Neutral Citation Number: [2010] IEHC 358

THE HIGH COURT

2010 29 COS

IN THE MATTER OF FENCORE SERVICES LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

Judgment of Miss Justice Laffoy delivered on the 15th day of February, 2010.

The history of the petition
This petition to wind up Fencore Services Limited (the company) was presented by Danske Bank A/S trading as National Irish Bank (the petitioner) on 13th January, 2010. It was made returnable for 8th February, 2010.

The petition is grounded on an unsatisfied demand under s. 214 of the Companies Act 1963 (the Act of 1963). The demand was made on 14th December, 2009. In it the petitioner demanded the payment of sums due on two term loans and on an overdraft facility which aggregated €5,686,143.60. The petition was verified by a short affidavit sworn on 15th January, 2010 by Michael Leonard, an official of the petitioner. The affidavit explained why the petitioner, which is a secured creditor, was pursuing the compulsory winding up route, rather than the receivership route. It disclosed that the company was involved in the shipping business. A ship owned by the company, the M. V. Kilcoe, which was chartered out and regularly visited Marseilles, was the subject of a mortgage in favour of the petitioner. The petitioner could appoint a receiver on foot of the mortgage, but such receiver might not be recognised in France. The purpose of seeking a winding up order was that a liquidator appointed by the Court would be recognised in all countries of the European Union and would, therefore, be in a position to protect the interests of all of the creditors of the company, including the petitioner.

The petition was advertised in two national daily newspapers and in Iris Oifigiúil on 19th January, 2010. The petitioner proposed that George Maloney, chartered accountant, be appointed official liquidator. There was a letter of consent from Mr. Maloney before the Court and also an affidavit of his suitability to act as official liquidator. If the company had not been voluntarily wound up between the presentation of the petition and the return date, the Court would have made a winding up order when the petition was heard on 8th February, 2010, because the proofs were in order and it would clearly have been proper to make such order.

However, in the intervening period between the presentation of the petition and the return date the company issued a notice dated 20th January, 2010 pursuant to s. 266 of the Act of 1963 that a creditors' meeting would be held on 2nd February, 2010. The petitioner received the notice on 25th January, 2010 and Mr. Leonard is aware that it was advertised in one national daily newspaper on 21st January, 2010. For present purposes, I am assuming that the notice of the creditors' meeting was properly advertised.

Mr. Leonard attended the creditors' meeting accompanied by the petitioner's solicitor and Mr. Maloney. The meeting was chaired by Noel Hanley, a director of the company. The meeting was told that earlier on that day the members of the company had passed a resolution for the voluntary winding up of the company and nominated Alan Fitzpatrick, a chartered company secretary, as liquidator. A statement of affairs was presented to the meeting. Mr. Leonard raised certain queries in relation to the statement of affairs and received answers which he considered were not satisfactory. Neither the petitioner, nor any of the other creditors present at the meeting, nominated an alternative liquidator. However, it was made clear on behalf of the petitioner that it did not intend to withdraw its petition. Mr. Fitzpatrick was appointed liquidator.

Mr. Leonard swore a second affidavit grounding the petition on 5th February, 2010 setting out the reasons why the Court should make a winding up order rather than to permit the creditors' voluntary winding up to proceed. Three affidavits were sworn on 5th February, 2010 on behalf of the company in response to the petition: by Mr. Hanley, Mr. Fitzpatrick and Daniel J. Hanley, the company's solicitor. A further affidavit was sworn on 8th February, 2010 by Mr. Hanley specifically in response to Mr. Leonard's second affidavit.

The petition was heard on 8th February, 2010.

Statement of affairs
Before outlining the reasons put forward by the petitioner for seeking a winding up by the Court, it is convenient to consider the statement of affairs put to the creditors' meeting.

The liabilities of the company are listed as follows:

The petitioner (secured debt) €5,676,158

Bank of Scotland Ireland €843,170

Trade creditors:

Green Star Shipping Ltd. €2,900,000

Hanley & Lynch €24,200

Park Chambers €13,118 €2,937,318

Renee Hanley €1,000,000

Revenue Commissioners (PAYE) €13,527

Obligations under leases €11,000

Total: €10,481,173

As regard the attitude of the creditors, Bank of Scotland Ireland did not attend the creditors' meeting but it was represented by counsel on the hearing of the petition and supported the petition and the compulsory winding up of the company. The Court was informed that it has no formal security. Green Star Shipping Company Limited (Green Star), Hanley & Lynch, the company's solicitors, and Park Chambers, the company's auditors, and Renee Hanley (Mrs. Hanley) were represented at the creditors' meeting by proxies. Mr. Leonard has averred in his second affidavit that Mr. Hanley, who held three proxies, indicated that those creditors were minded to vote for the company's nominee as liquidator, if an alternative proposal for liquidator was put forward. The Revenue Commissioners did not attend the creditors' meeting and were not represented at the hearing of the petition.

The petitioner has raised issues in relation to the status of Green Star and Mrs. Hanley as creditors of the company.

The assets of the company are listed in the statement of affairs, showing the estimated realisable value of the assets based on the opinion of the directors, as follows:

Fixtures and fittings €1,000

Insurance claim €3,500,000

Debtors Nil

Fencore Varna Limited €500,000

Motor vehicles €10,000

M. V. Vaagen €250,000

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Total: €4,261,000

The petitioner has raised issues in relation to the insurance claim and Fencore Varna Limited (Varna).

The statement of affairs shows a total deficit of €6,220,173.

Green Star
The petitioner's primary concern in relation to Green Star is identifying what interest it has in what the petitioner asserts is the principal asset of the company, the M.V. Kilcoe, which is the subject of a ship's mortgage in favour of the petitioner. That mortgage, a copy of which has been exhibited, was executed on 13th August, 2008 by the company in favour of the petitioner and it was registered in the register maintained under the Mercantile Marine Act 1955 (the Act of 1955) on 20th August, 2008. Contemporaneously with the mortgage, the company executed a deed of covenant in favour of the petitioner. In clause 8 of the deed of covenant the company undertook, *inter alia*, with the petitioner:–

(i) at all times to remain the sole, absolute and beneficial owner of the vessel (para. (c)) and

(ii) not to sell or agree to sell or transfer or assign "the Secured Property", which was defined as including, in addition to the vessel, earnings arising out of the ownership, possession, use or operation of the vessel, or to dispose of the vessel or any share or interest therein (para (d)).

Mr. Leonard averred in his second affidavit that in recent times the M. V. Kilcoe had been under charter to an Algerian State Agency known as CNAN. Under clause 4.1(b) of the deed of covenant, the earnings, including charter receipts, were assigned in favour of the petitioner by way of security.

As appears from Mr. Leonard's second affidavit, what gave rise to concern on the part of the petitioner was that there was entered in the register a transaction which was described as "Bill of Sale" dated 16th January, 2009 from the company to Green Star, which was registered on 28th January, 2009. An extract from the register certified on 20th July, 2009 by the Register of Shipping Port of Cork has been exhibited by Mr. Leonard, which shows the name of the ship as "Kilcoe".

In his first replying affidavit Mr. Hanley averred that he incorporated Green Star and negotiated a long term contract for the M. V. Kilcoe. What is clear from the evidence before the Court is that Mr. Hanley bought Green Star, a shelf company, from Mr. Fitzpatrick – a matter which has given rise to a separate issue which will be addressed later. The current position, as appears from an annual return (Form B1) filed in the Companies Registration Office (CRO) on 26th January, 2010 is that Mr. Hanley owns the entire issued share capital of Green Star. The directors are Mr. Hanley and Sian Brazil.

Further concerns of the petitioner in relation to the M. V. Kilcoe have been averred to by Mr. Leonard. First, when the petitioner took the mortgage over the vessel in August 2008 it was registered under the name M. V. Kilcoe and was registered under the Irish flag. Clause 8(k) of the deed of covenant required the company to procure and ensure that the vessel is registered and kept registered as an Irish ship at the Port of Cork and not to do anything whereby the registration might be forfeited, jeopardised or imperilled. In his second affidavit Mr. Leonard averred that, contrary to the terms of clause 8(k), and without the consent of the petitioner, Green Star re-registered the M. V. Kilcoe in Belize and re-named it M. V. Vaagen. Secondly, following the transaction with Green Star in January 2009 the petitioner has not received payments from the company notwithstanding that the charter receipts are charged in favour of the petitioner.

Mr. Leonard averred in his second affidavit that the foregoing concerns were raised with Mr. Hanley at the creditors' meeting. The explanation given by Mr. Hanley for re-registering the vessel was that it was to avoid the stringent registration standards of this State. No reason was given for re-naming the vessel. Mr. Leonard further averred that at the creditors' meeting Mr. Hanley explained the transaction with Green Star on several different bases: that the vessel had been transferred to Green Star for a nominal consideration; that the vessel had been transferred to Green Star which took over the company's debts which related to the vessel and settled with the company's creditors; and that the vessel was on a "bare boat hire" and Green Star had settled the trade creditors as a pre-payment of the charter monies. It is the petitioner's contention that none of those explanations accords with the content of the statement of affairs. Further, it is the petitioner's contention, and, as I understand it, this is the gravamen of the

petitioner's case that the company should be wound up under the supervision of the Court, that the transaction with Green Star needs to be investigated by a liquidator to establish if the company received any benefit from the transaction and whether its creditors, including the petitioner, were disadvantaged by the transaction.

In his second replying affidavit, Mr. Hanley, in explaining the transaction with Green Star, set out to demonstrate confusion on the part of Mr. Leonard as to the nature of the transaction. He pointed to the fact that clause 3 of schedule 1 to the deed of covenant, which would have prohibited the company during the period of the mortgage from creating a demise charter of the vessel for any period whatever, was deleted before the deed of covenant was executed and, therefore, the company was not prohibited from creating a charter by demise in favour of Green Star. He then averred that what the company granted Green Star was a "bareboat charter", which was not in breach of the deed of covenant. A copy of a "bareboat charter" has been exhibited, which is in the form of the standard form Baltic and International Maritime Council Bareboat Charter. The date of the charter is given in the document as 15th January, 2009. The charter period is stated as five years and the charter hire is stated as €30,000 per month. In relation to the mortgages affecting the vessel, it is stated: "as per ship's Registry on 15/01/2010" (sic). Among the additional clauses added to the standard form is a clause that all debts paid by Green Star, which are rightly payable by the company, shall be treated as pre-paid hire. Another additional clause provides as follows:

> "[Green Star] have the option to change the vessel's name to M. V. Vaagen during the currency of this charter. During the currency of the charter, nominal ownership/registration of the vessel on the Ship's Register shall be in the name of the charterer, the registered mortgages to be maintained unaltered and at the termination of this charter the registration shall be transferred back to the owners. [Green Star] have the option to change the flag of the vessel to Belize registry. The vessel to be permanently registered with mortgages attached. All costs incurred and time used to be for [Green Star's] account."

The "bareboat charter" document was signed by Deirdre Hanley, who is Mr. Hanley's partner, on behalf of the company and by Mr. Hanley on behalf of Green Star. Deirdre Hanley is a director of the company.

Mr. Hanley made the following further averments in his second affidavit:

> (1) Mr. Leonard had confused "the bareboat charter hire due to [the company] with the hire properly paid to [Green Star] under its contract with the time charterer" and he averred that the company did offer to pay the "bareboat charter hire" to the petitioner, which would have covered interest, but the petitioner refused the offer.
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> (2) The vessel is permanently registered under the Irish flag, but because of difficulties which the company was experiencing "with the Irish register", the company effected temporary registration on the Belize register. Permission was sought from the petitioner to have the Belize registration made permanent but such permission was not forthcoming.
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> (3) The "bareboat charter" provides for the temporary registration of the vessel by Green Star, but it remains at all times an asset of the company subject to the petitioner's mortgage. The debts of the company, which Green Star agreed to pay were historic. Green Star has settled liabilities of the company which have greatly exceeded the charter hire due. Mr. Hanley has averred that "the overpayment represented hire paid in advance" and that it is rightly a debt owing by the company to Green Star as set out in the statement of affairs. I take it this refers to the sum of €2,900,000 which appears in the statement of affairs as owing to Green Star.

Mr. Hanley's explanations as set out in his second affidavit, in my view, do not obviate the necessity for the liquidator of the company to investigate fully the transaction between the company and Green Star in relation to the M. V. Kilcoe. Establishing the propriety or otherwise of the transaction, not only as regards the obligations of the company to the petitioner under the mortgage and the deed of covenant, but also as regards the generality of the creditors of the company will involve not only investigating the facts but will also give rise to difficult issues of law. On factual matters, an obvious question is why the transaction with Green Star was registered as a bill of sale, if it was intended to take effect merely as a "bareboat charter", particularly, as there is a prescribed form of Bill of Sale under the Act of 1955. It is noted that the document as exhibited in Mr. Hanley's second affidavit does not show an endorsement by the Registrar of Shipping of the fact of registration, and date and time of entry, in the register as required by the Act of 1955. Apart from the form of the document, its content raises obvious questions. For example, why was Green Star prepared to pay off debts of the company aggregating €2,900,000, when the aggregate of the payments to the company to be made under the "bareboat charter" which could be forgone by the company would over the five year period amount only to €1,800,000 (€30,000 per month for five years)? While there may be rational answers to those questions, in my view, the petitioner has established that an independent investigation of the transaction is necessary, given that Mr. Hanley is the sole beneficial owner of Green Star.

Apart from the application of the Act of 1955, one of the many difficult questions of law which would arise on an independent investigation is whether Green Star is in breach of the duty imposed by s. 101 of the Act of 1963 to register the existing mortgage in favour of the petitioner on the basis that it acquired the M. V. Kilcoe when it was subject to the mortgage in favour of the petitioner, a point raised by the petitioner.

Mrs. Hanley as creditor

Mr. Leonard at the creditors' meeting and in his second affidavit has questioned the basis of the company's indebtedness to Mrs. Hanley as shown in the statement of affairs and has questioned whether that sum was "invested" in the company by Mrs. Hanley in 2005 or 2006, as was stated by Mr. Hanley at the creditors' meeting, by reference to the annual returns and the accounts for the financial years 2007 and 2008 in which there is no record of the company's liability.

In his second affidavit Mr. Hanley has averred that Mrs. Hanley did invest more than €1m in the company and the figure in the statement of affairs represents the balance due to her. He has exhibited bank statements and suchlike to corroborate his averment. However, he is unsure how the amounts invested are shown in the accounts of the company and has stated that this is a matter which the liquidator must take up with the company's accountants. It was contended on behalf of the petitioner that Mr. Hanley's response falls short of what might be expected from a director of the company who signed the accounts. Mrs. Hanley is the secretary of the company, according to the most recent annual return (Form B1) filed in June 2009. Mr. Hanley is the sole owner of the issued shares.

The insurance claim

In his second affidavit, Mr. Leonard has expressed the belief that the reference in the statement of affairs to an insurance claim with an estimated realisable value of €3,500,000 is to a total loss insurance claim made by the company in or about 31st October, 2007 in respect of the M. V. Kilcoe. He also has averred that Mr. Hanley told the creditors' meeting that the claim was made on the basis that the cost of repairs carried out on the vessel exceeded the amount payable in the event of a total loss of the vessel. Mr. Leonard has

exhibited correspondence between the petitioner and Mark Dekeukelaere, average adjuster at Seven Seas Shipping, who are consultants to the insurance company, Bulstrad Vienna Insurance Group (Bulstrad), to which the claim has been made. On the basis of that correspondence, Mr. Leonard has averred that the statement of affairs is materially misleading by including the sum of €3,500,000 as fully realisable. The significant item in the exhibited correspondence is an e-mail dated 16th July, 2009 from Mr. Dekeukelaere to Mr. Leonard, in which is quoted in full a reply from the surveyors acting for Bulstrad to Seven Seas Shipping dated 12th May, 2008, on the basis of which Mr. Dekeukelaere advised Mr. Leonard that Seven Seas Shipping, having not received any clear evidence from the owners enabling them to fight the case, had made a decision "to drop the claim".

Mr. Hanley in a second affidavit has made the point that the insurance claim has not been rejected. He averred that the liquidator, Mr. Fitzpatrick, is in the process of collecting documentation required by the insurance company. He further averred that it is going to be very much "a negotiating process dealing with the insurance company" and separate proceedings may have to be issued by the liquidator to have the matter settled. There seems to be an implicit recognition in his affidavit that the figure which appears in the statement of affairs is aspirational in that, as I understand his averment, it represents the Euro equivalent of "a sum approximating to its full value as that was what was spent on the rebuild" of the vessel.

Mr. Hanley also averred in his second affidavit that the vessel is an asset of major significance to all of the creditors of the company and, in particular, to contingent creditors, meaning himself, Mrs. Hanley and Deirdre Hanley whose guarantees have been called in by the petitioner. He expressed an opinion, which is not only derogatory of Mr. Maloney but is derogatory of the Court, that he had "no confidence that a quasi receiver as is contemplated by the petitioner would vigorously pursue" the insurance claim. The company's counsel did not stand over Mr. Hanley's opinion.

Varna
Varna is a subsidiary of the company, which is incorporated in Bulgaria. Mr. Leonard, in his second affidavit, has averred that the sole asset of Varna is the M. V. Kilmore, which is also mortgaged to the petitioner to secure a guarantee of the company's indebtedness to the petitioner. He has further averred that M. V. Kilmore is under process of being sold in Varna, Bulgaria by a forced sale process under Bulgarian law, and that he has been advised that following the forced sale process there will be no surplus available for any creditor. On that basis, the petitioner asserts that the estimated realisable value of €500,000 in the statement of affairs represents a material misstatement. Mr. Leonard has averred that Mr. Hanley was unable to explain the basis of the estimated realisation at the creditors' meeting.

In his second replying affidavit, Mr. Hanley has averred that the figure of €500,000 is the directors' best estimate of what will be achieved when M.V. Kilmore is finally disposed of. He has also clarified the basis on which Varna appears as an asset in the statement of affairs: it is on the basis that funds were loaned by the company to Varna, which I assume means that the sum in the statement of affairs is recoverable by way of debt.

Another concern in relation to Varna expressed by Mr. Leonard in his second affidavit relates to a worldwide Mareva type injunction granted by the High Court in London on 2nd October, 2009 in proceedings between NKD Maritime (BVI) Ltd., as applicant, and Varna, Mr. Hanley, the company and another company with which Mr. Hanley is associated, Gotech Fibre Limited, as defendants, which would seem to relate to a claim against Varna for US$600,000.

In relation to that order, Mr. Hanley has averred in his second affidavit that it resulted from an arbitration award in arbitration proceedings between the applicant and Varna and that neither he nor the other companies named in the freezing order were parties to the contract in issue or the arbitration. However, he has been making efforts to have the matter sorted on a commercial basis.

Status of petitioner as secured creditor
Because the petitioner is a secured creditor, his entitlement to vote at the creditors' meeting was governed by Order 74, rule 69 of the Rules of the Superior Courts (the Rules). That rule provides:

> "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state … in a voluntary liquidation in such a statement as is hereinafter mentioned the particulars of his security, the date when it was given and the value at which he assesses it and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to surrender his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

While, Mr. Leonard has not in his second affidavit explained why the petitioner did not nominate an alternative liquidator, but indicated at the meeting that it would not be withdrawn its petition, the only inference which can be drawn is that, because of the existence of that rule, the petitioner was not prepared to put its security in jeopardy.

The law
Counsel for the petitioner referred the Court to one English authority – the decision of the High Court in *Re Southard & Co. Ltd.* [1979] 1 WLR 546. He also cited three recent decisions of the High Court: *Re Hayes Homes Ltd.* [2004] IEHC 253; *Re Permanent Formwork Systems* Ltd. [2007] IEHC 268; and *Re Balbradagh Developments Ltd*. [2009] 1 I.R. 597.

In the Southard case Brightman J. referred to the decision of the Court of Appeal in *Re J.D. Swaine Ltd*. [1965] 2 All ER 762. There is a passage in the judgment of Diplock L.J. in that case which, in my view, gets to the core of how the Court should exercise its discretion in determining whether to make a winding up order, where the company is already being voluntarily wound up. In the passage (at p. 65) Diplock L.J. distinguished opposition to a petition to wind up with a view to ensuring that there would be no winding up order and the circumstances in which the Court is asked to substitute a compulsory winding up for a voluntary winding up, stating as follows:

> "In the case of a petition for compulsory winding-up, if the only circumstances which are available are that the petitioner seeks a compulsory winding-up and the majority of the creditors seek that there should be no winding-up at all, then *prima facie* the petitioning creditor is entitled to a winding-up unless there are some additional reasons for deciding to the contrary. If, on the other hand, the petitioner seeks a compulsory winding-up and the majority of the creditors seek a voluntary winding-up, then for the wishes of the petitioner to overrule those of the majority of the creditors there must be some special reason why the wishes of the majority should be overridden. The difference or distinction seems to me to be an obvious one, namely, in the former case, what is being resisted is any winding-up at all, so that the petitioning creditor, if he fails, will be denied the class remedy which he would otherwise have if the winding-up took place; whereas in the latter case he will get the class remedy anyway under the voluntary winding-up, and the matter then turns on his being able to show some reason why the remedy under the voluntary winding-up is not an adequate remedy for him."

How does one determine whether a petitioner has established that a voluntary winding up is not an adequate remedy for him? In the *Hayes Homes* case O'Neill J. stated that it is quite clear that the Court has a discretion and that it must weigh up all the factors relevant to the exercise of that discretion. He gave an example of circumstances in which the Court should intervene stating:

> "In my view this court should be disposed to intervene if the circumstances deposed to on affidavit show that the assets of the company, such as the good will of its business, have gone to an associated company without any payment and the liquidation is in the hands of the nominee of the person or persons who had control over the company and the connected or associated companies, and where the nominee of the majority of the creditors who stand to lose substantial monies has been rejected."

On the facts of that case, O'Neill J. made a winding up order, noting that the petitioner had moved with considerable expedition so that delay as a result of the replacement of the voluntary winding up with the compulsory winding up was not a significant factor.

A summary of the factors which are weighed in the balance by the Court in exercising its discretion is to be found in the following passage from the judgment of O'Hanlon J. in *In the matter of Gilt Construction Ltd.* [1994] 2 LRM 456 (at p. 458):

> "The general approach taken in these cases is to have due regard to the costs involved in winding up by the court and the delays which will be incurred, to the over-all value of the assets to be administered and the complexity or simplicity of the task facing the liquidator, as well as other factors, such as those raised by the petitioner in the present case, having to do with questions of *mala fides* on the part of a person or persons involved in the dispute."

In this case, the opposition to the making of a winding up order came from the company. Counsel for the company recognised that the exercise of the Court's discretion in each case is fact specific.

Exercise of discretion on the facts
I am satisfied that the petitioner has established that there are compelling reasons for the Court exercising its discretion in favour of a compulsory winding up under the supervision of the Court, rather than permitting the creditors' voluntary winding up to continue, in this case.

A factor which I consider to be of some relevance is that the only inference which can be drawn from the relevant chronology is that the initiation of the creditors' voluntary winding up procedure by the members of the company was a reaction to the presentation of the petition. Even though Mr. Hanley informed the creditors' meeting that the Operating Certificates in relation to the M. V. Kilcoe had expired, that it was unable to sail on the high seas, and that it was docked in La Spezia in Italy, and even though the company was patently seriously insolvent, the members of the company only moved to have the company wound up after the petition was presented.

For a variety of reasons it is impossible to form a view on whether the majority in value of the creditors favour a compulsory or a voluntary winding up. First, Mr. Hanley has been unable to allay the concerns raised by the petitioner as to the status of Green Star and the amount of the debt owed to it. Secondly, although not as significant, Mr. Hanley has not been able to allay the concerns raised in relation to the debt of Mrs. Hanley. Thirdly, it is understandable, given all the circumstances, that the petitioner chose not to value its security. Finally, as regards the remainder of the creditors, Bank of Scotland Ireland, the value of whose debt is almost fourteen-fold the aggregate value of the debts of the other four creditors, has come to Court to support the petition. That, in my view, is a significant factor.

The most significant factor, however, is what the evidence discloses about the transaction between the company and Green Star in January 2009. The current status of the insurance claim, the current status of Varna and its assets, and the questionable reliability of the statement of affairs as a true picture of the company's degree of insolvency, all of which require investigation, are also significant factors.

On the analysis of the evidence set out earlier in this judgment, the transaction in January 2009 requires to be fully investigated by a liquidator who is, and who is seen to be, independent of the members of the company and the members of Green Star. In my view, the petitioner has established that an investigation by the nominee of members of the company who entered into the transaction with Green Star, which is wholly owned by Mr. Hanley, would not, and would not be seen to, afford the petitioner an adequate remedy even with the safeguards which are now in place to ensure that a liquidator in a voluntary liquidation investigates matters properly, which I have outlined in my judgment in the *Balbradagh* case at para. 15. In this case, the complexity of the issues, both factual and legal, to which the transaction between the company and Green Star gives rise, would almost inevitably lead to Court involvement, even if the creditors' voluntary winding up were to continue. Therefore, saving of costs and expedition are not in this case relevant factors which, in other circumstances, might induce the Court not to interfere.

In the light of the foregoing observations, I consider that it is proper for the Court to exercise its discretion to make a winding up order.

The official liquidator
It is only fair to record that counsel for the petitioner made it clear that the petitioner has no issue with Mr. Fitzpatrick personally, which I take to mean that the petitioner has no concern as to the integrity of Mr. Fitzpatrick nor his capacity to conduct a creditors' voluntary winding up. The petitioner's concern is Mr. Fitzpatrick's previous involvement with Green Star. In his affidavit, Mr. Fitzpatrick has set out his qualifications and experience and his work in the field of insolvency, including acting as official liquidator in two compulsory liquidations. He does not address his involvement in the incorporation of Green Star. This is addressed in Mr. Hanley's second affidavit. I accept that Mr. Fitzpatrick ceased to be involved in the business of Green Star in December 2008. It is unfortunate that the annual return (Form B1) filed in the CRO in July 2009 suggested otherwise and that the situation was not rectified until the lodgement of a Form B10 in the CRO on the 26th January, 2010. Having said that, that Mr. Fitzpatrick's company formation aspect of his practice was involved in the incorporation of Green Star carried little weight in the decision which I have made that the company should be wound up by the Court.

In his second affidavit, Mr. Leonard very properly brought to the Court's attention that the petitioner holds security in the form of a guarantee from Mr. Hanley and Deirdre Hanley, which is secured by a mortgage over a residential property in Dublin. It was further disclosed that on 19th October, 2009 the petitioner appointed Mr. Maloney as receiver over that property. Mr. Hanley, in his second affidavit, has averred that the property in question is the property in which he has lived with his partner and four children for the past twenty years. Mr. Hanley has also averred in his second affidavit that the petitioner holds a personal guarantee and other security from Mrs. Hanley and that the "lien" over Mrs. Hanley's lands in County Waterford has been called in. Counsel for the company submitted that the persons with the greatest economic interest in the outcome of the liquidation are the guarantors, because they

will be claiming to be subrogated to the position of the bank in the winding up. That submission was made in the context of the company's case that the voluntary winding up should continue. However, it also raises issues as to who should act as liquidator.

If it is probable that sustainable complaints of conflict of interest will be made on the ground that Mr. Maloney has been appointed receiver over the assets of the guarantors or some of them and is also the official liquidator of the primary debtor, the company, then, in my view, the petitioner should give careful consideration to applying to have somebody other than Mr. Maloney appointed as official liquidator. In such consideration, the petitioner should also consider an averment made by Mr. Hanley, in his first affidavit, that Mr. Maloney was nominated by the bank to look at the books of the company during late 2009 with a view to offering advice on the company's continued survival and whether prior involvement of Mr. Maloney in relation to the company could give rise to sustainable complaints of conflict of interest or lack of independence or impartiality.

Order
I propose making an order that the company be wound up by the Court. I propose postponing the appointment of an official liquidator for one week until the petitioner has an opportunity to consider the observations made in the next preceding paragraph.