THE HIGH COURT

[2017 No. 58 COS]

IN THE MATTER OF IRISH ASPHALT LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 31st July, 2017

Introduction
1. The issue in this petition is when a liquidator should be appointed to Irish Asphalt Limited ("**IAL**").

Disclosure of Insolvency.
2. IAL knew in 2011, or earlier, that its liabilities exceeded its assets. The Petitioner, James Elliott Construction Limited ("**JECL**") learnt of that position after the secretary and financial controller of IAL ("**Ms. Cassidy**") swore an affidavit on 4th July, 2011, following delivery of the judgment by Charleton J. on 25th May, 2011, in proceedings brought by JECL against IAL ("**the Contract proceedings**"). Ms. Cassidy's affidavit was delivered in advance of the 60th day of the hearings in the Contract proceedings which gave rise to a further judgment of Charleton J. on 14th July, 2011. The order made by Charleton J. on that day granted a conditional stay to IAL for its appeal which required it to pay €1million to JECL and €500,000 towards JECL's costs pending the determination of that appeal.

Chronological Summary
3. The Petitioner on the fourth hearing day of this petition on Friday 21st July, 2017, submitted at my request a three page "Chronology of key events" as agreed with the other parties represented. Appendix 1 to this judgment contains that document for ease of reference and understanding of the litigation and reorganisation sagas involving IAL.

Time to Execute
4. The conditions for the stay were fulfilled and ultimately on 1st December, 2016, the order of the Supreme Court dismissing the appeal of JECL was perfected. This entitled JECL to recover the balance of the award made in 2011 with interest.

5. Following a demand dated 7th December, 2016, for the discharge of the balance of the award within 21 days pursuant to s. 570 of the Companies Act 2014 ("**the 2014 Act**"), JECL issued the petition before this Court now on 14th February, 2017. €2,411,228.83 together with continuing interest at the rate of 2% per annum is the undisputed balance due and owing by IAL to JECL as of 14th February, 2017. No payment has been made by or on behalf of IAL to discharge this debt.

Statutory Returns
6. IAL did not deliver its annual returns to the Registrar of Companies ("**the Registrar**") in respect of the years ending in 2010 to 2014 until after its successful applications pursuant to s. 343(5) of the 2014 Act on 19th June, 2017 and 27th June, 2017, for leave to file outside the prescribed periods.

7. Ms. Cassidy in her affidavit sworn on 27th March, 2017, averred that IAL had "*made a commercial decision*" not to deliver those returns until after either it received a threat from the Registrar to strike IAL off the Register of Companies "*and/or the Contract proceedings concluded*" because "*the accounts contained very sensitive financial information*". I describe the explanations and support for non-compliance offered in various affidavits sworn at the request of IAL as timorous.

8. The effort to minimise the significance of non-compliance for this petition continued into the letter from IAL's solicitors dated 5th July, 2017, which copied the two orders of Keane J. to JECL's solicitors. That letter, while mentioning the copying of the 2010 – 2014 financial statements to JECL's solicitors on Friday, 27th January, 2017, did not comment upon the finalisation of the statements for 2015 or 2016. The Court notes that "*draft and tentative for discussion purposes only*" financial statements for the year ending 31st December, 2015, were also copied to JECL's solicitors on 27th January, 2017. Statutory notes numbered 1-24 were included in revised draft statements for 2015 exhibited to the second replying affidavit of Ms. Cassidy sworn on 2nd May, 2017. By letter dated 31st May, 2017, IAL's solicitors forwarded copy financial statements for 2016, marked on p. 13: "*draft notes to the financial statements to be agreed by lawyers*". Attached to same was a cover letter from IAL's auditors confirming that there would be future amendments to the accounts.

9. The above detail distracts from IAL's current stance that its non-compliance with its statutory obligations should not be a significant factor if and when the Court exercises such discretion as it has in considering the petition and particularly in view of an ulterior motive for the petition.

The Reorganisation
10. Mr. Mark Mulcahy, Chartered Accountant and Financial Advisory Partner in Mazars, was engaged to advise JECL on whether there were circumstances to warrant an investigation into the affairs of IAL by an independent person such as a liquidator, with a view to recovering assets of IAL for the benefit of unsecured creditors of IAL.

11. It is instructive to attach the following prepared by Mr. Mulcahy's team as further appendices to this judgment because they are not contradicted and are based on publicly available documents in the company registration offices in Ireland and Northern Ireland:-

(i) Appendix 2 – summary profit and loss accounts and balance sheets for the periods which ended from 31st March, 2006, to 31st March, 2010, and the periods which ended from 31st March, 2010, to 31st March, 2015, with the proviso that the 2015 material was based on "*draft and tentative*" statements.

(ii) Appendix 3 – organogram of Lagan Holdings Limited ("**LHL**") up to March 2010 which shows IAL as a subsidiary of Antrim Asphalt Limited ("**AAL**") which was itself a subsidiary of LHL owned 55% by Kevin Lagan ("**KL**") and 45% by Michael Lagan ("**ML**").

(iii) Appendix 4 – organogram showing a reorganisation wherein many subsidiaries of LHL were transferred after March 2010 up to 2012, to other corporate groups controlled by KL and ML. IAL remained a subsidiary of AAL which was a subsidiary of LHL (in turn a subsidiary of Runlin Limited).

(iv) Appendix 5 – organogram showing a reorganisation which existed after 2012 and up to the date of review by Mr.

Mulcahy's team. Some issue of controversy arises from the implication in Mr. Mulcahy's averment that "*the result of the 2012 reorganisation has been to remove valuable entities (by reference to net asset positions) from*" the company of which IAL is a subsidiary and the trade of IAL to another group.

(v) Appendix 6 – a spreadsheet showing the net asset positions of the entities which formed part of LHL before and after the 2012 reorganisation.

(vi) Appendix 7- a spreadsheet showing fixed asset disposals from the periods which ended from 31st March, 2009, to 31st Dec, 2014.

12. The following are particular facts or realistic conclusions from the information and explanations given by Mr. Mulcahy and in respect of which there is little disagreement from any other deponent in the petition proceedings save for the effect or significance arising from those facts:-

(i) The directors of IAL included a note under contingent liabilities in the financial statements for the year ending 31st March, 2008, which referred to a claim for the supply of allegedly defective stone. Given that the *Hansfield/Mennolly* proceedings, mentioned in the chronology of key events, were commenced in 2007, it is reasonable to infer that the note refers to that claim or a similar claim.

(ii) The financial statements for the period which ended on 31st December, 2010, referred to the settlement of the *Hansfield/Mennolly* proceedings and also referenced JECL's claim which indicated that IAL was aware of its potential liability, although it continued to avow having no liability until after the making of the Supreme Court's final order in December 2016.

(iii) During the year which ended on 31st March, 2010, IAL paid a dividend of €3.75m, which payment appears in the financial statements of LHL for the same period.

(iv) On the day before the delivery of the judgment by Charleton J. in May 2011, IAL entered into multi-sterling pound loan agreements with Lagan Cement Group Limited and Lagan Construction Group Limited in exchange for fixed and floating charges over the property, undertakings and assets of IAL. Mr. Canavan, Director of LHL, averred in an affidavit filed to oppose the petition that those loans for a total in excess of STG£11m, were crucial for IAL to continue trading and were acquired at full value by LHL in November 2015.

(v) A significant portion of IAL's trade was transferred to Lagan Macadam Limited in 2012 which sits in the group with the ultimate parent being Lagan Asphalt Group Limited as opposed to Runlin Limited, the ultimate parent of IAL.

(vi) Lagan Macadam Limited has traded profitability since 2012.

(vii) IAL discontinued its trading activities during the year which ended on 31st December, 2012, and has been unable to benefit from the uplift in the construction industry since then.

(viii) The net assets of IAL decreased from a high of €43m in 2009 to a net liability position of €9.9m in 2015.

(ix) At some stage, after JECL's solicitors received the letter dated Friday, 27th January, 2017, Mr. Mulcahy and his team were able to prepare and advise JECL on the implications from the documents listed in appendices 2 – 6 and the facts summarised at subparas. (ii) to (viii) above. The petition now before the Court was filed on 14th February, 2017.

The Deceit Proceedings

13. On 4th December, 2014, JECL commenced proceedings claiming damages for deceit ("**the Deceit proceedings**") against KL, Terry Lagan ("**TL**"), John Gallagher, Lagan Cement Group Limited ("**the other defendants**") and IAL. The claim concerns the supply to JECL of construction material and particularly aggregate by IAL which was directed or controlled by some of the other defendants. JECL alleges that the other defendants fraudulently misrepresented the quality of the material and that the pyrite in the material has caused claims to be made against JECL by its customers including a claim by the board of management of a school. JECL seeks recovery of €525,582.51 , excluding VAT, for purchasing the defective material along with an indemnity for claims against JECL and exemplary damages in the Deceit proceedings. JECL's solicitors in particulars furnished on 15th September, 2015, as directed by Costello J. referred to damages totalling €40m which will be sought from IAL and the other defendants in the Deceit proceedings. IAL learnt in late July 2017 that Mr. Mulachy will be an expert witness on losses allegedly sustained by JECL in the Deceit proceedings.

14. On 24th April, 2017, three years following the admission of the Deceit proceedings to the Commercial Court, McGovern J., who is in charge of that list, knowing of the delay in the conduct of those proceedings by one or some of the parties (it would be futile and lack meaning for this Court to identify particular culpability of each party for those delays) and having been informed by counsel for the parties about:-

(i) the imminent hearing of two applications in respect of outstanding discovery on 2nd May, 2017, before Costello J. (Costello J. delivered judgment in those applications last Monday 24th July, 2017, and decided *inter alia* that IAL should file a short supplemental affidavit about documents which are no longer available); and

(ii) the outstanding determination of this petition

gave directions for JECL (the plaintiff) to deliver its witness statements by 24th July, 2017, (which were indeed delivered), the defendants to deliver their statements by 24th August, 2017, the experts to deliver a report on points of agreement and disagreement by 18th September 2017, the plaintiff to deliver its written legal submissions by 28th September, 2017, the defendants to deliver their written legal submissions by 12th October, 2017, the core booklet to be finalised by 19th October, 2017, with the estimated twenty week trial to commence on 14th November, 2017, and the proceedings to be mentioned before McGovern J. on Monday, 9th October, 2017 while the parties were also given liberty to apply to the Commercial Court according to the transcript furnished to this Court.

The Alleged Tactical Advantage

15. It was submitted on behalf of IAL, LHL and the other defendants that the motivation for this petition by JECL was to obtain a

tactical advantage in the Deceit proceedings. It is agreed that a liquidator of IAL will not have assets from which to discharge the costs of IAL in liquidation to defend the Deceit proceedings. Moreover, IAL will not be able to discharge any sum which may be awarded to JECL whether in damages or for costs in the Deceit proceedings while all the parties resisting this petition strenuously contend that JECL will fail in the Deceit proceedings.

16. This Court accepts on the balance of probabilities that a liquidator will not seek to defend the Deceit proceedings if JECL follows through on its confirmation given through its counsel on Thursday 20th July, 2017, that it will seek leave to proceed against IAL (in liquidation) pursuant to s. 678 of the 2014 Act following the appointment of a liquidator.

17. In this regard, it was mentioned that JECL may not have to prove the deceit of IAL at the trial scheduled to commence on 14th November, 2017, in order to recover the damages to be assessed. That, according to the other defendants, impacts on their defences and their reliance on pleas in the defence of IAL in the Deceit proceedings. The other defendants will not accept that JECL can rely on a default judgment against IAL for JECL's claim against them. Other than the clarification about a proposed application under s. 678 of the 2014 Act, senior counsel for JECL (who is not senior counsel for JECL in the Deceit proceedings) did not identify for this Court if, when and how JECL will following the appointment of a liquidator :

(i) apply for a default judgment against IAL;

(ii) proceed with the assessment of damages which arise from a default judgment against IAL or;

(iii) rely on any default judgment which may be given against IAL in the prosecution of its claim against the other defendants.

Remote Benefit

18. In the context of recovering the undisputed debt owed by IAL to JECL, there is a faint and distant hope for JECL that a liquidator will seek to reverse transactions in the 2012 reorganisations or earlier following further investigations. At this stage this Court cannot speculate about how a liquidator will view matters after appointment. Nevertheless, a liquidator will have obligations to investigate and report to the Director of Corporate Enforcement ("**DCE**") as provided for in the legislation.

Alleged Benefit to IAL by Deferring the Winding Up

19. The benefits to IAL which is insolvent in seeking to defend the Deceit proceedings until a liquidator is appointed according to its counsel are:-

(i) IAL will be able to exercise its right of access to the courts and to protect its property under Articles 40.3 and 43 of the Constitution albeit that it is an insolvent company which will be dissolved on completion of its inevitable liquidation.

(ii) The recovery of IAL's costs from JECL (incurred by IAL but discharged by LHL) for the benefit of LHL which is a secured creditor of IAL. LHL has paid and is committed to paying those costs estimated in total at €2 million. Recovery is premised on IAL successfully defending the Deceit proceedings and obtaining an order directing JECL to pay those costs.

(iii) The protection of its directors' reputations, including that of Ms. Cassidy who is not a defendant in the Deceit proceedings (she was not appointed a director of IAL until 1st January, 2012, although she has been the company secretary of IAL since 2000).

(iv) The attention of IAL's directors will be divided between the defence of the Deceit proceedings and the liquidation process including the necessity to reply to a liquidator and to ward off JECL's threatened request to a liquidator to investigate and report to the DCE.

(v) IAL's directors will be in an invidious position in their defence of the Deceit proceedings due to their loss of control of IAL to a liquidator including loss of potential access to or control of property, documents and experts as witnesses.

20. The submissions about the effect of a default judgment in favour of JECL against IAL again invite surmise by this Court about the conduct of the trial in the Deceit proceedings. I accept that a default judgment, if and when assessed, would indeed swell the unsecured debt of IAL and the increased unrecoverable debt for the secured creditor of IAL by reason of LHL's voluntary commitment to discharge IAL's own costs in defending the Deceit proceedings. The hypothetical reclassification of LHL's status by reason of some future action or claim of a liquidator is meretricious in my view. Further, the argument that LHL's overall status in the liquidation of IAL should be included in the class of unsecured creditors for the purpose of considering the effect of liquidation on that class is somewhat of a paradox.

21. Those resisting the petition asked the Court to include LHL's potential exposure in its consideration of interests for the unsecured class of creditors. In summary, the permutations obscure the simple facts that: (i) LHL sits in a group of companies of which IAL is part and has asserted secured creditor status in IAL since 2015 and (ii) JECL is an unsecured creditor for a significant sum which it was only first able to enforce since December 2016.

22. It is not for this Court to determine if and how a trial judge in the Deceit proceedings will address the issues of fairness and justice which may arise from the potential non participation of IAL in the trial of the Deceit proceedings. The Commercial Court can determine applications in relation to issues of fairness or justice in this regard. It is for that reason that this Court has expedited the delivery of this judgment so that the parties can take stock of the import and effect of this judgment while affording an opportunity to seek conditions or directions by reason of this judgment.

The Statutory Provisions

23. The following are the statutory provisions which the Court considers potentially relevant to its consideration of this petition and are set out for ease of reference:

(A) Section 567 of the 2014 Act :-

"(1) This section applies in relation to a company that is not being wound up where—
(a) execution or other process issued on a judgment, decree or order of any court in favour of a

creditor of the company is returned unsatisfied in whole or in part, or

(b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company,

and, in either case, it appears to the court that the reason or the principal reason for its not being wound up is the insufficiency of its assets.

(2) The sections specified in the Table to this section apply, with the necessary modifications, to a company to which this section applies, notwithstanding that it is not being wound up; accordingly, a person who would have standing otherwise to apply for an order or judgment under a section so specified shall have such standing to make an application under that section as so applied, but this does not affect the Director's power under subsection (3).

(3) The Director may apply to the court pursuant to this subsection for an order or judgment, as the case may be, under any of the sections which apply to a company to which this section applies.

(4) References in the sections specified in the Table to this section to—

(a) the commencement of the winding up of a company,

(b) the appointment of a provisional liquidator,

(c) the making of a winding-up order, or

(d) the relevant date,

shall, for the purposes of this section, be read as references to the date—

(i) of the judgment, decree or order mentioned in subsection (1)(a), or

(ii) on which the court determines that the company is unable to pay its debts.

(5) Where, by virtue of this section, proceedings are instituted under section 599 [related company may be required to contribute to debts of company being wound up], 608 [power of court to order return of assets which have been improperly transferred] , 609 [personal liability of officers of company where adequate accounting records no kept], 610 [civil liability for fraudulent trading], 612 [power of court to assess damages against certain persons] or 672 [order for payment or delivery of property against person examined under s. 671] , shall apply in relation to any order made as a result of those proceedings except that an order made as a result of an application by the Director pursuant to subsection (3) shall not be made in favour of the Director, otherwise than as to his or her costs and expenses.

(6) Subject to subsection (7), a person having a claim against the company may apply to the court for such order as is appropriate by way of enforcement of any right the court on the application finds to arise on the person's part to payment of a share of any sums or assets recovered or available following a successful application by the Director pursuant to subsection (3), and, on the hearing of an application under this subsection, the court may make such an order accordingly.

(7) An application under subsection (6) shall be made within a period of 30 days after the date of judgment or order given on behalf or in favour of the Director pursuant to subsection (3).

(8) Where section 721 applies by virtue of this section, it shall so apply as if the words 'which is subsequently ordered to be wound up by the court or subsequently passes a resolution for voluntary winding up' were deleted from it."

(B) Section 569(1) of the 2014 Act provides:-

"A company may be wound up by the court—

…

(d) if the company is unable to pay its debts,…

(e) if the court is of the opinion that it is just and equitable that the company should be wound up."

(C) Section 572(1) of the 2014 Act provides for the power of the Court on hearing a petition as follows:-

"On the hearing of a winding-up petition, the court may:-

(a) dismiss the petition, or

(b) adjourn the hearing conditionally or unconditionally, or

(c) make any interim order, or any other order that it thinks fit,

but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

(D) Section 576 of the 2014 Act provides:-

"An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the

company, as if made on the joint petition of a creditor and of a contributory."

(E) Section 589(1) of the 2014 Act provides:-

"Save in a case [which does not arise in this petition], 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."

(F) Section 602(1) and (2) provides that any disposition of company property made after the commencement of the winding up, done without the sanction of the liquidator [or a director who has retained power to do so under s. 677(3) of the 2014 (which does not apply in this petition)] shall be void unless the Court otherwise orders.

(G) Section 617 of the Companies Act 2014 makes provision for costs incurred in a winding up to be paid out of the property of the company and for the priority in which such costs are to be paid.

(H) Section 624 of the Companies Act 2014, does not replicate any earlier provision in the Companies Acts 1963 to 2012. It seeks to codify the duties of liquidators recognised at common law. It specifically provides:-

"…it shall be the duty of a liquidator to administer the property of the company to which he or she is appointed"

which includes "*ascertaining the extent of the property of the company*", and the gathering in, realisation and distribution of such property in accordance with law.

(I) Section 677 of the Companies Act 2014, amends and expands upon a number of provisions in the prior legislation relating to the effect of the commencement of winding up. Subsections (1) and (2) provide that from the commencement of the winding up, the business of the company shall cease, except insofar as may be required for its beneficial winding up. However, the corporate state and corporate powers of the company shall continue until dissolution.

(J) Section 678 of the Companies Act 2014, provides that no action shall be proceeded with against a company in liquidation except by leave of the Court and subject to such terms as the Court may impose.

(K) Section 437 of the 2014 Act has potential relevance if LHL appointed a receiver to the property of IAL. This section introduced a lengthy list of powers which are conferred on a receiver which refers at subsection (2) "*without limiting the generality of the powers*" to the power at subsection (3)(j) of a receiver to bring or defend any proceedings or do any other act or thing in the name of and on behalf of the company. A receiver may apply to Court pursuant to s. 438 of the Companies Act 2014, to permit "*a person who has been effectively put in control of a company…by a specific creditor… to control the affairs of the company and obtain the advices of the court in an as efficient and speedy a manner as possible*". [Quote from McCracken J. in *Salthill Properties Limited v. Porterridge Trading Limited* [2006] IESC 35.

Relevant Case Law

In Re Bula Limited

24. *In Re Bula Limited* [1990] 1 I.R. 440, concerned a petition by secured banking creditors in the insolvent Bula Limited ("**Bula**"). The following chronological summary of facts was elicited by this Court from the reported judgments and is useful for comparison and analysis:-

30 Mar 1983 Munster and Base Metals Limited ("**Munster**") made payments on behalf of Bula to banks.

Dec 1983 Planning permission was granted for the mine in respect of which Bula had the rights.

8 Oct 1985 Bula's banks appointed a receiver over the ore body of the mine.

18 Nov 1985 Munster registered a judgment mortgage against Bula's lands and ore body for £690,000

14 Feb 1986 The banks presented their petition to wind up Bula.

18 Feb 1986 Munster's judgment mortgage acquired a certain priority if the petition was dismissed.

2 Jul 1986 Bula and its guarantors issued proceedings seeking an injunction restraining the receiver appointed by secured banking creditors from accepting offers to purchase Bula's mine which had a £1b estimated market value until after four legal or commercial events occurred including the resolution of a mine access problem for Bula.

18 Jul 1986 Costello J. in an *ex tempore* judgment ordered the winding up of Bula despite the objection of Bula Holdings Limited (a shareholder and creditor for £13.5m) which argued unsuccessfully that liquidation would fetter the discretion of the receiver in selling Bula's asset. Munster also objected on the basis that a winding up order would invalidate its judgment mortgage.

Apr 1987 The appeal from the winding up order made by Costello J. was heard by the Supreme Court over three days.

13 May 1987 The judgment of McCarthy J. (Finlay C.J. and Henchy J. concurring) which was not adjourned but dismissed, pointed out that Bula was owned as to 49% by the State, 40.8% by Bula Holdings Limited and 10.2% by the Wright family. Significantly, McCarthy J. commented at page 447 that: "*It was avowedly for the purpose of defeating Munster's manoeuvres towards becoming a secured creditor that the petition was presented. It was not for the purpose of recovering the bank's debts, a purpose itself of a questionable validity,* ***much less to produce a benefit to a class of creditors to which the petitioners belong***". (Emphasis added by this Court). At the end of the next paragraph, McCarthy J. pointedly remarked:-

"…nowhere can I find in these affidavits any purported justification for bringing the petition other

than the indebtedness itself and the defeat of the Munster registration. If that be the case, in my judgment the presentation of the petition ***was an abuse of the process*** *of the Court." (Emphasis added by this Court)*

25. On p. 448 of the judgment, McCarthy J. corrected the apparent approach of the High Court by stating:-

> *"I would hold that a creditor is prima facie entitled to his order so as to shift the initial burden to those who oppose the winding up; the petitioner does not have to demonstrate positively that an order for winding up is for the benefit of the class of creditors to which he belongs, but,* ***if issue is joined on the matter, and a case made that the petition is not for that purpose but for an ulterior, though not in itself improper object, then the burden shifts back to the petitioner****." (Emphasis added by this Court)*

26. This Court will later discuss the shifting of that burden and effect thereof in the context of the facts which emerged at the hearing of this petition.

Genport Limited

27. *In Genport Limited* (Unreported, 21st November, 1996), the petitioner sought to enforce a costs order in her favour for £52,363.88. She was an employee of the landlord company to Genport which would have forfeited its lease to the benefit of the landlord if a winding up order was made. McCracken J. found that such an order "*would leave little in the way of assets for the remaining creditor*" and was influenced by the part heard substantial litigation between the company and the landlord company. He declined to regard the alleged ulterior motive as improper. The ulterior motive coupled with the absence of any real benefit to ordinary creditors did not persuade him to refuse the petition but to adjourn the petition pending the outcome of the litigation.28. The petition came back before McCracken J. in *In the matter of Genport Limited* [2001] IEHC 156 where the learned judge found that the petitioner had other avenues open to her to recover the debt. Rather than dismissing the petition, he adjourned it with liberty to re-enter.

Goode Concrete (In Receivership)

29. The judgment of Laffoy J. on 2nd November, 2012, in the matter of *Goode Concrete (In Receivership)* [2012] IEHC 439, concerned another petition to wind up arising from an order for costs in the amount of €56,763.33. A bank which was a secured creditor did not support the petition while two competitors owed money, supported the petition. The ulterior motive alleged was to terminate proceedings which made serious allegations of competition law breaches.

30. Laffoy J. identified a number of reasons to dismiss the petition. Suffice to say that the magnitude and diligent prosecution of the claim for damages in Goode Concrete's counterclaim against the petitioner was considered significant by Laffoy J. I do not consider that the future costs of IAL in defending the Deceit proceedings to be of similar significance. LHL justifies the underwriting of IAL's legal costs for its "*own commercial [and wider] interests*". Written submissions for IAL mentioned that if costs orders were made in the Deceit proceedings, "*IAL will recover as much as €2million in costs to the benefit of the secured creditor*". The idea of spending €2 million to recover €2 million is different to the counterclaim by Goode Concrete.

31. It is also worth noting that the majority in value of the unsecured creditors of Goode Concrete Limited had formed the view that a winding up order made at that stage would have been to their detriment. JECL certainly does not make that point as the largest unsecured creditor of IAL and the limited other unsecured creditors of IAL having some €140,000 in debt relate to legal costs according to counsel for IAL.

32. My attention was brought to the judgment of Snowden J. in *In re Maud; Maud v. Aabar Block S.a.r.l and another* [2016] EWHC 2175 (Ch) which arose in an appeal from an unusual bankruptcy order. This Court mentions same because it reviewed all of the above case law and concluded that it should not adopt the shifting burden approach in that peculiar case. Clearly the approach of the courts in this jurisdiction to date should be followed by this Court.

Applicable Principles

33. I set out the following non exhaustive list of principles which guide this Court while stressing that each petition is considered on its own merits:-

(i) A creditor of an insolvent company has a *prima facie* entitlement to a winding up order ("**an order**").

(ii) The probable or possible unavailability of assets for a liquidator does not preclude the making of an order but it can be one of the factors which the Court may take into account.

(iii) When the insolvent company, a creditor of the insolvent company or a contributory has a real basis to claim that the petitioner has an ulterior motive, a burden shifts back to the petitioner to show that it is not motivated by an ulterior motive. The shifting of the burden does not depend on the motive being improper or illegal.

(iv) If an ulterior motive is recognised by the Court, the petition may be refused, adjourned or granted subject in each case to conditions or without conditions as may be deemed fair and just. The statutory discretion of the Court is exercised in a principled and reasoned manner. Overriding and public policy reasons may apply. Moreover, s. 569(1) of the 2014 Act mentions the Court's opinion about whether it is just and equitable to make an order which also invites a reasoned approach.

(v) The nature of the ulterior motive is not out ruled as a point for consideration by the Court in the exercise of its discretion.

(vi) The impact on litigation for an insolvent company and the effect on each class of creditors may be considered by the Court in a petition.

(vii) Timing and tactics of the petitioner, the company and its creditors whether secured, unsecured or contingent may also form part of the equation.

(viii) The Court's discretion under s. 569 of the 2014 Act should be exercised justly and fairly in a principled manner.

Right of Other Defendants to Appear at the Petition Hearing
34. Before applying those principles, I address at this juncture the right of the other defendants in the Deceit proceedings to be heard at the hearing of this petition. It was convenient and expedient for the Court to accept the initial consensus among counsel for all of the parties represented at the hearing of this petition, that the Court should hear the submissions of counsel for the other defendants *de bene esse* or for what they are worth to the Court's consideration. The other defendants acknowledged that they ordinarily would not be entitled to be heard during the hearing of a winding up petition. I am grateful for the contributions made on the law by Counsel for the other defendants.

35. On the last day of oral submissions on 26th July, 2017, the Court rose for a few minutes to allow counsel for the Petitioner and counsel for the other defendants to reduce this area of contention. I was pleased that counsel came to an admirably suitable way of proceeding which allowed counsel for the other defendants to conclude his submissions while not demurring from the long established English line of authority which commenced with Mallins V.C.'s permission in special circumstances to parties who were not creditors to appear at the hearing of a petition and James L.J.'s refusal to allow an appeal in the same petition by a party who was not a creditor. (*In re Bradford Navigation Company* 9 L.R. Eq 80; (1869-70) L.R. 5 Ch App.600).

Purpose of Liquidation
36. A company, unlike a person, does not have a natural life. The existence of a company depends on whether it is wound up or is removed from the register of companies. After the liquidation process comes to an end, a company is dissolved. In other words, winding up is usually a necessary part of the dissolution process. The legislature has provided for the means to dissolve and remove a company from the register. Shareholders and officers of a company, liquidators, the Registrar and indeed the Court have been given specific powers and duties in the order which allows for companies to operate and for the wider community to rely upon. Included in those arrangements are the functions of the Registrar and of the DCE.

37. In addition, s. 576 of the 2014 Act describes the effect of a winding up order as operating "*in favour of all the creditors and of all contributories*". Counsel for LHL correctly submitted that it is inappropriate for a creditor to advance its own self interest as opposed to the interests of the class of creditors to which it belongs.

The Legal Order
38. The following passage from Kelly J*. In the matter of National Irish Bank Limited S.160 of the Companies Act 1990 Director of Corporate Enforcement v Nigel D'Arcy* [2006] 2 I.R. 163 at para. 42 resonated for the Court when considering the position of each of the parties represented at the hearing of this Petition:-

> *"I also derive assistance from the dictum of Henry L.J. in Re Grayan Building Services Ltd. [1995] Ch. 241 where he said at p. 257:- "The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders …*
>
> *The parliamentary intention to improve managerial standards … is*
>
> *clear … The statutory corporate climate is stricter than it has ever been, and those enforcing it should reflect the fact that Parliament has seen the need for higher standards." That statement, whilst made in the context of the law of England and Wales, applies with equal force to the position in this jurisdiction."*

39. The legislature has seen fit to grant privileges which are accompanied by obligations so that businesses can rely on some certainty when conducting their affairs. Counsel with different perspectives quoted from Hogan J. in *CMC Medical Operations Limited (in liquidation) v. The Voluntary Health Insurance Board* [2015] IECA 68 where he considered the statutory jurisdiction to order security as a protection "*against the potential abuse of the privilege of limited liability*." He stated:

> *"7.This does not mean, however, that the Oireachtas is obliged to afford the privilege of limited liability to corporate entities or that, where it does so, it cannot regulate or control that privilege*
>
> *8. Accordingly, I consider that the statutory power to order security should not be exercised where this would be oppressive or would stifle a genuine claim"*

Views of IAL's Future Liquidator
40. Mr. Luke Charleton, a Chartered Accountant, Insolvency Practitioner and head of EY's Transaction Advisory Services Team in Ireland swore his second affidavit in this petition on 3rd May, 2017. That affidavit described in detail the categories of documents other than the specific legal advice available to IAL at any time which he reviewed at the request of IAL for the purpose of addressing:-

> *"Mr. Mulcahy's assertion that matters arise such that it is in JECL's interest that a full investigation of IAL's affairs be carried out since 2007."*

41. IAL engaged Mr. Charleton's team in 2015 to advise IAL "*in conjunction with its legal advisors on its ongoing ability to continue to trade*". EY has provided e-discovery services to IAL and the other defendants in the Deceit proceedings.

42. Mr. Charleton also explained in his second affidavit that in 2012, EY provided a report to the directors of IAL assessing the financial impact of IAL's Earnings before Interest, Taxes, Depreciation and Amortization ("**EBITDA**") from changing IAL's business model to an equipment rental business. Mr. Charleton stressed that EY did not provide advice to IAL for the fixed asset disposals undertaken by IAL.

43. In summary, there was little difference in the opinion expressed by Mr. Mulcahy and those stated by Mr. Charleton that a liquidator would review or investigate the conduct of IAL's directors from some date prior to IAL becoming insolvent. There was little dispute between these insolvency practitioners about the issues to be reviewed, some of which are already set out at para. 12 of this judgment. The significant thrust of Mr. Charleton's affidavits relevant to the timing of a winding up order relates to his opinion based on the information made available to him that a liquidator of IAL would not find anything which would merit a recommendation to the DCE adverse to IAL's directors.

44. In this regard, counsel for IAL drew the Court's attention to the statement of Hardiman J. in In the matter of the Tara Mines Pension Plan [2010] IESC 62 on p. 17:-

> *"…that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions* ***of facts*** *which may have been deposed to." (Emphasis added by this Court)*

Conclusion Re Future Review

45. When appointed, a liquidator will review the conduct of IAL's directors. Mr. Charleton's reasoned opinion that the DCE will not be troubled about whether IAL's directors acted honestly or responsibly was based on information furnished to his team and based on a summary of legal advice which was not copied in the material which he reviewed. The Court, with due respect to Mr. Charleton's views, cannot determine what a liquidator will decide or report upon to the DCE. Mr. Charleton's opinion does not establish a fact but merely advises that a liquidator, the DCE, JECL and the wider public dealing with the Lagan Group companies which are controlled ultimately by KL and ML will not be concerned by a liquidator's perspective on the conduct of IAL's affairs.

46. If an investigation into the affairs of IAL is the primary ulterior motive of JECL in this petition, a question may be asked about whether "*issue is joined*" to such an extent that the burden according to the *Bula* judgment shifts back to JECL. Taking account of what I described under the heading entitled above: "*purpose of liquidation*", there is little reason to refuse the petition if the sole purpose is to pursue an investigation despite the availability of s. 567 of the 2014 Act which may avoid liquidation. A winding up order may not only assist JECL but will also allow the DCE, the Registrar and others relying on the integrity and structure of company law to fulfil their duties and perform their functions sooner rather than later.

47. This Court was urged to protect the reputation of the insolvent IAL on the grounds that its reputation is an asset. Counsel said that "*it is hard to imagine of an allegation more grave*" than deceit in the civil law against a company. It was also argued that the officers and shareholders are in some way entitled to have the reputation of honest conduct vindicated by allowing IAL to defend the proceedings in order to protect their reputations for their control and management of IAL. The ingenious submissions did not find favour with the Court and further reflection did not change that view.

48. A company is a creature of statute and IAL was incorporated with a view to make profit in some way for its shareholders. The law tolerates loss making companies as long as they are a going concern with an ability to meet their debts. It is sufficient to say that in the circumstances presenting there are enough safeguards in the legal order for officers and stakeholders to vindicate their reputations without having to rely with impunity as to costs on the defence of proceedings by an insolvent company. I therefore do not find that this strand of the submissions made on behalf of IAL carries much weight for this Court save for its review of the litigation advantage point.

Litigation Advantage as the Ulterior Motive

49. The averments of Mr. Patrick Elliott, Managing Director of JECL, in his two affidavits confirmed that it was in the interest of JECL and all other unsecured creditors of IAL to have a thorough investigation of IAL's affairs. He also agreed that the appointment of a liquidator may confer a litigation advantage to JECL in the Deceit proceedings while commenting that there is nothing improper in obtaining such an advantage.

50. Those resisting the petition, including Ms. Cassidy, repeated or relied on the view articulated by Mr. Charleton that JECL will never achieve a financial benefit from the appointment of a liquidator. *Ipso facto* it is contended that JECL knows or should realise the futility of appointing a liquidator other than to acquire the alleged litigation advantage in the Deceit proceedings.

51. If this Court found that the motive of JECL in issuing the petition was to gain a litigation advantage in the Deceit proceedings, this Court could still make the order sought. Reference was made to an "overwhelming" factor being required before the Court should make the winding up order. Although emphasising that the existence of an ulterior motive is enough to adjourn the petition, counsel for the other parties listed at least six factors for the Court to consider and the requirement for a "*principled application of the discretion*" to be exercised by the Court. In the circumstances of this petition, where JECL acknowledges advantage, there is an onus on JECL to assist in establishing equity, fairness or justice. In the interests of clarity I say that the Court has considerable discretion which should be exercised in a reasoned and principled manner when litigation advantages are established or acknowledged.

52. Given the history of litigation between the parties and the steps taken by IAL, which were not always recognisable by JECL or any other unsecured creditor of IAL since the prosecution of the Contract Proceedings, it is reasonable for any entity owed in excess of €2m to expect a liquidator's scrutiny to be applied in early course. Therefore, I accept Mr. Elliot's statement about the benefit of liquidation in this regard.

53. Even if I could find that JECL will not suffer a financial loss by adjourning the petition indefinitely as in *Genport* (and I do not accept that I can make such a determination now), JECL being the majority in value of unsecured creditors of IAL is entitled to rely on the structure created by the legislature for companies outlined under the paragraph above headed "*Purpose of Liquidation*". JECL, like IAL and all other parties interested in this petition, were and are entitled to the privileges of incorporated companies. If availing of such privileges, individuals and other entities create obligations which should be applied in an even and accountable manner with some certainty. The motivation of JECL in this petition, whether to have past conduct investigated or to acquire a tactical advantage in the Deceit proceedings, is reasonable when viewed through the prism of the commercial world operated with limited liability companies.

Contrast with Bula

54. It is not improper to seek a tactical advantage but it will "*shift the burden*" described in *Bula*. A comparison of the circumstances in *Bula* and those arising in this petition reveal the following significant differences:-

> a) The Supreme Court **dismissed** the petition and before mentioning the shifting of the burden in the judgment had found that "… *the presentation of the petition was an abuse of process of the Court*" whereas those opposing the petition before this Court now seek an adjournment of the petition until after the conclusion of the Deceit proceedings.
>
> b) Liquidators in the 1980s did not have the obligations to report to the DCE which were introduced by the Company Law Enforcement Act 2001.
>
> c) The petitioners in *Bula* had appointed a receiver over the ore body of Bula's principal asset in the year prior to the issue of the petition. JECL through no act or omission on its part was unable to execute its significant judgment from the

Contract Proceedings or to issue the petition until it did so in early 2017.

d) No creditor of IAL is in a position identical to that of Munster in *Bula*.

e) All parties to the Deceit proceedings and the other defendants in particular were aware of IAL's insolvent position since 2011 at least. Some or all of the other defendants could have sought to appoint a liquidator to IAL before or during the course of the Deceit proceedings which would have avoided the predicament now facing each of the parties in the Commercial Court. JECL acted promptly and cannot be blamed for petitioning only in 2017. In *Bula*, the petitioning banks waited for a year to petition and only did so to undermine the priority value of Munster's judgment. JECL has at least a dual motivation to petition for the winding up of IAL.

f) It was the secured creditors who petitioned in Bula whereas the secured creditor in this petition is using the continuing ability of IAL to trade for its own commercial and wider reasons. LHL acts with some impunity since it has not committed to making any payment whether for JECL's costs or otherwise if JECL succeed in the Deceit proceedings. It is most difficult for this Court to anticipate the outcome of various issues in the Deceit proceedings with or without IAL's participation given the undisclosed position of JECL about the effect of a default judgment. In *Bula*, the secured assets were available to the petitioning secured creditors whereas JECL is left with nothing for its judgment in the Contract proceedings and will not recover anything in the Deceit proceedings from IAL if JECL succeeds in the Deceit proceedings.

g) No effort was made by the petitioning banks in *Bula* to satisfy the burden which shifted to them in relation to the issue of equity, fairness and justice. JECL in this petition can rely on breaches of the legislation for companies and to the failure of IAL to make any effort to satisfy the award following the Supreme Court order in late December 2016. There is some merit in the submission made on behalf of JECL that a limited rental trade of IAL should not be allowed to continue purely for the benefit of the secured creditor because it "*improperly defies*" an order for IAL to pay €2,411,228.83 to JECL. The undertakings given by counsel for IAL, LHL and their directors in the afternoon of 21st July, 2017, to manage only the secured assets of IAL and the defence of the Deceit proceedings goes part of the way to alleviating some potential concerns but they still do not address the conduct of IAL's defence with impunity as regards any order for costs which may be awarded to JECL. They all submit that there could never be such an order but this Court cannot accept that submission as it prejudges the outcome.

Potential Use of Limited Liability Privilege

55. The undertakings confirmed to the Court on behalf of IAL and LHL on 25th July, 2017, were as follow:-

(i) IAL's cost of defending the Deceit proceedings will be met by LHL;

(ii) LHL's sole recourse in respect of costs paid will be limited to any costs recovered from JECL in the Deceit proceedings;

(iii) The business of IAL until the determination of the proceedings will be confined to managing its assets which are secured in favour of LHL, receiving rental income and defending the Deceit proceedings; and

(iv) IAL will not incur any new credit save for legal and other professional fees associated with this petition.

Those are duly noted and have a binding effect on the directors and shareholders of IAL and LHL until further order of this Court.

56. Despite those undertakings, the Court remains concerned about the effective supervision to minimise potential misuse of the limited liability privilege afforded to IAL which is insolvent. Lest any inference be drawn, this Court does not find that any misuse has occurred. Rules of engagement exist in the business world. Modern legislation concerning companies imposes greater demands and scrutiny than in previous eras. The Court should be wary of allowing insolvent limited liability companies to incur significant legal costs and court resources with impunity for its shareholders and directors as to the costs which may be awarded against insolvent companies. It is not enough to point to potential applications which can be made at a future date following the determination of proceedings.

57. I do not doubt the sincerity of the representations made on behalf of IAL, LHL and the other defendants about the prospect of successfully defending the Deceit proceedings. Hopefully, the Deceit proceedings will conclude a long tortuous saga for everyone involved. Nevertheless, this Court cannot adjudicate on the strength or weaknesses of either side in the Deceit proceedings.

58. On the other side of the equation, JECL has a burden in this Petition in relation to the litigation advantage which may be secured by the timing of a winding up order which can be made at any stage. The extent of that advantage has not been fully addressed by those represented at the hearing of this petition. The Court remains to be persuaded that the litigation advantages cannot be overcome by allowing a period for the parties to minimise or eliminate each perceived point of advantage. The quick and welcome modus operandi agreed by counsel last Friday in relation to the appearance of the other defendants at the hearing of this petition is a good example of how professionals can save time and trauma when they are requested to do so whether by the Court or their clients.

59. One of the litigation disadvantages addressed by counsel for the other parties was the potential unavailability of expert witnesses engaged by IAL for the trial of the Deceit proceedings if IAL was liquidated and the effect on the trial. The directions given by McGovern J. which were summarised earlier will be impacted upon. The judgment of Neuberger J. in *Brown v. Bennett* [2000] EWHC (Ch) Case No. HC199603328 concerned an application to set aside a witness summons served on a chartered accountant by the plaintiffs whose legal aid was withdrawn ten days before the trial. The learned judge said: "*Save in exceptional circumstances it cannot be right for a litigant to get around his or her obligation to pay an expert witness by use of a witness summons*." He said that he could accede to an application if there was a possibility of a no case to answer on the part of the defendants. The learned Judge also cited Phipson on Evidence, (1990, 14th ed., Sweet & Maxwell) at para 32-38 as authority for releasing "*an unwilling expert*".

60. Counsel for the other parties asked why JECL should be indulged by the Court after it has petitioned for an ulterior motive "*disapproved of by the courts*". He said that JECL should not be facilitated and it should be treated as any other creditor who petitions for an ulterior motive. There is merit in that argument but the Court has already outlined public policy and business world expectations which JECL, the public and the Court should be able to maintain. The overriding motivation for this Court in this petition is the administering of justice in a fair, transparent and principled manner in accordance with the applicable law for the benefit of those involved with IAL and other companies.

61. Bearing the potential expert difficulties in mind along with the other unascertained or inadequately identified advantages in the Deceit proceedings for JECL if a winding up order is made, I conclude that it is best to postpone the determination of what is in effect an application for a potentially lengthy adjournment. I also take account of the work schedules for the legal teams and experts engaged in the Deceit proceedings together with the imminent start of the long vacation.

62. At this stage it appears that a prolonged adjournment of the petition allows LHL and the other parties to keep IAL in the Deceit proceedings and beyond with little risk as to their exposure for the significant costs which may awarded to JECL against IAL if JECL succeeds in proving its alleged losses. The Court is attentive to the suggestion of adjourning with liberty to re-enter with seven days' notice but that permits a lack of supervision of an insolvent company continuing to trade which has not been fully addressed despite the undertakings given. It is hoped that this judgement will allow for an efficient and quick determination at the final hearing of this petition.

63. I have already noted at para. 17 of this judgment, the questions which senior counsel for JECL in the petition could not have been expected to answer during the hearing last week. Further questions could be posed. I am, therefore, requesting counsel to address me now or at 4pm today in relation to the logistics and detail of the following proposed directions which I have crafted having regard to the directions given by McGovern J. on 24th April, 2017, and my scheduled sitting as the duty judge on Friday, 8th September, 2017.

64. The proposals are to adjourn the hearing of this petition with the following directions:-

> (1) IAL and LHL and the other parties will furnish details by 4pm on Thursday 31st August 2017 through their respective firms of solicitors details of:-
>
> > (i) The perceived litigation advantage which will be conferred on JECL by the appointment of a liquidator on Tuesday 3rd October, 2017, 24th October, 2017, or following the determination of the first application which was indicated will be made for a direction to dismiss the Deceit proceedings due to commence on 14th November, 2017, ("those dates").
> >
> > (ii) The actions or representations which the respective parties require or offer to minimise the litigation advantage to JECL in those Deceit proceedings which will occur after the commencement of the liquidation of IAL on those dates;
> >
> > (ii) The conditions or terms which the Court might consider:
> >
> > > a) for any order appointing a liquidator to empower or require the liquidator to preserve or give access to property, documents and/or witnesses in the power of the liquidator who will be appointed to IAL;
> > >
> > > b) attaching to any further adjournment of this Petition in order to protect specific interests of the parties in the Deceit proceedings;
> > >
> > > c) imposing on any leave sought by JECL to proceed against IAL pursuant to s. 678 of the 2014 Act;
>
> (2) OECL will respond by 4pm on Thursday, 7th September, 2017 and the petitioner will deliver copies of all submissions to me on Friday, 8th September, 2017. At that time the Court will welcome information about whether the parties have acted upon the tentative recommendation for mediation mentioned by McGovern J. on 24th April, 2017, which appears eminently apt according to the limited knowledge which this Court has of the Deceit proceedings.
>
> (3) The Court will sit specially on Tuesday, 12th September, 2017 to hear oral submissions.

List of Appendices

- **Appendix 1** - Chronology of key events
- **Appendix 2** – Summary profit and loss accounts and balance sheets.
- **Appendix 3** – Organogram of LHL up to March 2010 which shows IAL as a subsidiary of AAL.
- **Appendix 4** – Organogram showing a reorganisation wherein many subsidiaries of LHL were transferred after March 2010 up to 2012, to other corporate groups controlled by KL and ML.
- **Appendix 5** – Organogram showing a reorganisation which existed after 2012 and up to the date of review by Mr. Mulcahy's team.
- **Appendix 6** – Spreadsheet showing the net asset positions of the entities which formed part of LHL before and after the 2012 reorganisation.
- **Appendix 7** - Spreadsheet of fixed asset disposals.