Neutral Citation Number: [2011] IEHC 91

THE HIGH COURT

2010 667 COS

IN THE MATTER OF LA PLAGNE LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

Judgment of Miss Justice Laffoy delivered on the 17th day of January, 2011.

1. The proceedings

1.1 These proceedings were initiated by a petition presented on 26th November, 2010 by John Fraher (Mr. Fraher), who is a fifty per cent shareholder of La Plagne Ltd. (the company), for an order that the company be wound up by the Court under the provisions of the Companies Acts 1963 to 2009. The petition has been resisted by the other fifty per cent shareholder of the company, John F. Ronan (Mr. Ronan).

1.2 In the petition Mr. Fraher is described as a contingent and/or prospective creditor of the company and as a contributory of the company. The only basis on which he contends that the company should be wound up, as set out in the petition, is that the company "is insolvent having an excess of liabilities over assets and is unable to meet its liabilities as they fall due for payment".

1.3 The grounds on which Mr. Ronan contends that a winding up order should not be made, in outline, are that Mr. Fraher does not have standing to seek the compulsory winding up of the company either as a contingent or prospective creditor or as a contributory and that, in any event, that the company is not insolvent.

1.4 The evidence on the substantive issues on which the petition was heard on 20th and 21st December, 2010 comprised:

(a) the verifying affidavit sworn by Mr. Fraher on 1st December, 2010 and the exhibits referred to therein;

(b) the replying affidavit sworn by Mr. Ronan on 17th December, 2010 and the exhibits referred to therein;

(c) an affidavit sworn by Gerard O'Mahoney, a partner in the firm of Deloitte and Touche, Chartered Accountants, who are financial advisers to Mr. Ronan, on 17th December, 2010 and the exhibits referred to therein; and

(d) an affidavit of Kevin Nolan, Certified Public Accountant, of the firm of Westboro Partners, who are business and financial advisers to Mr. Fraher, sworn on 20th December, 2010 and the exhibits referred to therein.

1.5 The formalities in relation to the proposed winding up, for example, vouching the advertising of the petition, the consent of the proposed official liquidator, an affidavit of his suitability and suchlike were also before the Court. I am satisfied that the formal proofs are in order.

2. The company

2.1 The company was incorporated on 4th May, 2004. Its primary object is to "invest, manage, acquire, hold property, debentures, debenture stock, commodities, preference and ordinary stocks and shares of any class or description" and to "act as an investment, holding company and anything ancillary to holding companies". Accordingly, the company is a holding company which has never traded. Its authorised share capital is €1million divided into 1million shares at €1 each. Only two shares have been issued, one of which is owned by Mr. Fraher and the other by Mr. Ronan. Mr. Ronan is the secretary of the company and Mr. Fraher and Mr. Ronan are its only directors. Their relationship has deteriorated in recent times. These are the third proceedings indirectly or directly connected to the company in which they have been involved and which had been before this Court. The first was a petition by Mr. Fraher to wind up one of the company's subsidiaries, Peleton Developments Ltd. (Peleton Developments). That petition was not opposed by Mr. Ronan. A winding up order was made on 18th October, 2010 (Record No. 2010/497 COS). The second was an application by Mr. Ronan against the company, three of its subsidiaries and Mr. Fraher for an order pursuant to s. 202 of the Companies Act 1990 (Record No. 2010/561 COS). Those proceedings were struck out by order of the Court made on 12th November, 2010.

2.2 The company's only assets are its shareholdings in its subsidiary companies. There are five subsidiaries, namely:

(a) Peleton Developments.

This company is a wholly owned subsidiary of the company. Prior to its liquidation, it was involved in construction and development. A measure of the extent of the breakdown of the relationship of Mr. Fraher and Mr. Ronan is that each has filed a separate statement of affairs in the winding up of Peleton Developments Ltd. According to Mr. Fraher there is deficiency of in excess of €1.679m in that company, whereas Mr. Ronan puts the deficiency at €0.681m. Both recognise that the company is an unsecured creditor in the sum of €36,394 of Peleton Developments. However, they diverge on the amount of the unsecured debt of one of the other subsidiaries of the company, P. & S. Kavanagh (Thomastown) Ltd. (Thomastown), Mr. Ronan putting that debt at in excess of €1.194m and Mr. Fraher putting it at in excess of €1.491m. Because of the divergence between Mr. Fraher and Mr. Ronan as to the affairs of Peleton Developments and the state of the evidence before the Court on this petition, in my view, it would be pure speculation to make any assumption as to the dividend, if any, payable to the company or to Thomastown out of the assets of Peleton Developments. In the context of the issues now before the Court, in my view, it would serve no useful purpose to consider the detail of the position of Peleton Developments further, while noting Mr. Fraher's contention that the insolvency of Peleton Developments impairs the ability of Thomastown to support the company.

(b) Clerihan Developments Ltd. (Clerihan).

This company, which is involved in property development, is also a wholly owned subsidiary of the company. Although no steps have been taken to wind up Clerihan, it is common case that it is not in a position to discharge the debt it owes to its associated company, Peleton Developments, which, although there is no consensus between Mr. Fraher and Mr. Ronan as to its amount, is in excess of €200,000. Therefore, it is reasonable to infer that it is insolvent. In the context of the issues now before the Court, it would serve no useful purpose to consider the detail of the position of Clerihan further.

(c) Peleton Limited (Peleton).

The company owns ninety per cent of the issued share capital of Peleton and the remaining ten per cent is owned equally by Mr. Fraher and Mr. Ronan. This company is a trading retail company, which trades as SuperValu in Clonmel, County Tipperary. According to Mr. Fraher, Peleton is indebted to AIB in a sum in excess of €1.945m as at 31st October, 2010 as a primary debtor. It is also indebted to Peleton Developments in either the sum of €502,195 (Mr. Fraher's figure) or €612,073 (Mr. Ronan's figure). According to Mr. Fraher, Peleton is indebted to Clonmel Urban District Council in respect of unpaid rates in the sum of €72,376 and proceedings to recover that sum have been instituted against Peleton.

(d) G.B.C. Supermarket Ltd. (GBC).

The company owns ninety per cent of the issued share capital of GBC and the remaining ten per cent is owned equally by Mr. Fraher and Mr. Ronan. This company is a retail trader trading as Centra at Clerihan in County Tipperary. It is indebted to AIB in a sum in excess of €1.749m as at 31st October, 2010 and that indebtedness is guaranteed by the company. It is also indebted to Peleton Developments but the amount is in dispute. It is the sum of €131,771, according to Mr. Fraher, or €271,925, according to Mr. Ronan.

(e) Thomastown.

The company is the owner of the entire issued share capital in Thomastown. It is also a retail trader and trades as SuperValu in Thomastown, County Tipperary. Thomastown is indebted to AIB in a sum in excess of €4.584m as at 31st October, 2010 and that indebtedness is guaranteed by the company. As stated above, Peleton Developments is indebted to Thomastown but the amount currently due to Thomastown is disputed.

3. The company's liability to AIB

3.1 According to Mr. Ronan, and this is not disputed by Mr. Fraher, the company was originally a holding company for the subsidiaries, Peleton and Peleton Developments, which is now in liquidation. In 2005 Mr. Ronan and Mr. Fraher decided to purchase the supermarket business of Thomastown and to develop it. The company acquired the share capital in Thomastown from the Kavanagh family with the aid of a loan of €2.3m from AIB. Thomastown separately obtained a loan in the sum of €5.2m from AIB. At the time, Mr. Ronan and Mr. Fraher made a joint validating statutory declaration for the purposes of s. 60 of the Companies Act 1963 (the Act of 1963), which was made on 29th June, 2005. In the statutory declaration they declared that it was intended that Thomastown would provide financial assistance to the company for the purpose of assisting the company in connection with the acquisition by it of the shares in Thomastown and it was declared that when such assistance was given Thomastown would be able to pay its debts as they became due.

3.2 The indebtedness of the company to AIB is currently governed by a Letter of Sanction dated 24th June, 2008, which was expressed to be a renewal of a facility originally sanctioned to part-fund the purchase of the shares in Thomastown. The amount of the loan is stated as €2.3m. It is repayable over seventeen years by consecutive monthly repayments of €18,226.10 per month by way of standing order, any residual balance to be repayable at the end of the repayment period. It is averred to in Mr. O'Mahoney's affidavit that the expiration of the loan period is 2022. Accordingly, I assume that the commencement of the repayment period of seventeen years was 2005. The security stipulated in the Letter of Sanction comprises the following:

(a) a supported guarantee for €2.5m from Thomastown;

(b) a supported guarantee in the sum of €2.5m from Peleton;

(c) a supported guarantee in the sum of €2.5m from Peleton Developments, which is now in liquidation, and is, in reality, of little comfort any longer to AIB;

(d) a supported guarantee in the sum of €2.3m from GBC;

(e) a "letter of guarantee for €500,000" from each of Mr. Ronan and Mr. Fraher.

As regards the guarantees at (a), (b) and (c), it was stipulated that the bank would only have recourse to the guarantors for €2.3m.

3.3 As of 13th December, 2010 the amount due by the company to AIB on foot of the loan was €2,117,413. As of that date, four monthly payments aggregating €73,872, in respect of the months of August, September, October and November 2010 were outstanding. The company does not trade and never did and it does not have, and never has had, the resources to discharge the monthly payments due to AIB on foot of the loan. What has happened is that Thomastown has given the money to the company to make the monthly repayments. Since March 2009 the standing order has been on the company's account and, apart from the four outstanding payments, Thomastown continued to make payments into the company's account to enable it to meet the standing order. It is not clear who has been responsible for the recent non-remittal of the monthly sum from Thomastown to the company. However, Mr. Ronan has averred that there has been no resolution of Thomastown to change the situation which formerly arose whereby Thomastown supported the company to discharge the monthly repayments to AIB. Mr. Ronan has averred that he was not aware until recently that the four monthly instalments were outstanding and that he intends to take the necessary steps to ensure that the situation is rectified. The sums which have been advanced by Thomastown to the company to discharge the monthly repayments have been treated as an inter-company loan from Thomastown to the company in the accounts of the company.

3.4 The company has guaranteed the liabilities of two of its subsidiaries to AIB: Thomastown in the sum of €5.4m, the amount currently due by Thomastown to AIB being in excess of €4.584m; and GBC in the sum of €1.8m, the amount currently due by GBC to AIB being in excess of €1.749m. In aggregate, the company's contingent liability to AIB on foot of those guarantees is in excess of €6.333m.

4. Alleged insolvency of the company – the evidence

4.1 The most recent abridged financial statements of the company lodged in the Companies Registration Office (CRO) relate to the year ended 31st May, 2008. For that year the balance sheet showed a deficit of €265,763. Fixed assets, that is to say the value of the shareholding in the subsidiaries, were shown as €3,010,778. The company's liabilities included the amount due to AIB on the loan (€2,218,746) and the amount due to Thomastown on the inter-company loan (€1,228,589). The notes to the accounts stated:

> "These financial statements have been prepared on a going concern basis. The company is relying on the continued support of its subsidiary companies. The directors are of the opinion that such financial support will continue for the foreseeable future and that it is therefore appropriate to prepare the company's financial statements on a going concern basis."

4.2 The financial statements for the year ended 31st May, 2009 have not yet been filed, although they have been prepared by the company's auditors, C.D. O'Neill & Co. As I understand the position, Mr. Ronan is not prepared to sign them in the absence of a statement, which, Mr. Fraher, as a director, in previous years subscribed to, that they have been prepared on a going concern basis on the assumption that the subsidiaries of the company continue to support it financially. In the draft accounts for the year ended 31st May, 2009 the balance sheet shows a deficiency of assets in the sum of €313,087.

4.3 Various exercises have been carried out by Mr. Nolan of Westboro Partners for Mr. Fraher, apparently with the assistance of the in-house accountant of the retail companies, with a view to supporting Mr. Fraher's contention that the company is insolvent. Management accounts of the company for the period to 31st October, 2010 have been prepared and exhibited. So called "desktop" valuations of the three retail companies, Peleton, GBC and Thomastown have been carried out as at 31st August, 2010, on the basis of which Mr. Fraher contends that the only subsidiary with any possible market value is Thomastown. Mr. Nolan has also prepared estimated statements of affairs as of 31st October, 2010, both on a book value basis and on a liquidation realisable value basis, for Peleton, GBC and Thomastown. In the case of each of Peleton and GBC, the "bottom line" on both bases is a substantial deficit. In the case of Thomastown the "bottom line" ranges from a surplus of in excess of €2.486m to a deficit of in excess of €1.078m.

4.4 The position of Mr. Fraher is that there is no reality to the company's subsidiaries continuing to support it, having regard to the financial position of the subsidiaries as disclosed in his affidavit and in the various exhibits to which I have referred. He has averred as follows:

> "… as a director of each of the subsidiary companies I will not permit them to do so in circumstances where there is no reality to the Company being in a position to repay any financial support given, thus exposing Mr. Ronan and me as directors of the subsidiary companies to a claim for reckless/fraudulent trading should the supporting subsidiaries (even if they were in a position to provide financial support, which is not accepted) go into liquidation."

Mr. Fraher has also suggested in his affidavit that the company will continue to have an increasing surplus of debt, that this is evidence that it will not be in a position to meet its liabilities as they fall due for payment and that the deficiency will continue to increase. He has also suggested that for the subsidiaries to financially support the company would constitute an unlawful preference by the subsidiaries of the company over their other creditors.

4.5 There is a vague averment in Mr. Fraher's affidavit that he had been advised by AIB "that the loans to the company and its subsidiaries (including Clerihan … and Peleton Developments …)" are to be transferred to the National Asset Management Agency (NAMA) in December 2010. The Court was told, although this is not on affidavit, that the loans were, in fact, transferred to NAMA on the 20th December, 2010. Mr. Fraher in his affidavit has suggested that what is likely to happen is that NAMA will foreclose on, or enforce, the loans in question. That is pure speculation and I attach no weight to it in reaching the conclusion which I set out later.

4.6 In his affidavit, which post-dated the respective affidavits of Mr. Ronan and Mr. O'Mahoney, Mr. Nolan, on the basis of the exercises which he carried out, to which I have already referred, and on the basis of –

> (i) a realisable asset value schedule as at 31st October, 2010 for the company, and
>
> (ii) a twenty four month cashflow forecast (from 1st November, 2010 to 31st October, 2012) in relation to the company and its three retail subsidiaries,

expressed the opinion that the company is insolvent on a balance sheet basis and is insolvent "on a cash flow basis given that it cannot meet its debts as and when they fall due". As regards the first exercise, which shows an increase in the net balance sheet deficit of the company from the figure of €347,692, as shown on the management accounts as at 31st October, 2010, to in excess of €1.646m in a best case scenario or in excess of €3.391m in a worse case scenario, while it may be meaningful in accountancy terms, it is not helpful in the application of the test which the Court has to apply on the petition, namely, whether the company is unable to pay its debts as they fall due. As regards the second exercise, Mr. Nolan's approach differs from that of Mr. O'Mahoney, who has prepared and exhibited a projected cash flow for the company and the three retail subsidiaries for the fifteen month period from August 2010 to November 2011. Whereas Mr. O'Mahoney, in his exercise, factored in that both Peleton and GBC will receive dividends in the liquidation of Peleton Developments, Mr. Nolan has not provided for any such payments or distributions because of "the uncertainty around same", which, in my view, is not an unreasonable approach. Nonetheless, Mr. Nolan has acknowledged that the exercise he carried out shows a closing cash position at the end of the twenty four month period of €101,812, which would be due to a positive cash flow position on the part of Thomastown. However, Mr. Nolan has averred twice in his affidavit that he has been instructed that "Mr. Fraher, as a responsible director, will no longer allow [Thomastown] to financially support [the company] or any of its other subsidiaries". He has concluded that "… hence [the company] did (sic) not have the disposable funds to meet its repayment obligations". While Mr. Nolan has adverted to the possibility of the turnover of Thomastown being adversely affected by competition from another supermarket group, as I read it, the basis on which he expresses the opinion that the company is unable to meet its debts as they fall due is because Mr. Fraher has decided not to let Thomastown support the company.

4.7 Mr. Ronan in his affidavit has taken a much simpler approach to the question whether the company is able to pay its debts as they fall due, pointing out that the company has only two creditors: AIB and Thomastown. He has asserted that the AIB debt is on particularly favourable terms, and he is supported in that view by Mr. O'Mahoney. His position, as I have stated, is that he intends to ensure that Thomastown continues to support the company financially to pay the monthly instalments to AIB, but on that point he has to face the contention made on behalf of Mr. Fraher that they are deadlocked and that it cannot be done. Mr. Ronan's position in relation to the inter-company debt is that it is not due for payment by the company to Thomastown and it will not be demanded. Again, Mr. Fraher takes issue with that proposition. Supported by Mr. O'Mahoney's cash flow projection for the company and its retail

subsidiaries, Mr. Ronan's position is that, with the assistance of the trading retail subsidiaries, primarily Thomastown, the company is able to discharge the monthly instalments which are in arrears and will be able to continue to discharge the monthly instalments as they fall due to AIB. He has averred that he is not aware of any complaint from any trade creditor in relation to the discharge of debts by the retail subsidiaries and he has made the point that an issue arises in relation to the outstanding rates alleged to be due by Peleton.

4.8 Mr. Ronan has exhibited a letter dated 13th December, 2010 from AIB, in which it is confirmed that all repayments due to AIB in respect of the retail subsidiaries of the company, namely, Peleton, GBC and Thomastown, were then up to date.

4.9 Mr. Ronan has asserted that Mr. Fraher has an ulterior motive for seeking to have the company wound up by the Court and has asserted that Mr. Fraher is attempting "to engineer the winding up … so as to allow him (or persons connected with him) to take advantage of its insolvency and to attempt to purchase the retail businesses of the subsidiaries in the liquidation". Mr. Ronan has also raised a point, which was raised in the s. 202 proceedings, as to the propriety of a payment by Thomastown to Mr. Fraher of a sum of €393,000 in respect of "management fees" in the early part of 2010. Mr. Fraher has defended his entitlement to the payments in question, but his counsel made the valid point that, in any event, it is a matter which could be investigated by the official liquidator in the winding up process if a winding up order was made. In my view, the issue as to the propriety of the payments in question is not relevant to the determination the Court has to make.

5. The petitioner as contingent or prospective creditor issue

5.1 Section 215 of the Companies Act 1963 (the Act of 1963) provides that an application to Court for the winding up of a company shall be by petition presented by, *inter alia*, a creditor, including a contingent or prospective creditor. However, paragraph (c) of s. 215 provides that the Court shall not give a hearing to a winding-up petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable, and until a *prima facie* case for the winding up has been established to the satisfaction of the Court. In his grounding affidavit, Mr. Fraher indicated that he was ready, willing and able to provide for such security for costs as the Court might think reasonable. At the hearing on 20th December, 2010 I made an order directing Mr. Fraher to provide security for costs in the form of a bond in the sum of €10,000 by 11th January, 2011, which Mr. Fraher undertook to the Court to provide. On that basis, I was satisfied that one of the pre-conditions set out in paragraph (c) had been complied with. In relation to the other pre-condition, that the Court shall not give the petitioner a hearing until a *prima facie* case for winding up has been established to the satisfaction of the Court, it would appear that the approach to be adopted by the Court and, in particular, whether it should hold a preliminary hearing on that issue has not been considered by the High Court in this jurisdiction. In *Re Fitness Centre (South East) Ltd*. [1986] BCLC 518, Hoffman J., delivering judgment in the High Court in the United Kingdom, stated that the corresponding provision of the United Kingdom Companies Act 1985 appeared to prohibit the Court from proceeding with the hearing of the petition until a preliminary hearing on the pre-conditions had been completed. However, his view was that that was not necessarily an insuperable procedural bar, because he considered that he could constitute the proceedings before him as the preliminary hearing, and then, if he formed a view which was favourable to the petitioner as to the question of security for costs and a *prima facie* case, he could go on immediately to the hearing of the petition. In this case, as Mr. Fraher was also petitioning to wind up the company in his capacity as a contributory, I consider that it was not improper to hear the petition, as I did.

5.2 In reliance on a number of English authorities (*Re Fitness Centre (South East) Limited; Sugar Hut Brentwood Ltd. & Ors. v. Norcross* [2008] EWHC 2634; and in *Re Sass* [1896] 2 QB 12, where the insolvency was a bankruptcy rather than a liquidation), counsel for Mr. Ronan submitted that Mr. Fraher does not have standing to petition for the winding up of the company as a contingent or prospective creditor. Mr. Fraher's case that he is a contingent or prospective creditor is based on the fact that he has guaranteed the company's indebtedness to AIB, as outlined earlier. Counsel for Mr. Ronan, correctly in my view, submitted that Mr. Fraher's case was evidentially deficient in that he had failed to set out the precise terms of the guarantee or exhibit a copy of it. A copy of Mr. Ronan's guarantee was handed into the Court with the consent of counsel for Mr. Fraher. That is in a standard form of AIB guarantee, which was given on 29th June, 2005. On the assumption that Mr. Fraher's guarantee is in the same form, which is a reasonable assumption to make in the absence of any objection from Mr. Fraher, Mr. Fraher has agreed –

> "to pay and satisfy to the Bank on demand all sums of money which are now or shall at any time hereafter be owing to the Bank anywhere on any account whatsoever whether from the [company] solely or from the [company] jointly or jointly and severally with any other person or persons … including … provided always that the total amount recoverable from the Guarantor shall not exceed the sum of €500,000 …."

In my view, what that agreement means is that the surety, Mr. Fraher, is liable to pay the limit stipulated of €500,000 towards the ultimate balance remaining due after all money obtainable from other sources has been applied in reducing the debt of the principal debtor, the company, to AIB. What the authorities relied on by counsel for Mr. Ronan establish is that, in the event of the insolvency of the company, AIB would have the right of proof in the liquidation of the company for the whole of its debt until it has received one hundred cent in the Euro notwithstanding that it had received some payment from Mr. Fraher as surety and that Mr. Fraher, as surety, would not, by reason of such payment, have any right of proof in the winding up in preference or priority to AIB as creditor. If, however, Mr. Fraher were to pay the whole debt, then, as regards the amount paid, he would be subrogated to the rights of AIB. As a matter of fact on the evidence, Mr. Fraher has made no payment whatsoever to AIB on foot of the guarantee.

5.3 Applying the foregoing principles to the facts before the Court, until Mr. Fraher has discharged the whole of the company's indebtedness to AIB, AIB, as creditor, is entitled to prove in respect of its whole debt and, as Hoffman J. put it in *Re Fitness Centre (South East) Ltd.* (at p. 521), Mr. Fraher "is debarred by the rule against double proof from making any claim at all". Not only has Mr. Fraher not discharged the whole or any part of the company's indebtedness to AIB, it would appear on the evidence that the primary liability of the company to AIB to discharge the entire debt immediately has not crystallised, so that the liability of Mr. Fraher as surety has not crystallised. Accordingly, in my view, Mr. Fraher, in purporting to petition as a contingent creditor of the company, does not have a sufficient interest to maintain the petition, because, as of now, he does not have that status.

6. Petitioner as a fully paid-up contributory

6.1 In reliance on a number of English authorities, counsel for Mr. Ronan submitted that Mr. Fraher, as a fully paid-up shareholder, does not have *locus standi* to bring the petition.

6.2 The earliest of the authorities relied on was the decision of the Court of Appeal in *In re Rica Gold Washing Company* (1879) 11 Ch. D. 36. In that case, the petitioner was seeking to have the company compulsorily wound up on the grounds that it was just and equitable to do so. Jessel M.R. made the following observations in relation to the position of a petitioner holding fully paid-up shares

(at p. 42):

> "He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a petition. That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say 'a sufficient interest', for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must shew what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf."

6.3 That principle was applied by the English High Court in two cases dating from 1996: *Re Othery Construction Ltd*. [1966] 1 All ER 145; and *Re Expanded Plugs Ltd*. [1966] 1 All ER 877. In the earlier of the two cases the petitioner alleged that the company was insolvent and that it would be just and equitable that the company be wound up. In the latter, the petitioner also sought to wind up the company compulsorily on the just and equitable ground, in circumstances where the evidence showed that there would be no surplus available for distribution among shareholders.

6.4 The principle was applied again a decade later by the English High Court in *Re Chesterfield Catering Co. Ltd.* [1976] 3 All ER 294, which was once again a case in which the just and equitable ground was invoked by the petitioning personal representatives of a deceased member of the company in circumstances where the company had ceased to trade and appeared to be insolvent. In his judgment Oliver J. quoted the passage from the judgment of Jessel M.R. in *In re Rica Gold Washing Company* which I have quoted earlier and commented (at p. 299):

> "However, it is I think clear that in referring to 'a sufficient interest' Jessel M.R. meant an interest by virtue of the petitioner's membership. In order to establish his *locus standi* to petition a fully paid shareholder must, as it seems to me, show that he will, as a member of the company, achieve some advantage, or avoid or minimise some disadvantage, which would accrue to him by virtue of his membership of the company; for instance, a member of a company might have a strong interest in terminating its life because he was engaged in a competing business or because he was engaged in litigation with the company, but I do not think that that was the sort of interest that Jessel M. R. had in mind.
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> … it seems to me to be contrary to the principle of all the cases to suggest that, even allowing that there may exceptions to the general rule, a petitioner can demonstrate his *locus standi* by pointing to some private advantage which he may derive from the winding up and which is unconnected with his membership of the company."

6.5 The final authority referred to by counsel for Mr. Ronan is a decision of the Privy Council on appeal from the Court of Appeal of Cayman Islands: *CVC/Opportunity Equity Partners Ltd. & Anor. v. Almeida* [2002] UK PC 16; [2002] 5 LRC 632. In delivering the judgment of the Privy Council, Lord Millett referred to the relevant provision of the Cayman Islands law – that the Court may wind up a company if it is of the opinion that it would be just and equitable to do so – and stated that it was well established that under the corresponding provision of English law a shareholder with fully paid-up shares had no *locus standi* to present a winding up petition unless there was *prima facie* evidence that there would be a surplus on a winding up. Although that is as far as that judgment is pertinent to the proceedings before the Court, it is interesting to note that Lord Millett also pointed out that there was no statutory equivalent in Cayman Islands law to the provision in the United Kingdom of which s. 205 of the Act of 1963 is the analogue in this jurisdiction.

6.6 Mr. Fraher's answer to the contention of Mr. Ronan that, as a contributory, he does not have *locus standi* is to be found in the following passage from the annotations on s. 215 of the Act of 1963 in MacCann and Courtney on *Companies Acts 1963 – 2006* (2008 Ed.), where the editors state (at p. 433):

> "Whilst the English courts have been reluctant to allow the holder of a fully paid share to petition to wind up a company unless it can be shown that the member will have a tangible interest in the liquidation, as where there would be a substantial surplus of assets available for members, the Irish courts have been prepared to make a winding up order on a creditor's (*sic*) petition even where there is no prospect of a dividend in the liquidation."

The authority cited by the editors for that proposition is *Re Irish Tourist Promotions Ltd*. (1963 – 1993) ICLR 382. That case, in which judgment was delivered by Kenny J. on 22nd April, 1974, is usually cited as an example of the deadlock in corporate management category of circumstances in which the Court may wind up a company under s. 213(f) of the Act of 1963 where it is of opinion that it is just and equitable to do so. For the reasons I will outline, I have not found it particularly helpful in determining whether Mr. Fraher has *locus standi* as a contributory.

6.7 As appears from the judgment of Kenny J., there was a raft of applications to the Court by the principal proponents in the *Re Irish Tourist Promotions Ltd.* proceedings, namely, Mr. Doherty, the petitioner, who was the owner of 218 (the figure of 219 in the judgment appears to be a typographical error) of the 500 issued shares in the company which were fully paid and who had an agreement with Mr. Smith to purchase 63 shares, but the transfer had not been completed, and Mr. Mullen who was the owner of the remaining 219 shares. The dispute between the petitioner and Mr. Mullen appears to have originated from a business relationship which was extraneous to the business of the company. In 1973, having concluded that the business of the company could not be carried on, the petitioner, in conjunction with a third party, had formed another company which was represented as carrying on the business which the company had previously carried on. An injunction was granted in the High Court on the application of Mr. Mullen to restrain those representations in proceedings under s. 205 of the Act of 1963 which had been commenced by Mr. Mullen alleging oppression by the petitioner. Those s. 205 proceedings had not been heard when the winding up petition was heard.

6.8 In July 1973 the petitioner presented his petition to have the company wound up (Record No. 1973/1759P) on the grounds that it was insolvent and that the petitioner and Mr. Mullen, who were the directors, were on such bad terms that a complete deadlock in the management of the company existed. Although this is not clear from the judgment, inspection of the original petition on the Court file has revealed that the petitioner asserted that it was just and equitable that the company be wound up, although s. 213(f) of the Act of 1963 was not expressly invoked.

6.9 It is recorded in the judgment of Kenny J. on the petition to wind up that it had not been seriously contested by counsel for Mr. Mullen and for the company that the company was then insolvent. Mr. Mullen's argument was that the company had a reasonable prospect of making substantial profits in the future. He was supported by Mr. Smith to the extent that Mr. Smith's view was that, if the company could be brought back to the stage and position it was in before the dispute between the petitioner and Mr. Mullen

began, it could be successful. Further, it is recorded that the majority of the creditors did not wish the company to be wound up. On the evidence, Kenny J. concluded that the company was insolvent; that it could not pay its debts. He also concluded that there was no prospect that it would ever trade profitably in the prevailing circumstances. He held that it should be wound up by the Court, although he commented that the prospects of anyone being paid anything were remote. The factors which appear to have weighed with Kenny J. were that –

> (a) the company had ceased to trade,
>
> (b) the petitioner and Mr. Mullen, the two directors of the company, were deadlocked,
>
> (c) Mr. Mullen refused to allow the petitioner to take any part in the running of the business,
>
> (d) Mr. Mullen was gainfully employed elsewhere,
>
> (e) no one was employed on a full time basis by the company, and
>
> (f) most significantly, the conclusion of Kenny J. that the estimate of what the company could earn, if it were to continue to trade, was "based upon hope and not on reasonable anticipation" and that it was "entirely false".

6.10 At the outset, I emphasised that the only ground relied on in the petition to ground Mr. Fraher's claim that the Court should make a winding up order is that the company is insolvent. He did not invoke the just and equitable ground provided for in s. 213(f), although in his grounding affidavit he did point to the fundamental difference of opinion between him and Mr. Ronan and he made the point that, given Mr. Ronan's attitude, he could not initiate or procure a creditors' voluntary winding up and he was prevented from having the company present the petition itself. The fact that Mr. Fraher has not expressly invoked the just and equitable ground, which was invoked by the petitioner in the *Re Irish Tourist Promotions Ltd*. case, is one of a number of distinguishing features between that case and this case. Another is the fact that, the petition had been "the subject of an oral hearing" in January 1974 which would have given Kenny J. the opportunity to resolve conflicts of fact between the petitioner and Mr. Mullen, an option which is not available to the Court here in relation to the conflicts between Mr. Fraher and his accountancy adviser, Mr. Nolan, on the one hand, and Mr. Ronan and his accountancy adviser, Mr. O'Mahoney, on the other hand, on the issue of insolvency. Kenny J. was also in a position to form a view as to the viability of the company in the future and to explore the motivation of the parties supporting and of the parties against the making of a winding up order. Having regard to those differences, I am doubtful as to whether the decision of Kenny J. should be regarded as authority for Mr. Fraher having *locus standi* to pursue this petition as a contributory.

6.11 There was an alternative remedy open to Mr. Fraher, as a member of the company. He could have sought relief under s. 205 of the Act of 1963, in which case the Court would have the broad panoply of powers available to it under subs. (3) of that section, and he could have sought an order winding up the company under s. 213(f) as a "fallback" position. He chose not to do so.

6.12 The editors of MacCann and Courtney *op. cit.*, observe at p. 419, in commenting on the definition of "contributory" in s. 208 of the Act of 1963, that Kenny J. –

> "… noted the insolvency of the company and the fact that in that case the petitioner accepted that he could not hope to get anything out of a liquidation. In coming to that conclusion no authority was cited but the decision is consistent with … s. 216(1)."

Section 216(1) deals with the powers of the Court on the hearing of a petition to wind up and provides, *inter alia*, that 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.

Notwithstanding that, I have some residual doubts as to whether Mr. Fraher has standing as the owner of fully paid-up shares to maintain a petition solely on the ground stipulated in s. 213(e) – that the company is unable to pay its debts. It is unnecessary to determine the issue definitively because of the view I have taken on the question whether it has been established that the company is unable to pay its debts as they fall due and the proper exercise of the Court's discretion under s. 216.

7. Company insolvent/exercise of discretion

7.1 It is unquestionably the case that, without the assistance of Thomastown, the company cannot discharge the only debts which have accrued and which will continue to accrue on a recurring basis, namely, the monthly instalments of the repayment of the loan from AIB which have already accrued and are in arrears, and the future monthly instalments which will continue to accrue until 2022. Even on Mr. Nolan's twenty four month cash flow forecast it would appear that Thomastown, as things stand, does have the capacity to assist the company in discharging the arrears and in making the monthly payments due from the company to AIB. The reason why the monthly instalments due by the company to AIB are in arrears is because, contrary to the agreement between Mr. Fraher and Mr. Ronan which is to be implied from the s. 60 statutory declaration, the payments by Thomastown to the company ceased without any resolution to that effect having been passed by Thomastown or without the agreement of Mr. Ronan as a fifty per cent beneficial owner of Thomastown through the medium of the company. I am not satisfied on the evidence that those payments have ceased because of the inability of Thomastown to meet the totality of its debts as they fall due.

7.2 As is pointed out in the annotation on s. 214 in MacCann and Courtney op. cit., although, where a petitioning creditor establishes that a company is unable to pay its debts, he will normally be entitled to a winding-up order *ex debito justitiae*, nevertheless, the Court retains an overriding and unfettered discretion to refuse to order to wind up the company, albeit that it will only exercise the discretion sparingly and where good cause is shown. Even if Mr. Fraher has *locus standi* as a contributory, I think any court should be loathe to wind up the company on his petition as a shareholder given that, by agreement with Mr. Ronan, he was responsible for putting the structure in place whereby Thomastown was to give financial assistance to its parent, the company, to discharge the company's indebtedness to AIB by instalments. By resiling from the agreement to give that assistance in circumstances in which Thomastown appears to have sufficient cash flow to provide it, Mr. Fraher has contrived a situation in which his accountancy adviser, Mr. Nolan, has averred that the company is insolvent on a cash flow basis.

7.3 Counsel for Mr. Ronan characterised the outcome of a winding up order made by the Court on the petition of Mr. Fraher as "corporate patricide". In my view, that is not an exaggeration. The company's three retail subsidiaries are trading. There is no evidence of any concern on the part of their trade creditors. Their respective financial commitments to their bank, AIB, are being serviced. If the Court were to make an order winding the company up compulsorily, inevitably, the official liquidator would have to

consider disposing of the company's shareholdings in the retail subsidiaries, in the context of the winding up. As opposed to that, in the final paragraph of his affidavit, Mr. Ronan has averred that allowing the company to continue and allowing the retail subsidiaries to trade will result in viable businesses surviving, 120 staff members retaining their jobs and AIB having its loans serviced by repayments of capital and interest.

7.4 Obviously, in the current difficult economic circumstances, it is not possible to predict with any degree of certainty what will happen in the future. However, having regard to the manner in which the company's parenthood of Thomastown came into being and the implied agreement between Mr. Fraher and Mr. Ronan that Thomastown would continue to give financial assistance to the company in connection with the discharge of the company's indebtedness to AIB, in my view, it would be unjust to allow Mr. Fraher to "pull the plug" at this juncture, on the basis of an alleged insolvency of the company which he has contrived contrary to that agreement. Insofar as a deadlock has arisen between Mr. Fraher and Mr. Ronan *qua* shareholders and *qua* directors of the company and its subsidiaries, there is an alternative remedy which Mr. Fraher can pursue which gives the Court a lot more options than making a compulsory winding up order at this juncture, although, of course, one cannot rule out the possibility that it could be necessary to make a winding up order under s. 213(f) at some time in the future. However, that would only be done after an oral hearing and after the Court had an opportunity to explore the respective motivations of the proponents.

8. Order

8.1 There will be an order dismissing the petition.