Neutral Citation Number: [2010] IEHC 373

**THE HIGH COURT**

**2010 473 COS**

**IN THE MATTER OF MARCON DEVELOPMENTS**

**AND**

**IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009**

**Judgment of Miss Justice Laffoy delivered on 12th October, 2010**

**1. The history of the petition**

**1.1** This petition presented by John Sisk & Company Limited (the petitioner) for an order that Marcon Developments (the company) be wound up by the Court and that Pearse Farrell (Mr. Farrell) of Farrell Grant Sparks be appointed official liquidator of the company was presented to the Court on 27th August, 2010. It was given a return date of 22nd September, 2010.

**1.2** The petition was based on a demand under s. 214 of the Companies Act 1963 (the Act of 1963) served on the company by the petitioner's solicitors on 5th July, 2010. The demand sought payment of the sum of €2,096,371.67 in respect of which the petitioner had obtained judgment in the Commercial Court on 7th December, 2009. The sum due on the judgment had been the subject of an earlier demand under s. 214 served on 16th March, 2010, which had not been followed by a winding up petition, as James Doyle, director of the petitioner, has averred "to facilitate the prospect of settlement negotiations". The judgment obtained by the petitioner arose out of a contract entered into by the company with the petitioner for the construction of a hotel and apartments in Ballybrit, County Galway on 24th March, 2006. On 27th August, 2010 the petitioner's solicitors served the petition on the company.

**1.3** Following the service of the petition, on 6th September, 2010 a meeting of the board of directors of the company was held at which it was resolved that meetings of the members and the creditors of the company be convened for 20th September, 2010 with a view to having the company wound up as a creditors' voluntary winding up and Kieran Wallace (Mr. Wallace) of KPMG appointed liquidator for the purpose of the winding up. The creditors' meeting was advertised on 8th September, 2010 in two national daily newspapers.

**1.4** The two meetings were duly held on 20th September, 2010. At the members' meeting, the resolution to wind up the company and to appoint Mr. Wallace as liquidator was duly passed. The subsequent creditors' meeting was chaired by Shane Connolly (Mr. Connolly), who is a director of the company. Two documents have been exhibited which record what happened at the creditors' meeting: a report and minutes of the meeting. Both documents disclose that various queries were raised by creditors at the meeting in relation to the statement of affairs which was presented by the company to the meeting, some of the queries having been raised by the director of the petitioner and the solicitor for the petitioner, who were in attendance. At the end of the question and answer and comment process, and the petitioner's solicitor having been given an opportunity to inspect the winding up resolution and the proxies which had been received by the chairman, the report discloses that the company's solicitor reminded the meeting that the company had nominated Mr. Wallace as liquidator and asked whether the creditors wanted to nominate a liquidator. The petitioner's solicitors' response was that the petitioner was not satisfied with the explanations received from the company and that, as the largest unsecured creditor, wished to nominate Mr. Farrell and asked that Mr. Connolly would exercise his vote in favour of Mr. Farrell. Mr. Connolly declined and Mr. Wallace was deemed to be appointed as liquidator. The report discloses that the petitioner's solicitors had indicated that he did not require a formal vote and accepted that the chairman's vote would ensure that Mr. Wallace's nomination would prevail. A committee of inspection was then appointed, which included the director of the petitioner who was present.

**1.5** While it is accepted by the petitioner that the creditors' voluntary winding up is regular, in that the meetings held on 20th September, 2010 were properly advertised and convened, the meetings were properly conducted and, in particular, Mr. Wallace was properly appointed as liquidator in accordance with the Act of 1963, the petitioner has prosecuted the petition and wishes to have the company wound up under the supervision of the Court and Mr. Farrell appointed as official liquidator for the purposes of the winding up.

**1.6** One creditor appeared in Court on the petition, namely, the Revenue Commissioners. Although an issue was raised at the creditors' meeting by a representative of the Revenue Commissioners as to the amount which appeared in the statement of affairs as being due to the Revenue Commissioners, the Revenue Commissioners informed the Court that they were adopting a neutral stance on the petition. Therefore, I attach no weight to the issue which arose in relation to the amount of the Revenue Commissioner's debt.

**1.7** Mr. Wallace assumed the position of liquidator of the company following the meeting of 20th September, 2009. He has furnished a helpful report to the Court as of 30th September, 2010, which sets out, *inter alia*, the work he has carried out in his capacity as liquidator. The Court was also informed by counsel for Mr. Wallace that he did not propose participating in the hearing of the petition. The petitioner has made it clear, both in the affidavit evidence and in the submissions of counsel, that the petitioner is not suggesting that Mr. Wallace is unqualified or unfit to act as liquidator and is not criticising Mr. Wallace in any way. No issue arises as to Mr. Wallace's suitability to act as liquidator of the company.

**1.8** The petition was strenuously resisted by the company, which adopted the position that the company should be wound up as a creditors' voluntary winding up.

**1.9** Before outlining the respective positions of the parties, I propose setting out the corporate structure of which the company forms

part and what the statement of affairs discloses.

**2. Corporate structure**

**2.1** The company is currently an unlimited company, although it was incorporated as a limited liability company on 25th April, 2001. The current shareholders of the company are three companies registered in the State: Passford Limited, Fieldford Limited, and Leftside Limited. Each was incorporated on 18th September, 2007 as a single member private company limited by shares. Mr. Connolly, in his affidavit sworn on 1st October, 2010, has averred that Marcon Construction, previously the sole shareholder of the company, transferred all its shares to the three companies on 21st December, 2007, on which date the company changed its status to an unlimited company "as part of a non-filing structure" which the company was advised to put in place.

**2.2** When the petition was presented, the directors of the company were Mr. Connolly and Aishlinn Connolly (Ms. Connolly) and Mr. Connolly was the secretary of the company. The same parties were the sole directors and the secretary of each of the three corporate shareholders of the company and, apparently, have been since September 2007.

**2.3** Mr. Connolly and Ms. Connolly signed off as directors on the most recent financial statements of the company for the year ended 31st July, 2007, which were filed in the Companies Registration Office (CRO) in early 2010. The notes to the financial statements disclose that Padraig Connolly was a director of the company until 2nd June, 2009.

**2.4** Two other companies of which Mr. Connolly is also a director and secretary feature in relation to the ownership and operation of the development which was the subject of the petitioner's building contract: Three Corner Holdings Limited and Chequer Hill Investments Limited. On the basis of the information furnished at the creditors' meeting, it is averred on behalf of the petitioner that the position is as follows:

> (a) Three Corner Holdings Limited is the owner (the freehold owner, I assume) of the site of the development at Ballybrit, having acquired it from Marcon Construction, which had acquired it from the company.
>
> (b) Printridge Limited, a trustee company, holds the hotel under a lease from Three Corner Holdings Limited on behalf of investors.
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> (c) Printridge Limited has a put and call agreement with Three Corner Holdings Limited, which gives Printridge Limited the right to require Three Corner Holdings Limited to purchase its interest in the development.
>
> (d) Printridge Limited has granted an operating lease to Chequer Hill Investments Limited, the operator of the development.

Mr. Connolly, in his affidavit, has taken issue with assertions made on behalf of the petitioner as to the objective involved in putting that structure in place and as regards its implications. It is not possible to form any view on the assertions made on behalf of the petitioner and they do not inform the Court's determination in this matter.

**3. Statement of affairs**

**3.1** In relation to assets, the statement of affairs itemised the following assets which have the same net book value and realisable value:

Stock €1,500,000

Cash at bank €238,420

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Total: €1,738,420

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Other debtors the net book value of whose debts are set out as follows are then itemised, but the estimated realisable value of the debts is given as nil:

Three Corner Holdings Limited €1,212,456

Printridge Limited €9,000,000

Chequer Hill Investments Limited €582,000

**3.2** What is disclosed in Mr. Wallace's report is that the "stock" relates to land at Oughterard, County Galway which is charged in favour of KBC Bank. KBC appointed a receiver over the lands on 17th September, 2010. Based on the amount owed to KBC being in the region of €8.5m and the serious decline in land values, Mr. Wallace stated that he did not expect any surplus from the receiver.

**3.3** An issue also arises in relation to the "cash at bank". Mr. Wallace discloses that that is in fact a deposit held by a firm of solicitors which was paid by two persons named as creditors of the company in the statement of affairs, John Grealish and Fiona Grealish, in relation to the purchase of the lands at Oughterard. According to the report of the creditors' meeting, Mr. and Ms. Grealish have judgment against the company for the sum of €935,000 (which I surmise is a typographical error, the judgment being for €953,680). That judgment is registered as a judgment mortgage against the lands at Oughterard and in the CRO (although the amount of the judgment was not notified to the CRO). As will appear, when I deal with the creditors of the company, a very large question mark hangs over whether the company will be able to claim the sum of €238,420.

**3.4** Mr. Wallace's report also discloses the following in relation to the debts which are represented in the statement of affairs as having no realisable value:

> (a) The sum of €1,212,456 owed by Three Corner Holdings Limited relates to monies advanced by the company for payment of management fees and salaries.

(b) The sum of €9,000,000 owed by Printridge Limited relates to "a sum of €9,000,000 set off by Ulster Bank Ireland Limited in or around November 2009 from the company's deposit account under a fixed charge the bank held over the company's deposit account". It is stated that the funds were used to partially discharge an amount owed "by a connected company, Printridge Ltd., to Ulster Bank Ireland Ltd. and appears to have been guaranteed by Marcon Developments". Although a similar assumption that Printridge Limited is connected to the company has been made by the petitioner, it is not clear to me on the documentation in evidence, including various CRO searches that Printridge Limited and the company are connected, but this is something which requires to be investigated.

(c) The debt of €582,000 due by Chequer Hill Investments Limited relates to monies advanced by the company to meet current expenditure.

**3.5** The liabilities of the company are categorised as owing to three categories of creditors: asset secure creditors; preferential creditors; and unsecured creditors. The liabilities to asset secure creditors aggregate €8,734,480 and comprise the sum of €238,420 paid by Mr. and Ms. Grealish as a deposit and held by a firm of solicitors, presumably, as stakeholder, and the liability to KBC Bank which is secured on the land at Oughterard. The preferential creditors are shown as the Revenue Commissioners in respect of Capital Gains Tax and PAYE and PRSI in the sum of €114,133 although, as I have outlined earlier, there is an issue as to the amount shown as due to the Revenue Commissioners and a question was raised at the creditors' meeting as to whether an additional sum, in excess of €1.8m, should have been shown as due to the Revenue Commissioners in respect of corporation tax. Moreover, in his report, Mr. Wallace has queried the preferential status of the sum due in respect of PAYE/PRSI on the basis that the company has not traded for over two years. Debts due to the unsecured creditors, as shown in the statement of affairs, aggregate €10,946,252. It has been acknowledged on behalf of the company that four creditors whose debts aggregate €228,500 should have been also included. Mr. and Ms. Grealish appear as unsecured creditors in respect of the sum of €715,260, that is to say, as I understand the position, the difference between the sum in respect of which they have judgment and the deposit held by the firm of solicitors.

**3.6** On the basis of the figures in the statement of affairs, the deficiency as regards unsecured creditors is shown as €18,056,445. Given the acknowledged understatement of the unsecured creditors, that deficiency is understated by €228,500. Having regard to Mr. Wallace's statement in relation to the likelihood that there will be no surplus from the receiver appointed over the lands at Oughterard, the deficiency would appear to be understated by a further €1,500,000. In truth, the deficiency is almost €20m and it is over €20m if Mr. and Ms. Grealish are entitled to the deposit held by the firm of solicitors, which seems probable given that they have judgment.

**3.7** The debts due to unsecured creditors which were shown on the statement of affairs in respect of which Mr. Connolly held proxies at the creditors' meeting were:

A. P. McCarthy €20,000

Shane Connolly €3,800,000

Marcon Construction €3,920,857

In relation to the debt due to Mr. Connolly, the information furnished at the creditors' meeting and recorded in the report and the minute thereof was that this was a debt originally due to Padraig Connolly in respect of an advance made by him to the company, which debt had been assigned by Padraig Connolly to Mr. Connolly. In note 25 to the company's financial statements for the year ended 31st July, 2007 it is stated that Marcon Construction advanced a loan of €4m to the company in the 2006 accounting period and this remained unpaid in the 2007 accounting period. Apparently, there was no change during the following three years.

**3.8** That last observation reflects what the creditors were told at the creditors' meeting about the overall position of the company, as recorded in the report of the meeting. The creditors were told that the hotel at Ballybrit was completed in 2006. It was confirmed that the company had not traded since 2007 and that no liabilities were incurred or discharged since 2007.

**3.9** It was the votes of the connected unsecured creditors, Mr. Connolly and Marcon Construction, which would have carried a vote in favour of Mr. Wallace. The petitioner's nominee could not have been defeated by the votes of all of the unsecured creditors other than Mr. Connolly and Marcon Construction.

**4. Grounds advanced by petitioner for winding up by Court**

**4.1** Counsel for the petitioner focused on three grounds in support of the petitioner's contention that a winding up order should be made on foot of the petition. These may be summarised as:

(a) the resignation of the company's auditors;

(b) issues which require investigation in relation to the conduct of the affairs of the company; and

(c) the availability of funding to enable the issues arising to be investigated in the liquidation and, if necessary, pursued through litigation.

I will consider each ground, and the company's response to it, in turn.

**5. Resignation of company's auditors**

**5.1** The company's former auditors, DHKN, Chartered Accountants, gave notice in September 2009 of their resignation as auditors of the company and advised the CRO that, in accordance with s. 185(2) of the Companies Act 1990, they considered that the following circumstances connected with their ceasing to hold office as auditors should be brought to the attention of the members and creditors of the company:

"DHKN is not satisfied with the flow of information from the Board of Directors and consequently we are unable to fulfil our obligations as Auditors under applicable Auditing standards."

It was also pointed out that the company had not filed its annual return made up to 30th September, 2008 with the CRO.

**5.2** Mr. Connolly has averred that he was not aware of the difficulties which DHKN stated they had in relation to the company and he was surprised with the content of their letter of resignation to the directors of the company, which was dated 9th September, 2009,

in circumstances where they had not indicated either verbally or in any other written communication that they had such difficulty with the company. He further averred that DHKN had agreed to resign when the directors indicated that they wished to appoint BDO as auditors.

**5.3** Apart from noting that the independent auditors' report given by DHKN in the financial statements for year ended 31st July, 2007, which was also dated 9th September, 2009, contained a disclaimer in relation thereto, it is not possible to form a view as to whether the resignation of the auditors is a material factor in the determination as to whether the company should be wound up by the Court.

**6. Issues requiring investigation**

**6.1** The balance sheet of the company as at 31st July, 2007 showed cash at bank and in hand in the amount of €9,298,476. The point made by the petitioner is that an investigation must be carried out as to what happened to that money between 31st July, 2007 and 20th September, 2010. The understanding of the directors and the legal advisers of the petitioner of what was stated in relation to the circumstances in which Ulster Bank appropriated the sum of €9m which was in an account of the company in that Bank, as averred to in the affidavit of one of the directors, James Doyle, sworn on 22nd September, 2010, in my view, may be incorrect. I note that note 18 to the financial statements for the year ended 31st July, 2007 indicates that Ulster Bank had a first fixed charge over a company bank account in the amount of €9m. Mr. Connolly has averred that the position in relation to the €9m over which Ulster Bank was granted security as part of the transaction pursuant to which the hotel was acquired by investors, was that the liability guaranteed by the company was that of the investors, for whom Printridge Limited was a nominee. He acknowledged that the directors of the company appreciated that, although they were satisfied that everything which was done was perfectly legal and appropriate, the liquidator would be required to investigate this, as well as all other aspects of the transaction in which the company was involved, to satisfy himself independently that such was the case.

**6.2** Although, contrary to the impression given in most of the documentation before the Court, Mr. Connolly does not appear to be a director of Printridge Limited, and, although the concerns of the petitioner that the receipt by Ulster Bank of the sum of €9m may have reduced Mr. Connolly's personal liability as guarantor to Ulster Bank may or may not be justified, the fact that the €9m which was in the company's name in Ulster Bank is no longer available to satisfy the claims of the creditors definitively requires to be fully investigated by a person who is independent of the directors of the company.

**6.3** It is the position of the petitioner that the debts due by Three Corner Holdings Limited, Printridge Limited and Chequer Hill Investments Limited should be pursued vigorously and, if necessary, petitions should be presented to wind up those companies and appoint a liquidator. The response of Mr. Connolly is that the directors of the company believe that Mr. Wallace will take all steps open to him to ensure that the debts due by those companies to the company are recovered. However, the directors' belief that the debtor companies will not be in a position to satisfy the liabilities is reiterated. Mr. Connolly's connection with Three Corner Holdings Limited and Chequer Hill Investments Limited certainly does indicate that the debts due by those companies should be pursued by a person who is independent of Mr. Connolly. The information before the Court indicates a very complex structure of interrelationship between the various companies and individuals involved in the development at Ballybrit, which may require substantial work to unwind, with a view to determining whether any company or individual might be pursued to the advantage of the general body of creditors of the company.

**6.4** The position of the petitioner is that it was always understood by its officers that Mr. Connolly was "the ultimate shareholder" of the company and that recourse could be had to him in the event that the assets of the company were insufficient to discharge the company's liabilities. In his affidavit, Mr. Doyle expressed suspicion on behalf of the petitioner that the restructuring of the shareholders of the company was a deliberate attempt by Mr. Connolly to avoid liability. Because of this, it is suggested that a liquidator, other than somebody nominated by the company, should investigate the documentation surrounding "the purported transfer of shares" and, if possible, bring an action challenging the change in shareholding. The response of Mr. Connolly, in its least umbrageous aspect, is to refer to the share transfer on 21st December, 2007 and the change of status of both Marcon Construction and Marcon Developments to unlimited companies on that day. It is stated that Marcon Construction was not an unlimited company during the period that it was a shareholder of the company. On that basis, Mr. Connolly's response is that Mr. Doyle's assertion that it was understood that recourse could be had to Mr. Connolly in the event of the assets of the company being insufficient to discharge the company's liabilities is inaccurate. While that may be the case, no supporting documentation in relation to Marcon Construction is exhibited. What happened on the 21st December, 2007 does require to be investigated as part of the overall investigation of the relationship and interaction between the various companies and the various individuals involved in the Ballybrit development.

**7. Funding of the liquidation**

**7.1** After being served with notice of the creditors' meeting, but prior to that meeting, the petitioner's solicitors wrote to the company pointing out that the petitioner is by far the largest unsecured creditor of the company. The petitioner offered to "underwrite the costs of the liquidation" should Mr. Farrell be appointed as liquidator at the creditors' meeting. It was pointed out that it would be clearly of benefit to the company and to the creditors if the offer was accepted. The offer was not accepted. In his affidavit, Mr. Doyle, on behalf of the petitioner, undertook that should Mr. Farrell be appointed as liquidator, presumably by order of the Court, the petitioner would underwrite in full the liquidator's costs. The company's response, in Mr. Connolly's affidavit of 1st October, 2010, was that Mr. Wallace has committed to taking the assignment and "has indicated, as he has done in other liquidations, that he is prepared to carry out his duties as liquidator irrespective of whether or not he realises sufficient assets to discharge his fees".

**7.2** At the hearing, counsel for the petitioner clarified that what the petitioner was prepared to undertake was to discharge the fees of the liquidation regardless of whether assets were recovered in the liquidation and on the basis that the petitioner would not seek recoupment of the fees out of any assets recovered. As regards the fees due to Mr. Wallace in respect of the work he has undertaken to date in the course of the creditors' voluntary winding up, counsel for the petitioner indicated that the petitioner would discharge those costs on the basis that it was unlikely that they would measure at more than €7,000.

**8. The law**

**8.1** Of the recent Irish authorities cited by counsel for the petitioner and counsel for the company (*Re Gilt Construction Ltd.* [1994] 2 ILRM 456; *Re Naiad Ltd.,* (Unreported, High Court, McCracken J., 13th February, 1995); *Re Eurochick (Irl.) Ltd.* (Unreported, High Court, McCracken J., 23rd March, 1998); *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), the decision of the High Court (O'Neill J.) in *Re Hayes Homes Limited* was the only case in which the Court acceded to an order to wind up the company compulsorily where a creditors' voluntary winding up was in being. In that case, having reviewed the earlier Irish authorities on whether to replace a voluntary winding up with a

compulsory winding up, O'Neill J. stated:

> "What is quite clear is that the court has a discretion and it must weigh up all the factors relevant to the exercise of that discretion. It can of course be fairly said that in the English case in circumstances where a liquidation was in the hands of the nominee of those who could be said to be responsible for the insolvency and where there was some evidence of asset transfers prior to winding up, at an undervalue to associated companies, that decisive weight was attached to the justifiable sense of grievance of a so called outside or independent creditors who stood to lose considerable amounts of money. In the Irish cases referred to, the evidence supporting the petitions did not appear to establish circumstances of that kind and hence given that there was no dispute as to the independence and capacity of the liquidators chosen, the sense of grievance of the petitioners in those cases was clearly discounted."

However, O'Neill J. went on to say that, in his view, the Court should be disposed to intervene if the circumstances disposed to on affidavit show that 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 creditors who stood to lose substantial monies had been rejected.

**8.2** It was submitted on behalf of the company that this case is distinguishable on the facts from the *Hayes Homes* case in two respects. First, it was submitted that there is no evidence here of assets of the company having gone to an associated company without any payment. Secondly, but for a mishap, the nominee of the petitioning creditor in the *Hayes Homes* case, the Collector General of the Revenue Commissioners, would have been appointed liquidator at the creditors' meeting, the mishap being the failure to have lodged an instrument of proxy pursuant to Order 74, rule 82(1) of the Rules of the Superior Courts 1986.

**8.3** Counsel for the petitioner, on the other hand, pointed to similarity between this case and the *Hayes Homes* case, in that in that case the petitioning creditor had given an undertaking to discharge the costs of the liquidation. In this connection, O'Neill J. stated:

> "Another factor to which I attach a great deal of weight is the undertaking given to the court by the petitioner to discharge the costs and expenses of the voluntary liquidation to date and to discharge all future costs and expenses to be incurred in a compulsory winding up. Having regard to the potential assets of the company it would appear to me, that this is a considerable boon to the company, because it will preserve the assets from depletion by the costs and expenses of the liquidation."

**8.4** In the *Hayes Homes* case, O'Neill J. quoted a passage from the judgment of McCracken J. in the *Eurochick* case in which McCracken J. quoted with approval a passage from the judgment of O'Hanlon J. in the *Gilt Construction* case which sets out the general approach to be adopted in cases in which it is sought to substitute a winding up by the Court for a creditors' voluntary winding up. O'Hanlon J. stated (at p. 458):

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

A factor which weighed with O'Neill J. was that the petitioning creditor had moved with considerable expedition, so that delay as a result of the replacement of the creditors' voluntary winding up with the compulsory winding up was not a significant factor in the completion of the winding up of the company.

**9. Application of the law to the facts**

**9.1** I have come to the conclusion that, in this case, the proper course for the Court to adopt is to make a winding up order. I have reached that conclusion for the following reasons.

**9.2** First, the company is hopelessly insolvent and that is a state of affairs which must have been known to the directors of the company before the petitioner got judgment in the Commercial Court, served the first s. 214 demand and served the second s. 214 demand. Indeed, on the evidence, it would appear that the affairs and financial state of the company were stagnant for more than two and a half years before the petition was presented. In my view, it is reasonable to infer that the move to initiate a creditors' voluntary winding up on the part of the company was a reaction to the presentation of the petition at the end of August 2010. I believe that it is reasonable to draw such an inference, notwithstanding the averment on the part of Mr. Connolly in his affidavit of 1st October, 2010 that he had "taken advice and was in the process of planning" to put the company into creditors' voluntary winding up prior to the presentation of the petition.

**9.3** Secondly, on the basis of the statement of affairs the only conceivable source of funding for the liquidation out of assets of the company is the sum of €238,420 held by the firm of solicitors to which Mr. and Ms. Grealish claim entitlement. On the evidence, as I have stated, a very large question mark hangs over whether that sum will be available to the liquidator to be distributed in the course of the liquidation. Therefore, the probability is that Mr. Wallace, if he continues as liquidator, will have no funds to meet the costs of the liquidation or the claims of the creditors. On the other hand, if the costs of the liquidation are underwritten by the petitioner in the manner represented to the Court, that must be to the advantage of the petitioner, who is by far the largest unconnected creditor, and to the generality of the unsecured creditors. As a matter of common sense, the fact that he will be remunerated for his efforts must incentivise an insolvency practitioner to pursue claims in respect of the assets of the company to a greater degree than would be the case if he was not being remunerated. Moreover, if assets are recovered they will be available to meet the claims of the creditors in the first instance, rather than the costs of the liquidation.

**9.4** Thirdly, although Mr. Connolly has refuted assertions made on behalf of the petitioner which assert past wrongdoing in relation to the management of the affairs and the assets of the company, he has recognised that in this case there are matters which the liquidator of the company will have to investigate. He could hardly have done otherwise. The statement of affairs and the other evidence before the Court raises questions about how the affairs of the company were conducted and, in particular, how its assets were dealt with from 2006 onwards so as to give rise to a deficit of *circa* €20m as of 20th September, 2010. The task facing the liquidator in addressing those issues will not be a simple task. On the contrary, because of –

> (i) the complicated nature of the corporate structure of the company and the companies and individuals associated with it,
>
> (ii) the changes instigated in relation to that structure in 2006 and 2007,

(iii) the complexity of the scheme of disposal and management of the development at Ballybrit, including the involvement of the investors and their trustee company, and

(iv) the question marks which must inevitably arise in relation to the financial statements of the company for the year ended 31st July, 2007, having regard to the manner in which DHKN qualified their report,

the task facing the liquidator is a very formidable task. It is probable that the liquidator will require directions from the Court throughout the course of the liquidation. In the circumstances, it seems to me that the sensible course is that the liquidation comes under the supervision of the Court now.

**9.5** Fourthly, there has been no delay on the part of the petitioner in prosecuting the petition, which pre-dated the commencement of the creditors' voluntary winding up process. The work done by Mr. Wallace to date is work which required to be done, and for which he must be remunerated. However, the making up of a winding up order would not involve duplication of work already done.

**9.10** Fifthly, and significantly, it is a cause of concern that the making of a winding up order has been resisted by the company through Mr. Connolly, who is an unsecured creditor of the company in the sum of €3,800,000. One would have expected that, given that without the undertaking by the petitioner to underwrite the costs of the liquidation the likelihood is that there will be no funds to meet such costs, Mr. Connolly would have appreciated the benefit to himself and to the generality of the unsecured creditors of having the company wound up by the Court on the basis of the undertaking proffered by the petitioner. That he does not, suggests that he does not wish that claims which the company may have against individuals and companies associated with it and against third parties are rigorously investigated and pursued.

**9.11** Sixthly, I do not propose to speculate on why the Revenue Commissioners have adopted a neutral stance in relation to the petition or why no other unsecured creditor appeared to support the petition. The important factor is that none of the secured creditors will suffer a prejudice or a detriment if a winding up order is made and there must be some prospect that the position of all of the unsecured creditors will be improved if the liquidator in a Court winding up investigates and pursues claims on behalf of the company. Therefore, I conclude that, on balance, a winding up order would be to the benefit, rather than to the detriment, of the generality of the unsecured creditors of the company.

**9.12** Finally, although, in the majority of cases the safeguards which are now in place which ensure that a liquidator in a winding up outside the Court fulfils his role properly (the supervisory role of the Director of Corporate Enforcement, the existence of a committee of inspection, and the statutory entitlement of a creditor to apply to Court to have an issue determined under s. 280 of the Act of 1963) afford ample protection for the interests of creditors in a winding up outside the Court, there are cases, such as this case, where in balancing all of the relevant factors it is clearly preferable that the winding up be under the supervision of the Court from the outset.

**10. The liquidator**

**10.1** On the evidence before the Court both Mr. Wallace and Mr. Farrell are widely experienced professional insolvency practitioners, each of whom, as the parties acknowledge, would be a suitable appointee as official liquidator of the company. In so finding, I am satisfied that each would act independently of the party who nominated him. I do not accept that there is any risk that either would succumb to the message of the old adage that "he who pays the piper calls the tune", as counsel for the company suggested the petitioner's unwillingness to accept Mr. Wallace as official liquidator suggests.

**10.2** Having said that, the petitioner sought the appointment of Mr. Farrell as official liquidator in the petition which was presented on 27th August, 2010. Unless an issue of conflict of interest is disclosed on the evidence, in my view, Mr. Farrell should be appointed, as he would have been if the creditors' voluntary winding up had not intervened. The relationship of the petitioner, who has nominated Mr. Farrell, with the company is the simple relationship of unsecured creditor and debtor and the position of the petitioner is undistinguishable from that of the other unsecured creditors. Therefore, no issue of conflict of interest arises. Therefore, I propose appointing Mr. Farrell as official liquidator.

**10.3** I propose directing that the costs of the creditors' voluntary winding up be costs in the liquidation and I propose directing the petitioner to discharge the costs of Mr. Wallace as liquidator, without imposing any limitation on those costs. In due course, Mr. Wallace can apply to Court in the Examiners Court List to have his costs measured.

**11. Order**

**11.1** There will be an order that the company be wound up by the Court and that Mr. Farrell be appointed official liquidator for the purposes of the winding up. As I have stated, the order will also provide that the costs of the creditors' voluntary winding up will be costs in the liquidation and that the costs of Mr. Wallace as liquidator in the creditors' voluntary winding up be paid by the petitioner. The order will recite the undertaking of the petitioner to discharge the fees of the liquidation without recourse to any assets of the company recovered in the course of the liquidation.