In the present case there was no "queue" of creditors, and no meeting of creditors, and it was asserted that the purpose of seeking the order of garnishee was not to obtain advantage over other creditors, and that the plaintiff was not aware of any winding up on 16 October, 2019 (when the order *nisi* was made) or 1 November, 2019 when Mr. Farrelly obtained an adjournment. Notwithstanding that the House of Lords in *Roberts* subsequently ruled in favour of a liquidation and set aside the absolute order of garnishee, Counsel did rely on the following statement of Lord: "2. The burden of showing cause why a charging order *nisi* should not be made absolute is on the judgment debtor". Effectively, the Plaintiff submits that the burden here is on the Petitioning Creditors to dislodge or have set aside the order *nisi* on the basis of special circumstances.

Decision on the appropriate test

47. I find both s.606 and the interpretation of the similar English provision in Roberts Petroleum to be compelling. In this Court's view, it is clear that in order for "execution" to be such as could interfere with the liquidation must have a degree of finality. In terms of an order for garnishee, it must be an order absolute. In my view, s.606 expresses the legislature's preference for there to be an orderly winding up and for the statutory priorities to apply when a company goes into liquidation, or liquidation is imminent due to its insolvency. Subsection (1)(b) of s.606 refers to a creditor being deprived of attachment of debt where "the company is subsequently wound up", so it expressly contemplates a petition and winding up order being made *after* an attachment of debt. The section therefore leans against a "first in time" reward for a party who obtains only a conditional order of garnishee. Subsection (4) expressly provides that attachment of a debt is not completed until "receipt of the debt" – which usually does not occur until after the order *nisi* is made absolute.

48. The question then arises as to whether under subsection (4) the rights conferred on a liquidator under subsection (1) "may be set aside by the Court in favour of the creditor to such extent and subject to such term as the Court thinks fit". The first point to be made is that this does not seem to arise until *after* a liquidator has been appointed.

49. Even if it is assumed that this court can avail of subsection (4) pre-liquidation, the subsection appears to give the Court a discretionary power, but does not give any guidance as to the circumstances in which the Court might exercise it even though its exercise will necessarily oust the usual priorities for the payment of creditors. The mere fact that a conditional order of garnishee has been obtained before a petition is presented surely cannot be sufficient, as that would entirely undermine subsection (1) and the core intention behind s.606 and the normal priorities that apply in a winding up. It must therefore be a subsection that can only apply in exceptional circumstances, for example, where a fraud or criminal wrongdoing has been perpetrated against a creditor that prevents the completion of execution or receipt of a garnisheed debt. Nothing of that nature emerges from the facts in the present case, and counsel for the Plaintiff did not advance any cogent arguments or exceptional circumstances to justify the Court exercising its discretion in favour of the Plaintiff under subsection (4), relying essentially on the 'first in time' argument. I am not satisfied that that the Plaintiff is entitled to call in aid subsection (4).

The claim of insolvency

50. In response to the Petitioning Creditor's submissions that s.606 and *Roberts Petroleum* should be applied in the present case, the Plaintiff submits that the standards in those tests are simply not met. Specifically, the Plaintiff submits first, that there is no proof of

insolvency and second that no meaningful steps have been taken to progress the liquidation.

51. In addressing this first issue, proof of insolvency, the Plaintiff submitted that there was no evidence that the Company in question was even insolvent. In response to this submission, the Petitioning Creditors point to the first affidavit sworn on behalf of the Plaintiff by Luigi de Siervo on 15th October 2018 where he refers at paragraph 33 to the "… very worrying and problematic newspaper reports arising from the newspaper media which give rise to an immediate fear that the insolvency of the Defendant is imminent", and states at paragraph 43 that "There is ample evidence to show that the Defendant and the wider group of companies of which it is a part is possibly insolvent." Exhibited to this affidavit are a number of newspaper and media reports referring to the insolvency of other companies within the group, including the petition to wind-up the UK Company. This is significant for two reasons, first it is submitted that later submissions which downplay the insolvency of the groups and question such insolvency altogether are disingenuous. Second, the Petitioning Creditors submit that there was an awareness on the part of the Plaintiff as to the insolvency of the Defendant at the time of the garnishee application, and that it was further aware of the insolvency process which had started with other companies within the group. In any event, in this Court's view it is quite clear that the company, and indeed the group of companies, are insolvent. Further, while the Plaintiff alleged that there was no evidence of debt and asked the Court to discount the inter-company debt, it was not disputed that all that is required of a petitioner is *prima facie* evidence of debt. I am satisfied that the Petitioning Creditors have discharged this onus of proof and in particular can rely on the evidence in the second affidavit of Zelf Hussain sworn on 23rd November, 2018.

52. The second issue raised by the Plaintiff is the progression of the liquidation. The Plaintiff submits first, that only 2 of the 13 companies within the group have entered into liquidation. The Plaintiff questions not only the progress of, but also the ability to effect, an orderly winding-up of the group of companies. It is submitted that the averments by the Petitioning Creditors that they will endeavour to effect an orderly winding up are uncertain and that the winding up itself is not yet ready to proceed as no plan or scheme has yet been put into action. In this regard, the Plaintiff relies on *Roberts Petroleum* where Lord Brandon stated:

> "6. The following combination of circumstances, if proved to the satisfaction of the Court, will generally justify the Court in exercising its discretion by refusing to make the Order absolute:
>
> (i) The fact that the judgment debtor is insolvent;
>
> (ii) The fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding."

53. The Plaintiff submits that the Petitioning Creditors in this case fall far short of these requirements as, even if it is insolvent, no scheme of arrangement has been put in place. At best, the Plaintiff submits that the Defendant company is "on the road to liquidation" which according to *Roberts Petroleum* is insufficient to dislodge a garnishee. In that regard Lord Brandon states:

> "The authorities do not, in my view, establish that the insolvency of a company, followed or to be followed, inevitably later by a liquidation, is enough of itself to justify the Court in exercising its discretion by refusing to make an Oder *nisi* absolute. There must, as I have indicated earlier when trying to summarise the collective effect of the authorities, be some further factor in the situation, the most common such factor being that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding."

54. The Petitioning Creditors submit that as these proceedings have been before the Court since the time of issue of the petition, it would have been inappropriate to take any steps to appoint a liquidator or to present the winding-up petition. The Petitioning Creditors further submit that if it had proceeded with the winding up application in the face of the continuing dispute in the Garnishee application, this is conduct which the Court could have had regard to when dealing with the within application and the Court could have set aside the rights of the liquidator and other creditors. In any event, the petition has now been issued so the Petitioning Creditors submit that the company is more than simply "on the road" to liquidation.

55. In relation to delay in the issuing of the petition itself, in the affidavit of Mr Hussain it is averred that the liquidators were not in a position to move the liquidation application until their appointment as liquidators to the UK Company on 18th October, 2018, and thereafter it was necessary to engage with former company management in order to ascertain the position with regard to inter-company debt.

56. Furthermore, in relation to the potential scheme or plan for the winding-up, the Petitioning Creditors submit that they are bound to have consideration to the Recast Insolvency Regulation. It is submitted that there needs to be a Europe-wide insolvency process under this regulation. Specifically, Article 56 of that regulation provides:

> "Cooperation and communication between insolvency practitioners
>
> 1. Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate to facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest. That cooperation may take any form, including the conclusion of agreements or protocols.
>
> 2. In implementing the cooperation set out in paragraph 1, insolvency practitioners shall
>
> (a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;
>
> (b) consider whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision;
>
> (c) consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan.
>
> For the purposes of points (b) and (c), all or some of the insolvency practitioners referred to in paragraph 1 may agree to grant additional powers to an insolvency practitioner appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings. They may also agree on the allocation of certain tasks

amongst them, where such allocation of tasks is permitted by the rules applicable to each of the proceedings."

It is submitted that this Regulation, taken together with Articles 57 and 58 of the Insolvency Regulation require as a matter of EU law that there be a collaborative and uniform winding-up of the Group.

57. In finding that the Court is not obliged to make the order of garnishee absolute, the Court must now consider whether or not to grant the garnishee order absolute or whether to grant the Petition to wind-up the company. The preponderance of case law, including that discussed above, generally favours allowing the insolvent company to be wound-up in an orderly manner so as not to put any creditor at a particular disadvantage.

58. The Court has also had regard to the submissions of the parties. The Petitioning Creditors submitted that there are a range of "rights and entitlements" to be considered by this Court in weighing the petition against the garnishee. The Petition sets out the creditors not only of the Defendant company, but also the creditors of the UK Company. The Petitioning Creditors submit that allowing the Plaintiff to recover their debt in the manner sought will not only be to the detriment of the defendant's other creditors, but also to the detriment of creditors of the UK Company who will suffer losses if the UK Company cannot recover their significant inter-company debt from the Defendant. At paragraph 23 of Mr Hussain's affidavit he also avers that the rights and entitlements of the employees of the defendant company should be considered and dealt with in a winding-up.

59. The Petitioning Creditors seek to implement an "orderly group winding-up" to ensure all unsecured creditors are dealt with rateably. At paragraph 22 of the affidavit of Mr. Hussain dated 9 November 2018 he states that "I believe it cannot be appropriate for a single creditor to recover sums which ought to be distributed *pari passu* in the normal way." Further on in the same affidavit he avers at para 27 that the appointment of a provisional liquidator and granting of various powers sought to be conferred on the liquidator would ensure that "there is no scramble by creditors to benefit at the expense of other creditors" and would "prevent the position of the creditors worsening, to deal with the employees appropriately and to maximise the intercompany recoveries for the benefit of all creditors".

60. The Plaintiff, however, submits that the Inter Company debt is not a trading debt and that the actual trading debts account for less than €150,000 of the overall debt of the Defendant. The attitude of these trade creditors is unknown and none of these trade creditors participated in the petition presentation. Moreover, the plaintiff submits that as in *Roberts Petroleum*, the most significant debt is that which was the subject of the Garnishee Order. In that regard Lord Brandon stated:

> "I consider that this is a significant additional factor to bear in mind, the amount of money owed to Roberts, for which they already had a judgment, represented about 45% of the total amount of money owed to all the other knowing trade creditors taken together. This fact makes it difficult to regard those other creditors as being the main body of Kenny's creditors."

61. Finally, the Plaintiff submits that the "other creditors" which Mr Hussain avers should be allowed to recover are unknown and that the Group debt cannot be taken into account as it is not properly set out on affidavit and in any event no real or meaningful group insolvency plan has been put in place. For these reasons the Plaintiff submits that there is no special circumstance which would give rise to this Court dislodging the order *nisi* which was obtained first in time and the order should be made absolute.

Decision

62. I accept as correct the Petitioning Creditors' evidence and submissions. I am satisfied that the company is insolvent and should be would up, and that the conditional order of garnishee should be discharged. However, having regard to the extent of the asserted inter-company debt, proof of which relies primarily on group spreadsheets prepared by group financial staff cooperating with the Petitioning Creditors, it is preferable in this instance to appoint a liquidator other than an accountant from PwC (Ireland), a sister firm of PwC (UK). This is not because of any suggestion of lack of qualification, professionalism or independence of the proposed liquidator. Rather it is because the main task of the liquidator that this Court appoints will be to verify the validity and extent of the inter-company debt and it is important that the liquidator be perceived to be an entirely independent and disinterested party in order to optimise transparency and impartiality in the process.

63. Accordingly: -

> a. The Petitioning Creditors have shown sufficient reason for the Court not to make the conditional order of garnishee absolute. The application to make the conditional order of garnishee absolute is therefore refused, and the conditional order stands discharged.
>
> b. The Court will appoint a liquidator to the company but will require the submission of alternative name(s). In the meantime, the monies at issue should continue to be held on deposit by AIB.

Addendum to judgment

64. On 13th May, 2019 the parties were notified that this judgment would be delivered on 15th May, 2019. On 14th May, 2019, when the text of the judgment had been completed, Counsel for the Plaintiff (Mr. Jarlath Ryan B.L.) attended before me in the presence of counsel for the Petitioning Creditors and supporting creditors (Mr.Edward Farrelly B.L. and Mr. Declan Murphy B.L.), and presented a letter from the plaintiff's solicitors to the other parties' solicitors stating:

> "Dear Sirs,
>
> It has come to our client's attention that the liquidator of MP & Silva SARL is recommending to the Monaco Court that a claim in the sum of €59,975,890.07 be admitted in the liquidation of MP & Silva SARL in relation to monies owed from MP & Silva SARL to Media Partners & Silva Limited.
>
> This materially affects the underlying issue in the above proceedings, being the solvency of Media Partners & Silva Limited. We believe that this development should be brought to the attention of the Court in light of the material impact that this development has on Orders that may or may not be made by the Court.
>
> We intend to mention the matter to Mr Justice Haughton tomorrow morning.
>
> Yours faithfully"

65. On this basis Mr. Ryan asked the court to consider reconvening the hearing of the Petition, and by extension the Garnishee proceedings. This was opposed by counsel for the other parties. I decided to consider the request and review the papers accordingly, and to communicate on 15th May either a decision to reconvene, or to deliver my judgment as prepared.

66. The second affidavit of Zelf Hussain dated 23 November, 2018 is of assistance. At paragraph 12 he states:

> "The Irish company has recoverable assets of less than €5m. These relate to cash balances at bank. The other assets which the Irish company had for accounting purposes are receivables. They are largely receivable from the Group of companies in circumstances where the Group is insolvent and it has stopped trading. *In my view the Defendant Company will not recover any of these receivables in full*. Comparable to that is the indebtedness of the Irish company which is for USD$37,543,553 to the Petitioning Creditor and a minimum of €18,033,143.12 to the Plaintiff as well as the smaller creditors above. In that regard I beg to refer to the Petition and the grounding affidavit sworn by me on 9 November 2018." [Emphasis added]

Further creditors represented by Mr Murphy claim to be owed in excess of €5 million by the company, and a further creditor (Genoa) appears to be owed €724,000. In addition, there are trade creditors owed in the region of €150,000.

In the Consolidated Group Balance sheet dated 31 May 2018 exhibited with the Petition, it is apparent that MP & Silva SARL (Monaco) under accounts receivable is owed inter-company receivables of €54,567,941. Total current assets are stated to be €103,041,484. However, this is balanced by total current liabilities of €197,830,807. It has total capital and reserves of €89,765,521.

67. Also disclosed with the Petition is an "Inter-company Matrix (USD)" which demonstrates that the Monacan company owes the Petitioning Creditors $17,170,084, owes the Company $70,752,081, and the Singapore group company $3,318,946, giving a total inter-company indebtedness of the Monaco company of $91,241,111.

68. There is therefore evidence to suggest that the Monacan company is highly insolvent. There is no evidence adduced by any party to suggest the possibility, let alone probability, of any dividend or any significant dividend for the company arising from the Monacan liquidation. The mere fact that the Monaco company liquidator is recommending that certain debt be 'accepted' is meaningless in the absence of any information or suggestion that there will be any dividend at all. Moreover consideration of the Consolidated Group Balance Sheet would suggest that most if not all of the group companies are carrying substantial intercompany debt the bulk of which will never be repaid. Indeed, as noted early in my judgment, the Petitioning Creditors aver that the entire group of companies are hopelessly insolvent and that the inter-company debt amounts to USD $44,151,553.00 with the overall liabilities estimated at $62,644,500.00. Of course if it turns out that there is to be a substantial payment made by the Monaco company liquidator to the company (or its liquidator) then all the unsecured creditors, including the Plaintiff, will benefit rateably.

69. The above judgment was prepared on the basis, inter alia, of all the averments, documents and spreadsheets exhibited in the garnishee proceedings and the Petition. It is clear that the Petitioning Creditors fully disclosed the existence of theoretical receivables due to the company from the Monaco company. I accept the argument put forward by Messrs Farrelly and Murphy in opposing reconvening the hearings that the Plaintiff has not presented any affidavit or fresh evidence, and in particular there is no evidence of any likelihood of any significant dividend such as might undermine a finding that the company is insolvent. This intervention comes too late in the day and is not based on any cogent evidence that would warrant re-convening the hearing of either of the proceedings or affording the parties an opportunity to adduce further evidence. My judgment therefore stands.