THE HIGH COURT

[2016 No. 783P]

BETWEEN

BANDON MOTORS (BANDON) LIMITED

PLAINTIFF

AND

WATER SUN LIMITED AND NYHAN MOTORS BANDON LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 13th April 2018

Introduction

1. Two applications are before the court. The plaintiff company seeks an interlocutory injunction restraining the defendant companies from presenting a petition to wind it up. The defendant companies seek liberty to cross-examine two of the deponents who have sworn affidavits in support of the plaintiff company's injunction application.

The underlying proceedings

2. The plenary summons in this case issued on 29 January 2016. The plaintiff's motion of the same date was filed on the same day. The principal relief claimed under the general indorsement of claim in the plenary summons is a perpetual, or permanent, injunction in the same terms as those of the interlocutory injunction now sought i.e. one restraining the defendants from presenting a winding up petition against the plaintiff in the Central Office of the High Court, together with damages for 'malicious' abuse of process. The defendants entered a memorandum of appearance on 4 February 2016.

3. When the present application came on for hearing on 3 and 4 May 2016, the plaintiff had not then delivered a statement of claim. In the absence of a properly particularised claim, it is necessary to attempt to identify the issues that the plaintiff seeks to have tried from the averments contained in the affidavits exchanged between the parties and the written and oral submissions on which they rely.

Background

4. The plaintiff's interlocutory injunction application is grounded on an affidavit of Kevin Barry, sworn on 29 January 2016. Mr Barry is the sole director and registered shareholder of the plaintiff company, Bandon Motors (Bandon) Limited ('the new company'), which was incorporated on 5 September 2013.

5. Mr Barry avers that, shortly after its incorporation, the new company acquired the business and assets of a company named Bandon Motors Limited ('the old company'). For many years prior to the incorporation of the new company, Mr Barry was an employee of the old company, though never a director or shareholder. A Mr Bob Clarke swore an affidavit on 18 February 2016 in support of the new company's injunction application, in which he avers that he was a director of, and primary shareholder in, the old company. He is now a sales manager with the new company. He does not disclose whether he has a beneficial interest in the ownership of it (see paragraph 24 below).

6. The business of the old company principally comprised the ownership and operation of a Ford motor vehicle dealership trading as Bandon Motors located on the Clonakilty Road in Bandon, County Cork, together with the operation and ownership of an adjacent petrol filling station. The new company now operates that dealership and has its registered office at that address. The dealership employs 27 people.

7. Mr Barry deposes that the new company entered into an agreement to purchase the business and assets of the old company after the latter fell into financial difficulties, despite the underlying profitability of its motor dealership, because it could not service its bank borrowings. Mr Barry does not disclose either the material terms of that purchase agreement or the basis upon which the new company was able to fund its acquisition of the business of the old one. Mr Barry refers to the transaction several times as 'a management buyout' but does not disclose which of the management personnel of the old company, if any apart from him, were involved in it; what level of funding was necessary to enable it to occur; or what was the source of that funding.

8. Mr Clarke avers that the old company sold its business and assets to the new company 'in the manner described by Mr Barry in the … affidavits sworn by him', without acknowledging that, in those affidavits, Mr Barry has provided little or no information or detail concerning the manner in which the new company acquired the business of the old one.

9. Mr Barry avers that, just prior to the conclusion of its purchase of the old company's assets in December 2013, the new company agreed with a Mr Con Nyhan to sell its petrol filling station property to him for a consideration of €900,000. It appears to be common case that there had been a number of meetings between Mr Clarke, Mr Barry and Mr Nyhan between October and December 2013 in the context of the purchase by Mr Nyhan, through another company controlled by him, of a separate property, situated on the Cork Road in Bandon ('the Cork Road property'), that the old company also owned.

10. The new company received that sum from Mr Nyhan but, in Mr Barry's words, the legal transfer of the title to the petrol station was not attended to. Mr Barry does not explain why not. Nor does he exhibit any contractual documentation evidencing that agreement for sale. He does aver that Mr Nyhan, either directly or through a company owned or controlled by him, subsequently went into occupation of the petrol station premises before leasing it to a third party in or about November 2014. Mr Barry further deposes that he later instructed the new company's solicitors to seek to regularise the position, which prompted them to write to Mr Nyhan's solicitors to that end on 18 November 2015, but without eliciting any response.

11. In a subsequent affidavit, sworn on 18 February 2016, Mr Barry elaborates on the circumstances of that agreement. He exhibits a letter dated 14 January 2014 from a third-party petrol station operator to him on behalf of the old company, offering to purchase the petrol filling station for €900,000. Mr Barry avers that the petrol station operator was only interested in purchasing the filling station and had no interest in taking on the old company's motor dealership, employees or creditors.

12. According to Mr Barry and Mr Clarke, Mr Nyhan agreed to match that offer and, in addition, to provide the new company with an unsecured five-year interest free loan of up to €500,000 in consideration for which he was to receive a 40% shareholding in the new

company in lieu of interest on the loan, though only at the end of that five-year period.

13. Mr Barry also exhibits to that affidavit an agreement dated 20 December 2013 between the old company and its bank, whereby the bank agreed to accept €900,000 in full and final discharge of the old company's (unspecified) indebtedness on certain terms and conditions, most notably the payment of that sum to the bank's solicitors before 8 p.m. on that date. Given the old company's pressing need under that agreement to compromise its indebtedness to the bank through the payment of €900,000 by close of business on 20 December 2013 and the strong implication that it was only able to do so with funds received in that amount – either directly or through the new company – from Mr Nyhan's purchase of the filling station, the significance of an offer in the same amount by a third party the following month is not readily apparent.

14. Mr Barry avers that it was a term of the agreement between the old company and the bank that the new company was to take on all of the rights and entitlements of the employees of the old company and not to effect any redundancies. However, the agreement that Mr Barry exhibits deals only with the settlement of the old company's indebtedness to the bank. It does not contain the term alleged or any term referable to the proposed acquisition of the business of the old company by the new company. Indeed, it makes no reference whatsoever, whether directly or indirectly, to the proposed transfer of the old company's business to any other entity. Nor does it make any mention of the new company.

15. Mr Barry asserts that the advantages of the proposed transaction with Mr Nyhan from the latter's perspective were essentially fourfold: first, he would obtain ownership of the petrol filling station; second, he would have access to Ford commercial vehicles from the new company at cost price; third, he would have a future equity stake in the Ford dealership business of the new company; and fourth, the funds he advanced to the new company would not be susceptible to any clawback by his creditors.

16. The first of those propositions adds little to the court's understanding of the loan element of the transaction. Mr Barry has exhibited an offer of €900,000 for the purchase of the petrol station received the following month from a third party that strongly suggests Mr Nyhan had acquired it in December 2013 at full market value. Hence, it is difficult to see how the opportunity to make that acquisition for that sum could also act as an incentive to make a further €500,000 available to the company as an unsecured interest free five-year fixed term credit facility.

17. The second proposition is unsupported by any evidence of an agreement whereby Mr Nyhan or any of his companies was to be provided by the new company with Ford commercial vehicles at cost price.

18. On the fourth proposition, Mr Barry exhibits a letter dated 24 September 2014 from a firm of solicitors representing Mr Nyhan's daughter, Laura, to the solicitors for Henry Ford & Son Ireland, expressing the belief of that firm of solicitors that neither the National Asset Management Agency ('NAMA') nor any other creditor of Mr Nyhan would have grounds to take action against Ms Nyhan in respect of the unspecified funds invested by her in the new company. It is not immediately apparent how the relevant assurance – that Mr Nyhan's creditors had no actionable claim to the funds in question – could be said to be contingent upon the investment of those funds in the new company, rather than upon the lawful entitlement to those funds (wherever invested) of Ms Nyhan rather than her father.

19. Thus, the third proposition is the only one upon which the new company's claim that the loan transaction had obvious advantages for Mr Nyhan tangibly rests. And that proposition is that Mr Nyhan provided a €500,000 unsecured interest-free five-year fixed-term credit facility to the new company with immediate effect in December 2013 in return for the proposed transfer to him of a 40% shareholding in that company only in or after December 2018, whatever the value - if any - of that company and, by extension, of a 40% shareholding in it, might then be.

20. Mr Barry and Mr Clarke each make the following identical averments concerning the terms of the 'oral agreement' that they say they both reached with Mr Nyhan 'in or around December 2013':

> '(i) Mr Nyhan or his nominee would purchase the petrol station for €900,000.
>
> (ii) Mr Nyhan or his nominee would provide the [new company] with capital and stock to the value of €500,000, interest free and for a five year term.
>
> (iii) The [new company] would repay Mr Nyhan or his nominee €500,000 after 5 years.
>
> (iv) Following the expiry of the 5 year loan term, Mr Nyhan or his nominee would become entitled to a 40% shareholding in the [new company].
>
> (v) The [new company] would secure a continuation of the Ford franchise held by the old company.
>
> (vi) The parties would negotiate with a view to entering into a shareholders agreement to regulate the standings of the various stakeholders in the company.'

21. Mr Nyhan swore an affidavit in reply on 9 February 2016. He avers that, while he is not a director of either defendant company, he has been authorised to represent each in its dealings with the new company and Mr Barry. The directors of the second defendant, Nyhan Motors (Bandon) Limited ('Nyhan Motors') are Mr Nyhan's wife Noirín Nyhan and his daughter Laura Nyhan, and the directors of the first defendant, Water Water Sun Limited ('Water Sun'), are Laura Nyhan and a Ms Geraldine Maguire. Mr Nyhan avers that Water Sun and Nyhan Motors are associated companies, and that the former is a subsidiary of the latter. Mr Nyhan is unforthcoming about his own role in, or connection with, each of those companies, save to say that it is common case that he represented each in its dealings with the new company at all material times.

22. Mr Nyhan disputes the averments of Mr Barry and Mr Clarke concerning the agreement reached between them in December 2013. Mr Nyhan avers that the entire business of the old company was valued at €900,000 and the Nyhan family provided the new company with the capital necessary to acquire it. According to Mr Nyhan, Mr Barry did not provide any of that capital and holds 40% of the shares of the new company in trust for the Nyhan family.

23. Mr Nyhan exhibits a declaration of trust in respect of 40 of the 100 ordinary issued shares in the new company, executed by Mr Barry on 14 February 2014, in favour of John O'Connell of McGuire Desmond, Solicitors. Mr Nyhan deposes that Mr O'Connell was solicitor to the Nyhan family at the material time and that this declaration was executed pursuant to the agreement reached at the outset that the Nyhan family was to have a 40% shareholding in the new company.

24. In a subsequent affidavit sworn on 18 February 2016, Mr Barry avers to his belief that he did not 'knowingly execute this document', although he does not explain how he may have done so unknowingly.

25. He does aver that, at his own request, he received a draft of the trust declaration, among other documents, from Mr O'Connell (who was at that time the solicitor to the new company) as an attachment to an e-mail on 24 March 2014 because he wanted to review that documentation. He further avers that, having reviewed it, he was anxious to seek legal advice and e-mailed those documents to his own solicitor on 27 March 2014. He exhibits his e-mail to his solicitor of that date, to which I will return in a moment. He then exhibits legal advice he received to the effect that, if Mr O'Connell was going to be registered as a shareholder in the new company, the execution of a declaration of trust by Mr Barry in favour of Mr O'Connell would be irrelevant. But the premise on which that advice was based was incorrect - Mr O'Connell was never registered as a shareholder in the new company. Thus, Mr Barry's subsequent averment that, in light of the advice he received, he 'could not have and did not sign' the trust declaration, is a *non sequitur*.

26. Returning briefly to Mr Barry's e-mail to his solicitor of 27 March 2014, under cover of which he enclosed various draft documents received from Mr O'Connell in respect of which he wanted to obtain his solicitor's advice, two points are particularly striking. The first is that, in listing the proposed shareholders agreement as one of those documents, Mr Barry writes beside it: 'I am holding 60% (20 for Kevin 40 for the Clarke Family) and John O'Connell 40% (Nyhan family).' The second point is that one of the items that Mr Barry lists to be considered by his solicitor for inclusion in the proposed shareholders agreement is the following: 'Make sure nothing in Shareholders Agreement that would allow the 40% shareholder buy out the 60% shareholding by triggering a clause in the agreement.' Neither of these statements contains a reference to the transfer or operation of a separate 40% shareholding in the new company in the future, rather than in the present, tense. Further, it is very difficult to accept the new company's contention that these negotiations in March 2014 can be plausibly construed as directed towards the regulation of a relationship between shareholders that was not to take effect before 31 December 2018, then still almost five years in the future.

27. Mr Barry further exhibits an e-mail that Mr O'Connell wrote as solicitor to the new company on 19 February 2014, in support of an application by it to a merchant services provider, confirming that 'Kevin Barry holds 100% of the shares in [the new company].' Mr Barry asserts that this e-mail serves to confirm that he did not execute a declaration of trust in favour of Mr O'Connell in respect of 40% of the shares in the new company on 14 February 2014. For my part, I do not see how that is so. It is common case that Mr Barry is, and was at all material times, the legal owner of 100% of the shares in the new company. The question is whether Mr Barry holds 40% of that shareholding on trust for Mr O'Connell and, through him, the Nyhan family, in consequence of an asserted agreement and exhibited trust declaration to that effect. Mr O'Connell's e-mail does not address, much less contradict, that proposition.

28. Mr Nyhan avers that, while he had discussions with Mr Barry about formalising the terms of the loan finance that had been provided to the new company (including the fixing of a five year loan period), he made it clear that two conditions would have to be met: first, a dealership franchise agreement must be concluded between the new company and Ford; and second, a shareholders agreement must be concluded between the shareholders in the new company. It is common case that the latter did not happen.

29. Conversely, Mr Barry deposes that, while discussions occurred in or around December 2013 about Mr Nyhan becoming a shareholder in the new company, 'ultimately terms were not agreed and Mr Nyhan did not become a shareholder', while asserting that, at the same time, Mr Nyhan did agree with Mr Barry and Mr Clarke that 'the indebtedness of [the new company] to [Nyhan Motors] would be interest free and would be repayable not earlier than five years from when the advances took place', creating a striking asymmetry of immediate benefit and risk, whereby the new company was to receive €500,000 interest free for a five year term right away from Mr Nyhan, while he was to have no security of any kind in respect of that loan, and was to have no shareholding in the new company, much less the benefit of any shareholders' agreement concerning its operation or management, until after the expiration of the loan term.

The disputed debt

30. Mr Barry accepts that the new company received €101,100 from Nyhan Motors on 27 January 2014; a further €250,000 from that company on 23 December 2014; and stock (comprising various motor vehicles) over an unspecified period to the value of €84,900. Mr Nyhan avers in response that Water Sun was the source of the €250,000 payment in December 2014, exhibiting a copy of the relevant bank statement of that company in support of that assertion.

31. Mr Barry acknowledges receipt of those monies and that stock, as well as receipt of two further sums from a company named Midleton Motorview, comprising €11,500 on 14 February 2014 and €52,300 on 1 May 2014. Mr Barry avers that Midleton Motorview is another company associated with Mr Nyhan, before characterising the two sums it provided as - by implication, distinct - 'investments' by it in the new company. Mr Nyhan has clarified that the company concerned is, in fact, MN Motors Limited ('Motorview'), which trades as Motorview from premises in Midleton, County Cork. Mr Barry provides no evidence or information to suggest a separate investment agreement between the new company and Motorview.

32. In summary, by March 2015, the new company had received cash in the total sum of €414,900 and stock to the value of €84,900, amounting to an aggregate benefit of €499,800, from companies associated with Mr Nyhan or the Nyhan family.

33. Against that background, Mr Nyhan avers that, in around March 2015, when it became apparent that a shareholders' agreement could not be concluded he made it clear to Mr Barry that the loans to the new company would have to be called in.

Initial demands for repayment

34. On 15 April 2015, 'Water Sun Limited, c/o Nyhan Motors' wrote to the new company in the following terms:

> 'We refer to the loan of €500,000 advanced to you by us, which loan is repayable on demand.
>
> We hereby demand repayment of the entire amount of €500,000. We hereby put you on notice that we will take proceedings to recover the said sum of €500,000 in the event that payment is not received by close of business on 17th April 2015.'

35. On 23 April 2015, Water Sun wrote again to the new company, this time giving an address 'c/o Noirín Nyhan'. The letter noted that no reply had been received to Water Sun's earlier letter and gave notice, pursuant to s. 214 of the Companies Act 1963, that if the new company did not pay the asserted debt of €500,000 within 21 days, Water Sun would petition the High Court to appoint a liquidator to wind it up on the basis of its being deemed unable to pay its debts.

36. On 18 May 2015, through its solicitors Water Sun wrote to the new company, adverting to Water Sun's 21-day notice letter of 23

April 2015 and demanding the discharge of the alleged debt by close of business the following day, failing which they would proceed against the new company without further notice.

Is the debt not yet due?
37. On 19 May 2015, through its solicitors, the new company replied, stating tersely that it did not owe Water Sun the sum claimed, before adding that there was no basis for issuing a 21-day warning letter; that a winding up petition would be fundamentally flawed and an abuse of process; and that, should one be presented, it would be strenuously defended and the subject of an application for the new company's costs.

The disputed set off of the value of vehicles received against the debt claimed
38. Nothing further happened until, in July 2015, an issue arose about a number of Ford motor vehicles that the new company had delivered to Nyhan Motors, precipitating further exchanges on the nature of the financial or commercial relationship between the parties.

39. On 16 July 2015, Mr Barry wrote on behalf of the new company to Mr Nyhan at Nyhan Motors, referencing a recent telephone call between them. In that letter, Mr Barry stated:

> 'Nobody has ever produced to us any basis for [Water Sun] to claim to be owed €500,000 by [the new company]. It was on that basis that the letter from [Water Sun's solicitors] of 18 May was replied to.'

40. While it appears to be common case that the new company would not have known in December 2014 that the source of the payment of €250,000 it received that month was Water Sun, in an affidavit that he swore on 18 February 2016 Mr Barry concedes that he and, by necessary implication, the new company were made aware of that fact in the course of an exchange of e-mails between him and Mr O'Connell, the Nyhan family solicitor, that occurred less than two months later on 20 February 2015. That was before the new company elected in May 2015 to respond to Water Sun's claim for immediate repayment of €500,000 with a bare denial that it owed that company the sum claimed, without providing any clarification or acknowledgment that it had indeed received approximately €500,000, but was asserting that it had borrowed the entire sum from Nyhan Motors as an unsecured, interest-free, 5 year loan that was not due for repayment until 31 December 2018, and that it had not entered into any loan transaction with Water Sun, although it had since learned that Water Sun was the source of €250,000 of those funds.

41. Returning to the letter of 16 July 2015, Mr Barry went on to assert that the new company had never disputed that it had received identified cash payments and stock from companies associated with the Nyhan family to the value of €499,800 (although without pointing to any prior acknowledgment in that regard), before continuing:

> 'You are also aware from the outset it has been agreed that the indebtedness of [the new company] in respect of the cash and the stock received is interest free and not repayable not earlier than 5 years from when it was advanced.
>
> Notwithstanding the interest free 5 year period we are negotiating with Bank of Ireland with a view to obtaining a financing facility of €500,000 and we propose to repay in cash the indebtedness in respect of the above. We have been advised by Bank of Ireland that it will be approximately 12 weeks before that money could be advanced to us.'

42. The letter concluded by asserting that the delivery of motor vehicles by the new company to Nyhan Motors earlier that month must be viewed as a matter entirely separate from the issue of the new company's indebtedness to Nyhan Motors and Motorview, so that those vehicles must be either paid for or returned, before finally adding that any failure to do so would prejudice the new company's proposed application to Bank of Ireland for the financing facility suggested.

43. I pause here to note that this letter, written by Mr Barry in July 2015, represents the first assertion in writing of the terms of the December 2013 transaction for which the new company now contends – i.e. that the monies advanced were to comprise an unsecured interest-free loan for a term of 5 years from an unspecified date in that month; an assertion immediately followed by a proposal to repay those monies in cash before the end of October 2015, rather than the end of December 2018.

44. In addressing that difficulty, Mr Barry exhibits to his affidavit of 18 February 2016, an exchange of e-mails that occurred on 3 February 2015 between the new company's solicitors and Mr O'Connell, the solicitor for the Nyhan family. In that exchange, those solicitors were addressing the terms of a proposed shareholders' agreement that, it is common case, was never executed. Mr Barry contends that those e-mails include an express acknowledgment by Mr O'Connell on Mr Nyhan's behalf that the loan terms contended for by the new company were unconditionally agreed. The words relied on appear in an e-mail from Mr O'Connell to which a revised draft shareholders' agreement was evidently attached, although that attachment is not included with the e-mail as exhibited by Mr Barry. In the body of that e-mail (as amended in a subsequent one), Mr O'Connell comments on the attached (though not exhibited) draft, as follows:

> 'The essence of the agreement is that it is more balanced in terms of shareholder rights, however should the loan advanced by my client to the company not be repaid within the five year period for repayment that was agreed when the funds were advanced (to expire in December 2018)…,the provisions in the previous draft of the agreement, which gave my client control of the board and weighted voting rights etc would come back into play.'

45. It seems to me that this statement, shorn of its surrounding context, is of little assistance in determining whether the reference to a 'five year period for repayment that was agreed when the funds were advanced (to expire in December 2018)' is a reference to a freestanding accomplished agreement to that effect, quite apart from the execution of the shareholders agreement that was plainly then envisaged, or a reference instead to an agreement of the kind covered by the general – some would say, pervasive - principle that 'nothing is agreed until everything is agreed', and thus an inchoate or ineffective one unless and until, amongst other matters, the shareholders' agreement was executed - an eventuality which the parties agree never came to pass. As I have already noted, Mr Nyhan acknowledges that he did have discussions with Mr Barry about formalising the terms of the loan finance that had been provided to the new company (including the fixing of a five-year loan period), but – as he contends - always conditional upon, amongst other matters, the execution of a shareholders' agreement.

46. Indeed, in the written submissions filed on their behalf, Water Sun and Nyhan Motors argue – with some force, I would say – that the correspondence exhibited, including an earlier iteration of a proposed shareholders agreement forwarded from Mr O'Connell to Mr Barry on 14 March 2014, tends to significantly undermine the new company's position in respect of the December 2013 agreement for which it contends, as it requires the court to accept that the parties began negotiating in earnest a shareholders' agreement almost five years prior to the anticipated acquisition of the relevant shareholding necessary to give it effect.

47. Returning to the train of correspondence, Mr Nyhan wrote on behalf of Nyhan Motors to Mr Barry at the new company on 20 July 2015. His letter makes no reference to the contents of Mr Barry's letter of four days earlier. Instead, it references the invoices totalling €216,046 due on ten Ford motor vehicles recently delivered by the latter to the former, before concluding:

> 'As per recent discussions we have offset the above against money due and owing in excess of the above to us. Finally, as vehicles above are paid in full can you…complete transfer of registration papers as agreed….'

48. Mr Barry avers that the terms agreed in respect of the delivery of those 10 vehicles were that eight of them were to be paid for within three days of delivery and the remaining two were to be paid for within three working days of registration. Mr Nyhan avers that Nyhan Motors was exercising a contractual right of set off against the monies owed by the new company in respect of the monies due to it for those vehicles. However, he does not identify, much less exhibit, the contract or agreement that he contends is the source of that right.

49. The solicitors for the new company wrote to Mr Nyhan at Nyhan Motors on 24 July 2015. That letter listed the amount outstanding on each of the ten Ford motor vehicles recently delivered before asserting on behalf of the new company that there was never any agreement whereby the aggregate sum due in respect of the purchase of those vehicles was to be offset in whole or in part against the new company's indebtedness to Nyhan Motors and Motorview, which it described as its 'long term debt'.

50. The letter asserted on behalf of the new company that the debt 'does not require to be repaid prior to 31 December 2018', before confirming that the new company was then in discussion with its bank to obtain facilities to repay the debt 'on or before 31 October 2014'.

51. The letter went on to state that there was no basis for withholding the payment due in respect of the delivered vehicles; that a criminal complaint had been made to An Garda Síochána; and that the new company was preparing High Court proceedings against Mr Nyhan personally in respect of his direction or control of Nyhan Motors for the loss and damage occasioned to the new company by the withholding of that payment.

An interim agreement

52. Mr Nyhan avers that the new company would not release the documentation necessary to register certain of the delivered vehicles and that, since the customers of Nyhan Motors who had ordered them were awaiting delivery, Nyhan Motors had no option but to engage with the new company to resolve the impasse.

53. Mr Nyhan deposes that he had discussions with Mr Barry that culminated in an exchange of e-mails between them late on the evening of 6 August 2015. Mr Nyhan exhibits those e-mails. They evidence an agreement to return certain vehicles to the new company; to make payment to it in respect of others; and to offset the balance due on three of them, to the value of €67,846, against the new company's loan. No other payments were to be offset. The new company's complaint to An Garda Síochána was to be withdrawn on the return of the vehicles and receipt of the payments. In his e-mail, Mr Nyhan had proposed a term whereby the remaining balance on the loan was to be paid on or before 31 October 2015. In his response, Mr Barry substituted the following text:

> 'The plan is to clear the remaining balance of the loans in full on or before the 31 October 2015 on receipt of funds from BOI, this is at an advanced stage and no problems are foreseen but if they do arise contact will be made immediately.'

54. Neither the remaining balance of the loans nor any portion of that balance was repaid, either before 31 October 2015 or since. Nor is there any evidence before the court that the new company made contact with Mr Nyhan or any of the companies with which he is associated to explain the position in that regard.

55. In an affidavit sworn on 18 February 2016, Mr Barry avers that the new company was and is willing to clear the remaining balance on the loans and has applied to Bank of Ireland for the necessary funds, in which connection he exhibits a copy of an e-mail from Bank of Ireland to him, which – he avers - confirms that.

56. However, that e-mail is dated 20 November 2015, three and a half months after Mr Barry had asserted that the anticipated receipt of funds from that bank was at an advanced stage. Its subject line is 'loan application feedback' and in it, the bank manager concerned states that he had just had a chat with the bank's underwriter, the formal application having been submitted earlier that week, and that the bank was favourably disposed towards it, subject to the provision of certain specified further information, but that the view had been expressed that the bank would be more comfortable with two years trading accounts and the benefit of detailed management accounts for the whole of 2015, thereby implying that the provision of the finance sought was unlikely to be properly considered before the early part of 2016, belying the assertion in Mr Barry's e-mail of 6 August 2015 that the anticipated receipt of funds from Bank of Ireland was then at an advanced stage.

The registration of cautions

57. It is common case that the new company received €900,000 from Mr Nyhan in December 2013 for the sale of the petrol filling station adjacent to the Ford motor dealership. It appears that the funds realised were used to finance the new company's acquisition of the old company's motor business. Hence, while Mr Barry avers that the €900,000 paid by Mr Nyhan simply purchased the petrol filling station, Mr Nyhan avers that he provided all of the funds necessary to enable Mr Barry to finance the 'management buyout' of the motor dealership business of the old company through the vehicle of the new company and that he was to receive a 40% shareholding in the new company as part of a broader transaction whereby he also agreed to provide the new company with €500,000 in loan finance.

58. Mr Barry avers that the new company's assets included the lands registered in Folio CK35877F and Folio CK45672F, and that the petrol filling station is located on part of the latter folio. Mr Barry goes on to depose that Mr Nyhan went into occupation of the filling station property immediately afterwards and that, in or about November 2014, he leased that property out to a third party.

59. On 7 October 2015, Mr O'Connell swore an affidavit, as a director of a company named Parain Limited ('Parain'), in support of its application to have a caution registered over the lands in Folio CK35877F and part of the lands in Folio CK45672F. In that affidavit, Mr O'Connell deposed that Parain provided the purchase price for those properties; that they were registered in the name of the new company, which held them as bare trustee for Parain; and that Parain's beneficial ownership of those properties had been acknowledged in correspondence and documentation issued by the new company at the time Parain acquired and paid for them. Parain's caution against the registration of any dealing by the new company with those properties as registered owner was duly registered on 26 November 2015.

60. On 18 December 2015, Mr Barry swore an affidavit on behalf of the new company in support of its requisition for the cancellation

of that caution, averring that the new company is the registered owner of those properties but that Parain had not provided any purchase monies for them and that Bandon Motors does not hold them as bare trustee for Parain.

61. In these proceedings, Mr Barry avers that the registration of a caution was entirely unnecessary concerning that part of the Folio CK45627F lands that comprises the petrol station property, in view of the new company's offer to convey the title of that property to Nyhan Motors or any other entity nominated by Mr Nyhan. But, of course, Parain's application for the registration of a caution is grounded on an affidavit sworn by Mr O'Connell on 7 October 2015, whereas Bandon Motors' offer to transfer it is first documented in a letter from its solicitors dated 18 November 2015, shortly prior to the formal registration of the caution on 26 November 2015.

62. Mr Barry further avers that Parain has no interest whatsoever in the lands described in Folio CK35877F, on which is situated an essential workshop used in connection with the Ford dealership showroom premises on the adjoining Folio CK67317F lands. However, Mr Barry has exhibited a draft of the proposed shareholders' agreement and subsequent correspondence concerning the terms of that document that suggest the point is in dispute. The relevant clause in the shareholders' agreement proposed on behalf of the Nyhan family states:

> 'Lease for Workshop. Notwithstanding any other provision of this Agreement, [the new company] and [Mr Barry] hereby covenant with the Nyhan Shareholder that [the new company] shall surrender its lease in respect of workshop premises occupied by [the new company] under lease from [Parain] upon being directed to by the Nyhan Shareholder provided that [Parain] has procured the construction of a new workshop premises for [the new company] on Folio CK67617F to the same specification as the existing workshop.'

63. The solicitors for the new company wrote to Mr O'Connell on 25 February 2015, acknowledging receipt of that draft shareholders' agreement as an attachment to his e-mail of 3 February 2015. In that letter they respond in material part:

> '[The relevant clause] deals with what is a very significant matter. I am advised that the current workshop operated by [the new company] is not registered in the name of [Parain] nor is it to be so registered. The clause is factually incorrect. Title to the workshop is to be transferred from the old company to the new company and [other] solicitors are dealing with that transfer. If Mr Nyhan proposes to build a new workshop adjacent to the showrooms at his cost and in exchange to receive the old showroom, that proposal needs to be the subject of specific detailed agreement. At a minimum the new workshop needs to be built in accordance with planning permission, certified by an architect and so built to meet the requirements of Ford.
>
> In principle, Kevin Barry can see merit in the idea but it is too material a matter to be dealt with simply in one clause.'

64. Mr O'Connell swore a further affidavit on behalf of Parain on 9 February 2016, in opposition to the application by the new company for the cancellation of Parain's registered caution over the lands concerned. Mr O'Connell averred that Parain had issued High Court proceedings under the title '*Parain Ltd v Bandon Motors (Bandon) Limited t/a Bandon Motors, Record No. 1196 P 2016*' asserting its interest in those lands, although those proceedings had not yet been served on 2 March 2016.

65. It follows, as Mr Barry acknowledges, that there is a dispute between the new company and Parain concerning the ownership of the workshop premises and the lands upon which they are situated. For my part, I cannot see the relevance of that dispute or, indeed, of the registration of the relevant cautions to the essential issues in the present injunction application or, indeed, the resolution of those issues. Mr Barry suggests that through the maintenance of those cautions by Parain, Mr Nyhan is 'actively frustrating' the new company's efforts to raise the funding required to repay the remaining balance of its loans but the new company has not provided any evidence to substantiate that claim.

The '21-day letter' and draft petition

66. On 15 December 2015, the solicitors for Water Sun and Nyhan Motors sent a 21 day letter to the new compay in the following terms:

> 'Your company [the new company] is indebted to our clients, [Water Sun] and [Nyhan Motors], in the sum of €250,000, plus interest, plus costs, in respect of a loan, made on or about the 23rd day of December 2014, which was repayable on demand. On behalf of our client (sic) we hereby demand repayment of the said loan in full.
>
> …
>
> TAKE NOTICE that if [the new company] fails to pay the sum outstanding of €250,000, plus interest, plus costs, within 21 days from the date hereof and by return, your company may then be considered to be insolvent in accordance with the provisions of Section 214 of the Companies Act 2014/Section 570 of the Companies Act 2014 and an application may then be made to the High Court seeking to have the company wound up under the Companies Act 2014.'

67. The solicitors for the new company responded by letter dated 22 December 2015 stating that: at no time did it enter into an agreement to borrow money with Water Sun or Nyhan Motors; at no time did it borrow money repayable on demand from Mr Nyhan or any company through which he conducts his affairs; that the presentation of a winding up petition on that basis would be fundamentally flawed and an abuse of process; and that any petition would be strenuously defended and the subject of an application for costs.

68. The solicitors for Water Sun and Nyhan Motors wrote again on 26 January 2016, enclosing a draft winding up petition and stating that their instructions were to issue and advertise it forthwith unless the monies claimed were remitted by return. The letter concluded in the following terms:

> 'We also intend to notify your client's bank as soon as the petition is issued in the Central Office of the High Court so that the company's bank accounts can be frozen in accordance with the provisions of the Companies Act 2014.'

69. The draft petition of Water Sun and Nyhan Motors recites in material part that the new company is indebted to them in the sum of €250,000, together with interest, in respect of a loan they made to it repayable on demand; that repayment was demanded on 15 December 2015; and that more than 21 days had elapsed since then without repayment having been made in whole or in part.

The injunction application

70. The solicitors for the new company replied substantively by letter dated 28 January 2016. In it they advanced the following contentions.

71. First, the new company has no obligations to Water Sun and has never had the benefit of a loan from that company, nor any other dealings with it, rendering the proposed petition fundamentally flawed.

72. Second, while Nyhan Motors did provide the new company with monies and stock, it did so on specific repayment terms agreed between Mr Nyhan and Mr Barry, respectively, in or about December 2013, whereby that indebtedness would be interest free and would not be repayable earlier than five years from when the advances took place.

73. Third, the quantification of the debt claimed at €250,000, represented a reduction from the earlier debt claimed of €500,000, which appeared to be based on the continued wrongful assertion of an entitlement to claim a set off in respect of the balance.

74. Fourth, in the circumstances just described, Water Sun and Nyhan Motors were not proposing to petition the High Court bona fide to secure the orderly administration of the assets of the new company but rather as a tactical ploy to coerce payment of a disputed debt.

75. Fifth, this lack of *bona fides* was also evident from the specific threat to notify the new company's bankers once the petition had been issued to have the company's bank accounts frozen, even before the petition was advertised, preventing the payment of the new company's employee wages, debts to suppliers and other creditors, and tax liabilities and, thus, effectively shutting it down before the petition could be heard – a threat that was described as 'highly irregular'.

76. Sixth, the threatened course of action would thus amount to an abuse of process and the malicious presentation of a petition, for which tortious conduct the new company would pursue a claim in damages against Water Sun and Nyhan Motors in respect of the resulting loss and damage.

77. The said letter concludes by indicating an intention to apply to the High Court on the following day, 29 January 2016, for the injunction now at issue, failing the provision of an undertaking on behalf of Water Sun and Nyhan Motors not to present a winding up petition against the new company.

78. High Court proceedings issued on 29 January 2016 and, on that date, Gilligan J gave the new company leave to issue a motion giving notice of the present interlocutory injunction application returnable for 4 February 2016, on the undertaking of the defendants – who appeared in court through counsel - to refrain from issuing, presenting or advertising the petition, pending the determination of that application.

Legal principles

79. In claiming an entitlement to petition for the winding up of the new company, the defendants rely on the following provisions of the Companies Act 2014 ('the 2014 Act'). First, s. 569 (1), which provides in material part:

> 'A company may be wound up by the court-
>
> (d) if the company is unable to pay its debts….'

80. Next, the following parts of s. 570:

> 'For the purposes of this Act, a company shall be deemed unable to pay its debts-
>
> (a).If-
>
> > (i).a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 then due, has served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and
> >
> > (ii).the company has, for 21 days after the date of the service of that demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor,
>
> or
>
> (b).if-
>
> > (i) 2 or more creditors, by assignment or otherwise, to whom, in aggregate the company is indebted in a sum exceeding €20,000 then due, have served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and
> >
> > (ii) The company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of each of the creditors,
>
> ….'

81. The principles governing the consideration of orders restraining the presentation of a winding up petition relevant to the present application are the following:

> (i) The jurisdiction to restrain the presentation of a petition to wind up a company is one that should be exercised with great caution: *Bryanston Finance Ltd v de Vries (No. 2)* [1976] Ch. 63; approved in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12 (High Court, Keane J) (at 14) and, subsequently, *Meridian Communications Ltd & Anor v Eircell Ltd* [2001] IESC 42 (Supreme Court, McGuinness J, Hardiman and Fennelly JJ concurring).
>
> (ii) Since an application to restrain the presentation of a winding up petition involves not the restraint of an alleged violation of a plaintiff's right but of the exercise by a creditor of his right of access to the courts, the normal

considerations of a fair question to be tried, the adequacy of damages as a remedy, and the balance of convenience do not arise; instead, it is for the applicant to establish at least a *prima facie* case, which will in many instances be established by evidence that the petition is bound to fail or, at the least, that there is a suitable alternative remedy: *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd and Meridian Communications Ltd & Anor v Eircell Ltd*.

(iii) Since a winding up petition is not a legitimate means of enforcing payment of a debt which is bona fide disputed, the presentation of a petition will in normal circumstances be restrained if the company, in good faith and on substantial grounds, disputes all liability in respect of the debt claimed; *In re Pageboy Couriers Ltd* [1983] ILRM 510 at 572, following *Mann v Goldstein* [1968] 1 WLR 1091; approved in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd and Meridian Communications Ltd & Anor v Eircell Ltd*.

(iv) Even where a company appears to be insolvent, the court might, in the exercise of its equitable jurisdiction, restrain the presentation of a petition where it is satisfied that the petition is being presented for an ulterior or collateral purpose and not in good faith i.e. where it amounts to an abuse of process, but the court must approach the position of such a company with the interests of the creditors particularly in mind; *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* applying *In re Frederick Inns* [1994] ILRM 387; approved in *Meridian Communications Ltd & Anor v Eircell Ltd*.

Analysis

i. is there a prima facie case that the petition is bound to fail?
82. Adopting the necessary caution, I must first consider whether the new company has established a *prima facie* case that the petition is bound to fail or that there is a suitable alternative remedy available to the petitioners in respect of the debt they claim.

83. In advancing the first of those two propositions, the new company's claim that the petition is bound to fail is based on the assertion that the new company in good faith disputes all liability in respect of its admitted debt on substantial grounds, specifically, that the approximately €500,000 in credit advanced to it on diverse dates between January 2014 and, at the latest, March 2015 is the subject of an oral agreement entered into on an unspecified date in December 2013 that the unsecured, interest-free credit facility concerned was to be for a fixed period of 5 years from, as has been variously suggested, either the end of that month, i.e.31 December 2013, or the date of each of the relevant advances, such that it is not yet due for repayment.

84. Has the new company established that it contends for a loan agreement containing that term in good faith and on substantial grounds? The facts of *In re Pageboy Couriers Ltd* were, in a significant way, the converse of those asserted by the new company in the present application. There, it was the alleged debt due to the petitioner from the company that was claimed to derive from an alleged oral agreement, rather than any limitation or qualification upon the repayment of an acknowledged debt. It was in that context that O'Hanlon J was satisfied that the company's cogent denial of any such oral agreement was asserted on substantial grounds and in good faith. There, the alleged debt – first intimated through the issue of summary debt recovery proceedings - was immediately disputed by the company, whereas here, as has already been described, the initial demand for repayment of the debt was first met by a terse denial of indebtedness, followed only some months later by the assertion that, while there was indeed a debt, it was one owed to another entity and, more fundamentally, one subject to an oral agreement that repayment would not fall due until December 2018.

85. The only evidence for the existence of the oral agreement contended for here is the bare averments of Mr Barry and Mr Clarke to that effect. Mr Clarke does not disclose whether he has any beneficial interest in the ownership of the new company, a point of particular concern in light of the failure by both Mr Barry and Mr Clarke to address, much less explain, the statement made by Mr Barry in an e-mail on 27 March 2014 that he was then holding 40% of the new company's shares for 'the Clarke family'.

86. I have already indicated that the limited documentary evidence upon which the new company seeks to rely to corroborate its claim to an established five-year fixed-term loan agreement is of little, if any, probative value in that regard. That is because the issue between the parties is not whether Mr Nyhan ever agreed that the new company was to be provided with that facility. Rather, it is whether Mr Nyhan did so in exchange for the mere verbal promise of the receipt of a 40% shareholding in the new company in five years' time, as the new company contends, or only ever did so conditional upon the immediate transfer to him of an equitable interest in 40% of the shares in the new company and the prompt execution of a shareholders' agreement.

87. It is common case that, despite protracted negotiations, a shareholders' agreement was never executed. In relation to the transfer of an equitable interest in 40% of the shares in the company, Mr Nyhan has exhibited what appears on its face to be a declaration of trust in respect of that shareholding, executed by Mr Barry on 14 February 2014 in favour of Mr O'Connell, the Nyhan family solicitor. While I note Mr Barry's denial that he knowingly executed that document, he has not provided any explanation or theory concerning how he might have done so unknowingly and, as I have already indicated, I find his arguments against the logic or likelihood of his having done so unpersuasive. Nor can I overlook the statement made by Mr Barry in an e-mail that he wrote to his own solicitors on 27 March 2014, and which he chose to exhibit for a different purpose, that Mr O'Connell was then holding 40% of the shares in the new company for the benefit of the Nyhan family.

88. I should emphasise that I have not purported to resolve any of the conflicts of evidence with which the various affidavits exchanged between the parties are replete. Rather, borrowing the language of Buckley LJ in *Bryanston Finance Ltd v de Vries (No. 2)* (at p. 78 of the report), I have endeavoured to assess whether the new company has established clear and persuasive grounds for restraining Water Sun and Nyhan Motors from exercising the statutory right of petition to wind up the new company and have concluded that it has not.

89. In urging the opposite conclusion, the new company invites the court to consider a range of modern cases in which the test for restraining the presentation of a winding up petition has been applied. The first of those is *Coalport Building Company Ltd v Castle Contracts (Ireland) Ltd* [2004] IEHC 6 (Unreported, High Court (Laffoy J), 19th January, 2004). There, just as in this case, the alleged debt arose from the asserted terms of an oral agreement and was disputed as soon as a formal demand for payment was made. On the evidence presented, Laffoy J concluded that the applicant had established that *prima facie* the debt was disputed on substantial grounds and in good faith.

90. However, each case must be determined on its own facts and there are as many points of distinction as points of similarity between the facts of this case and those of *Coalport*. For example, in *Coalport*, the dispute related to whether the relevant services had ever been contracted for or provided, whereas in this case there is no issue but that the new company sought and obtained approximately €500,000 in credit. In *Coalport*, the disputed transactions formed part of an extended course of dealings between the

company and the intended petitioner, whereas in this case an alleged term of a single and rather unusual transaction is at issue. In *Coalport*, the relevant agreement was neither documented nor evidenced in writing whereas in this case there is a range of surrounding documentation to assist in the assessment of whether a substantial ground has been raised concerning the term of the agreement contended for. And in Coalport, the company's assertion of solvency was supported by a proposal to lodge the amount of the alleged debt in court as a condition of the order sought, whereas no such proposal has been made in this case.

91. The new company also places substantial reliance on two other cases in which Laffoy J identified extensive conflicts of fact and significant or difficult issues of law, mandating the conclusion that the company had raised, *bona fide*, a dispute on substantial grounds concerning the debt claimed; those of *Cotton Box Design Group Ltd v Earls Construction Company Ltd* [2009] IEHC 312 (Unreported, High Court, 25th May, 2009) *and Donal Rigney Ltd v Empresa De Construcoes Amandio Carvalho S.A. & Ors* [2009] IEHC 572 (Unreported, High Court, 27th November, 2009). But the position in this case is quite different in that the new company relies on a single contested proposition of fact – that it entered into a free standing oral agreement that it was to receive a €500,000, unsecured, interest-free credit facility for a fixed five-year term. On the evidence presented, it has failed to establish that assertion as a substantial ground advanced in good faith, amounting to a prima facie case that the petition is bound to fail.

92. As part of the same exercise, the new company cites the decision of Ryan J in *D & F Health Partnership Ltd v Horan Keogan Ryan Ltd* [2011] IEHC 333 (Unreported, High Court, 10th August, 2011) for the purpose of seeking to distinguish it. The dispute on the debt at issue that the company in that case asserted was that it was not the debtor but merely the agent for a disclosed principal, which was. Ryan J found that while that claim was repeatedly asserted in affidavits filed on behalf of the company, it was not fortified with any document that might be considered contractual or even as containing a clear statement in support of that case, before concluding that a substantial ground had not been raised. For the reasons I have already given, based on a careful consideration of the various documents exhibited in support of, and in opposition to, the present application, I have come to the same conclusion in this case.

93. Finally on this point, the new company seeks to rely on the case of *White Cedar Developments Limited v Cordil Construction Ltd (In receivership)* [2012] IEHC 525 (Unreported, High Court (Laffoy J), 7th December, 2012). The facts in that case bear no relationship to those of the present application in that the express terms of the written contract relied on there, in conjunction with other uncontroverted evidence before the court, prompted Laffoy J to conclude (at para. 29):

> 'In my view, not only has the plaintiff disputed the debt claimed to be due by it to the defendant in good faith and on substantial grounds, but, and it is rare that one can so find on this type of application, it has done so in a very convincing manner.'

94. In summary, adopting the necessary caution, I conclude that the new company has failed to establish for the purposes of the present application that its denial of liability for the debt claimed by the petitioners is made in good faith or on substantial grounds. It follows that the new company has failed to establish a prima facie case that the petition is bound to fail.

ii. is there a prima facie case that that there is a suitable alternative remedy to the petition?
95. The new company submits that there are two, or perhaps three, suitable alternative remedies that Water Sun and Bandon Motors can pursue.

96. First, there appears to be a tentative suggestion, through the invocation of the decision in *Coalport,* discussed above, that the new company is fully solvent, even in the face of the disputed debt, and that Water Sun and Nyhan Motors should therefore simply pursue separate debt collection proceedings against it. There are two problems with that contention. First, there is only very limited evidence before the court concerning the financial position of the new company, comprising abridged financial statements for 2014 and a one-page unaudited balance sheet for the year ending 31 December 2015. Second, there is no suggestion or agreement on the part of the new company that it is prepared to lodge the amount of the alleged debt in court pending the resolution of any such proceedings as a condition of the order it seeks, in contrast to the position adopted by the applicant company in *Coalport.* Thus, I cannot be satisfied that separate debt collection proceedings are a suitable alternative remedy in this case.

97. Second, the new company suggests that a suitable alternative remedy is available in the guise of a counterclaim for repayment of the debt at issue in the present proceedings. That is a very novel argument, which, if accepted, would create a circular effect whereby the issue of proceedings seeking to restrain the presentation of a winding up petition would result in every case in which the grant of an interlocutory injunction to that effect is also sought, in the grant of that interlocutory injunction on the basis that the debt the subject of the proposed petition should thereafter be pursued as a counterclaim in those injunction proceedings. I reject that contention as fundamentally inconsistent with, or subversive of, the clear scheme contained in the provisions of Chapter 2 of Part 11 of the 2014 Act.

98. Third, the new company submits that Water Sun and Nyhan Motors somehow can, and therefore should, pursue the debt the subject of their proposed winding up petition in the proceedings against the company that have recently been issued, though not served, on behalf of Parain, claiming ownership of the filling station and workshop lands. However, that is not merely a claim brought by a quite separate entity but also a quite separate claim. I am satisfied that, even if the different claims of the proposed petitioners here and of the plaintiff in those proceedings could be somehow fairly and properly consolidated (and I do not think that they could), it would not represent a suitable alternative remedy for the former in that, like the new company's first suggestion, it would involve requiring them to pursue a claim for debt without regard to their position as creditors should the new company prove to be insolvent. In consequence, it would unfairly deprive them of their statutory right as creditors of the new company to petition the court for its winding up.

iii. Is the petition being presented for an ulterior or collateral purpose or not in good faith, such that it should be restrained as an abuse of process?
99. In correspondence, on affidavit and in its submissions, the new company has raised a miscellany of complaints in asserting that the proposed petition would amount to an abuse of process.

100. For example, the new company has repeatedly raised the issue of whether Water Sun and Nyhan Motors are the appropriate creditors in respect of the debt claimed. It has also sought to raise the issue of whether it is accurate to claim that the new company is indebted to those companies jointly in the sum of precisely €250,000, as asserted in the statutory demand. In view of the admitted receipt by the new company of loan finance and stock to the value of approximately €500,000, that was arranged through Mr Nyhan on behalf of a company or companies with which he is associated and in respect of which a liability of at least €250,000 remains outstanding, it seems to me that those issues are matters for the hearing of the petition, since any technical defect or error there may be in that regard cannot amount to an abuse of process sufficient to warrant the grant of an injunction restraining the petition from being presented and, thus, from being considered at all.

101. The new company separately argues that the proposed petition would be an abuse of process as it is being presented for ulterior or collateral purposes. Specifically, the new company contends that the ulterior or collateral purposes concerned are: (i) to coerce repayment of a debt not yet due; (ii) to further the disputed claim of Parain to the workshop lands registered in the name of the new company; and (iii) to prevent Ford Credit Europe as a secured creditor of the new company from appointing a receiver and thereby obtaining priority over Water Sun and Nyhan Motors as creditors of the new company.

102. On the first point, I am bound by my earlier finding that the new company has failed to establish for the purposes of the present application a substantial ground that the debt at issue is not yet due.

103. On the second point, I fail to see how the presentation of a petition to wind up the new company could further the claim of Parain to the workshop lands. On the contrary, as Water Sun and Nyhan Motors point out, under s. 678 of the 2014 Act, the effect of a winding-up order, if one was made, would be to prevent Parain from proceeding with its action without the leave of the court. Hence, in contrast to the findings made by McCracken J *in Re Genport Ltd* [1996] IEHC 34 (Unreported, High Court, 6th November, 2001), I can find no evidence in this case that the winding-up of the company is being sought to provide an incidental benefit to a third party.

104. On the third point, no basis has been established for concluding that the presentation of a winding-up petition or the making of a winding-up order could alter the priorities between any secured creditor of the new company, on the one hand, and Water Sun and Nyhan Motors as unsecured creditors of the new company, on the other. For that reason, the facts presented are clearly distinguishable from those at issue in the case of *In re Bula Ltd* [1990] 1 IR 441.

105. In claiming that the proposed petition is not being presented in good faith, the new company argues that this is evident from - what it describes as - the specific threat to notify the new company's bankers once the petition had been issued to have the company's bank accounts frozen, even before the petition was advertised. It will be recalled that the solicitors for Water Sun and Nyhan Motors stated in a letter written on 26 January 2016, enclosing a draft winding up petition that was to be immediately issued and advertised unless the monies claimed were remitted by return:

> 'We also intend to notify your client's bank as soon as the petition is issued in the Central Office of the High Court so that the company's bank accounts can be frozen in accordance with the provisions of the Companies Act 2014.'

106. In their legal submissions, Water Sun and Nyhan Motors explain that this was a reference to the provisions of s. 602(1) and (2) of the 2014 Act (formerly, s. 218 of the Companies Act 1963), whereby dispositions of company property made after the commencement of the winding up shall be void. Under s. 589 of the 2014 Act (formerly, s. 220 of the Companies Act 1963), the winding up of a company is deemed to commence at the time of the presentation of the winding-up petition in respect of the company. Commenting on s. 218 of the 1963 Act, Breslin, *Banking Law, 3rd edn.*, (Dublin, 2013) expresses the view (at para. 9-59) that the purpose of that section is to ensure that at the time of the liquidation, all the assets of the company are 'frozen' so that they may be distributed in accordance with the statutory rules. In *Re Industrial Services Company (Dublin) Ltd* [2001] 2 IR 118, Kearns J found that a bank, as an institutional creditor, was liable for payments that it had permitted to be made in and out of a company's account after a petition had been presented to wind it up. That decision was followed by Clarke J in *Re Worldport Ltd* (Unreported, High Court, 16th June, 2005). Having referred to the commentary on s. 218 of the 1963 Act in Breslin, Kearns J observed: 'In other words, the objective [of the section] is to preserve the net value [of the company's assets] as of the date of the petition for the benefit of the general body of creditors.'

107. Whether writing to a company in the terms described on behalf of a creditor who proposes to present a petition is, or is not, highly irregular, I cannot say. However, in light of the applicable law, it does seem to me that the statement at issue in this case might more accurately be characterised as a warning than as a threat.

108. I recognise, just as Buckley LJ did in *Bryanston Finance Ltd* (at p. 78 of the report), that the presentation of a petition may do great damage to a company's business and reputation, although I also think, as Buckley LJ did there, that the potential damage may have been rather exaggerated in the case at hand. The new company's specific complaint, as articulated by Mr Barry, is that the 'devastating and irreversible effect' of the presentation of a petition would be to freeze its accounts, preventing it from paying staff, creditors, suppliers and revenue debts, rendering it unable to trade and putting its entire existence under threat. Yet, as Kearns J pointed out in *Re Industrial Services Company (Dublin) Ltd* (at p. 130 of the report), in a winding up the court retains the important power of validation in respect of any payment or disposition otherwise deemed void under s. 602(2) of the 2014 Act (formerly, s. 218 of the 1963 Act). And I must not forget that, as Buckley J went on to observe in *Bryanston Finance Ltd*, the restraint of a petition may also gravely affect the would-be petitioner and not only him but also others, whether creditors or contributories.

The application to cross-examine

109. Pursuant to an Order of O'Connor J made on 3 March 2016 granting leave, Water Sun and Nyhan Motors apply, by motion on notice issued on 21 April 2016, for liberty to cross-examine Mr Barry and Mr Clarke on the affidavit(s) sworn by each for the purpose of the present application.

110. In view of the conclusions I have reached on the first application, it is unnecessary to rule on that application and I do not propose to do so.

Conclusion

111. For the reasons I have given the new company's application for an interlocutory injunction restraining the presentation by Water Sun and Nyhan Motors of a winding- up petition against it is refused.