THE HIGH COURT

[2011 No. 735 COS)

IN THE MATTER OF CTO GREENCLEAN ENVIRONMENTAL SOLUTIONS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963- 2009

Judgment of Miss Justice Laffoy delivered on 12th day of March, 2012.

1. The petition

1.1 On 20th December, 2011 Louis J. O'Regan Limited (the Petitioner) issued a petition in this Court seeking an order that CTO Greenclean Environmental Solutions Ltd. (the Company) be wound up under the provisions of the Companies Acts 1963 to 2009. In the petition it was disclosed that:

> (a) on 27th October, 2010 the Petitioner had obtained judgment in the High Court against the Company in the sum of €596,802;
>
> (b) on 14th November, 2011 the Petitioner's solicitors had served a demand under s. 214 of the Companies Act 1963 (the Act of 1963) on the Company at its registered office demanding payment of the said sum of €596,802; and
>
> (c) despite the passage of three weeks since the date of the s. 214 demand, the Company had not paid or satisfied the sum claimed or any part thereof.

Assuming the said sum of €596,802 was due to the Petitioner and unpaid, there was a deemed insolvency by virtue of the provisions of s. 214.

1.2 The petition, which was returnable for 23rd January, 2012 was verified by the affidavit of Louis J. O'Regan (Mr. O'Regan) a director of the Petitioner. The petition was duly advertised in two national daily newspapers and in Iris Oifigiúil and that fact was proved by an affidavit sworn by James Riordan, a solicitor in the firm of James Riordan and Partners, the solicitors for the Petitioner on the petition. Mr. Sean O'Riordan, CPA, consented to act as liquidator, if appointed by the Court. An affidavit of fitness of Mr. O'Riordan was filed.

1.3 In short, the proofs to establish the entitlement to a winding up order and the appointment of an official liquidator were in order.

1.4 However, the Company sought an adjournment to file an affidavit resisting the petition. An affidavit sworn by Patrick Boardman on 3rd February, 2012 was subsequently filed. The nub of the Company's resistance to the making of a winding up order, as set out in that affidavit, was as follows:

> "I say that at a meeting held on 11th October, 2010 between representatives of the company and the Petitioner (including your deponent Louis J. O'Regan) acting for the Petitioner represented that the Petitioner would not pursue any judgment obtained against the company if the company did not defend the said claim. I believe that he made that representation for tactical reasons having regard to the anticipated course of the evidence at the trial."

1.5 Mr. O'Regan responded to Patrick Boardman's assertion quoted in the preceding paragraph in an affidavit sworn on 3rd February, 2012 in which he averred:

> "... I say that I did not agree on 11th October, 2010 or on any other date that the Petitioner would not pursue any judgment that it might subsequently obtain against the [Company]."

1.6 That led to a plethora of affidavits, which gave rise to a total conflict of evidence on the core issue, namely, whether the Petitioner, acting through Mr. O'Regan, had agreed that, if the Company did not defend the action which led to the judgment of 27th October, 2010, the Petitioner would not enforce the judgment. That being the case, the Court gave leave to each side to cross-examine the other side's deponents. That evidence was taken on 27th February, 2012. Submissions were received from each side on 5th March, 2012. At an early stage, the Court was apprised of the fact that the Company considered that it was not appropriate that Sean O'Riordan, CPA, should be appointed as official liquidator of the Company because of his previous involvement in relation to the matters in issue between the Petitioner and the Company. It was indicated on behalf of the Petitioner that the Petitioner was not adverse to some other person being appointed as official liquidator. That was a prudent approach to adopt because, having regard to his previous involvement, it was not appropriate to nominate Mr. O'Riordan as official liquidator.

1.7 Having regard to the extraordinary course of events which the affidavits and the oral evidence have disclosed, which I will consider in detail later, I think it is useful to consider the circumstances in which the judgment of the High Court was obtained first and what happened in the High Court subsequent to that judgment.

2. The High Court judgment and garnishee order

2.1 The proceedings in which the order of 27th October, 2010 was made were proceedings between the Petitioner, as plaintiff, and the Company, Hammond Lane Metal Company Ltd. (Hammond Lane), and Eastwood Ltd., as defendants (Record No. 2009 No. 7418P; 2009 No. 314 COM), to which I will refer as "the Commercial Court proceedings", in which the Petitioner was pursuing a claim for in excess of €114m. As is disclosed in the order made on 27th October, 2010 by Finlay Geoghegan J., the action was at hearing in the Commercial Court on 19th October, 2010, 20th October, 2010, 21st October, 2010, 22nd October, 2010, 26th October, 2010 and 27th October, 2010. The order records that there was no appearance by or on behalf of the Company. It also records that a settlement had been reached between the Petitioner and Hammond Lane and the third defendant and it was ordered that the proceedings be struck out against Hammond Lane and the third defendant with no order as to costs and that any orders for costs which had been made as between those parties were to be vacated. The position as regards the Company was that its claims for indemnity and contribution as against Hammond Lane and the third defendant were struck out with no order as to costs. Finally, it was ordered that the Petitioner recover against the Company the sum of €596,802, together with its costs of the proceedings based on a one day hearing, the costs to be taxed in default of agreement.

2.2 Hussey Fraser, solicitors, had acted for the Petitioner, as plaintiff, in the proceedings. Eversheds O'Donnell Sweeney had acted for Hammond Lane. Originally, Ronan Daly Jermyn had been on record for the Company but, on foot of the firm's application, an order was made by the Commercial Court (Kelly J.) on 15th October, 2010 that the firm had ceased to act on behalf of the Company. The application was grounded on a letter from the Company, signed by Patrick Boardman as a director, informing Ronan Daly Jermyn that the Company no longer required the firm to represent them in the court proceedings and they were formally withdrawing instructions.

2.3 In an affidavit filed on behalf of the Petitioner, Mr. Anthony Hussey of Hussey Fraser, who was available for cross-examination by counsel for the Company on 27th February, 2012 but who was not cross-examined, averred that he had been advised on 11th October, 2010 that the directors of the Company were considering giving evidence which would be supportive of the plaintiffs (i.e. the Petitioner's) case in the Commercial Court proceedings, but nothing came of that and no such evidence was given. Mr. Hussey averred that he was not aware of any agreement that the Petitioner would not pursue any judgment it might obtain against the Company and that, to the best of his knowledge, information and belief, there was no such agreement between the Petitioner or anybody on behalf of the Petitioner.

2.4 In his final affidavit sworn in support of the petition on 23rd February, 2012, which was very late in the day, Mr. O'Regan disclosed for the first time that, in fact, the Petitioner had obtained a garnishee order against the Company in respect of part of the debt represented by the judgment of 27th October, 2010. This occurred on foot of an order dated 28th October, 2010 made in the Commercial Court proceedings by Finlay Geoghegan J. which recorded that Hammond Lane was indebted to the Company in the sum of €230,000. A conditional order of garnishee attaching the sum of €230,000 was made and the matter was returned to 15th November, 2010. By letter dated 1st November, 2010 Hussey Fraser notified the Company of the judgment given on 27th October, 2010 against the Company and of the conditional order of garnishee made on 28th October, 2010 and of the fact that the matter was returnable in the Court on 15th November, 2010. Neither Hammond Lane nor the Company resisted the application to make the attachment of the sum of €230,000 absolute. Ultimately the Petitioner received the sum of €230,000 from Hammond Lane in part discharge of the judgment debt owed by the Company. That fact should have been disclosed in the petition, irrespective of the fact that the Petitioner claims that it is "owed at least a further €5,243,604" by the Company.

3. The evidence

3.1 The contractual relationships between the Petitioner, the Company and Hammond Lane arose in connection with the clean up of the Irish Steel site at Haulbowline Island, County Cork. As I understand the position, the premise underlying the Commercial Court proceedings was that there was a partnership between the Petitioner, the Company and Hammond Lane and, possibly, the third defendant. In any event, the position of the Company and, obviously, on the basis of correspondence put in evidence, of Hammond Lane is that Hammond Lane had a contract from the State to carry out the clean up. Hammond Lane subcontracted work on the site to the Company and the Company, in turn, sub-contracted work to the Petitioner. The position of the Company is that it is owed approximately €12.5m by Hammond Lane and it is acknowledged that the Petitioner has a claim for €5,243,604 against the Company.

3.2 The four current directors of the Company, Patrick Boardman, John Boardman, Derek Boardman and David Ronan each swore an affidavit resisting the petition and each was cross-examined on behalf of the Petitioner. In addition to the affidavits sworn by Mr. O'Regan, Kevin Canny, a civil engineer in the firm of J. Burke & Assoc. Ltd., the consulting engineers retained as professional witnesses by the Petitioner, the proposed official liquidator, Sean O'Riordan, CPA, and Harry O'Sullivan, a partner in the firm of Moylan Mulcahy & Co, the chartered accountants who acted for the Petitioner, swore affidavits on behalf of the Petitioner. Mr. O'Regan, Mr. O'Riordan and Mr. O'Sullivan were cross-examined. Mr. Canny was not.

3.3 The evidence disclosed that the four directors of the Company and Mr. O'Regan had a busy day on 11th October, 2010. The five met in the Eddie Rockets diner in Waterford before attending the offices of J. Burke & Assoc. Ltd. for a consultation. According to the directors of the Company, it was at their meeting in Eddie Rockets that Mr. O'Regan proposed that the Company should not defend the Commercial Court proceedings, but that instead its directors should work with him to sue Hammond Lane when the Commercial Court proceedings had concluded. According to David Ronan, Mr. O'Regan told the directors of the Company not to mention what he proposed to Mr. Burke because he wanted to keep it a secret. The five returned to Eddie Rockets after the meeting in the offices of J. Burke & Assoc. and, according to Mr. Ronan, Mr. O'Regan again went through the terms of his proposal and they "shook hands on it".

3.4 After that the directors of the Company went to Cork and had a consultation with their solicitor, Richard Martin, of Ronan Daly Jermyn. An e-mail from Mr. Martin to the four directors dated 12th October, 2010 has been put before the Court, in which Mr. Martin addressed what had happened the previous day and, in particular, the fact that the discussion centred around the possible withdrawal of the instructions of Ronan Daly Jermyn. Mr. Martin set out the possible downside of the directors making a decision not to incur further costs in defending the proceedings and in not having legal representation at the hearing. In his e-mail of 12th October, 2010, Mr. Martin pointed to the possibility of a judgment against the Company resulting in liquidation of the Company and he outlined the serious consequences which might ensue from a liquidation, for example, disqualification or restriction orders against directors. Mr. Ronan averred that, after the meeting with Mr. Martin, the directors agreed that they would accept Mr. O'Regan's offer because they did not want to spend any more money on the proceedings.

3.5 However, none of the directors averred to the fact that there was a further meeting on the evening of 11th October, 2010. That meeting took place at the Sheraton Hotel in Fota Island, Cork, and it was attended by the four directors, Mr. O'Regan and Mr. Canny. It is common case that the purpose of the meeting in the offices of J. Burke & Assoc. Ltd. in Waterford was to ascertain if the directors of the Company would give evidence in support of the Petitioner's case in the Commercial Court proceedings. However, Mr. O'Regan's position is that none of the directors raised the question of what would happen if the Petitioner got judgment against the Company in Waterford. Mr. O'Regan's evidence was that it was first raised at the meeting in the Sheraton Hotel. Mr. Canny, in his affidavit, averred that he attended the meeting at the Sheraton Hotel late in the evening, at the request of Mr. O'Regan, so that he could witness what was said. Mr. Canny made a contemporaneous manuscript note at the meeting in the following terms:

> "David said he would concede in the case if Louis gives a gentleman's agreement not to liquidate CTO."

Mr. Canny's evidence was that, at this remove, his memory "as to who said what is not clear". He further averred that he did not note that there was an agreement on the point and, if there had been, it is likely that he would have noted it.

3.6 As regards the involvement of the directors of the Company in the Commercial Court proceedings, Mr. Ronan was served with a subpoena on behalf of the Petitioner, but he was not called as a witness. It is common case that there was a meeting in the vicinity of the Four Courts on 20th October, 2010 at which the four directors of the Company met Mr. O'Regan and Mr. Canny, which clearly indicates that the four directors were interested in the outcome of the proceedings. That was a week before the Petitioner settled with Hammond Lane and the third defendant and obtained judgment against the Company. It is also common case that Mr. O'Regan told Mr. Ronan and Mr. John Boardman at a meeting in Cahir House Hotel in Tipperary that he had settled with Hammond Lane and the

third defendant. I think it is probable that Mr. O'Regan is correct in stating that the date of that meeting was 27th October, 2010 when Mr. O'Regan was on his way home from Dublin to Cork after the Commercial Court proceedings terminated. Mr. O'Regan's evidence was that he also told Mr. Ronan and Mr. Boardman that he had got judgment against the Company, to which Mr. Boardman responded that there were no assets or money in the Company anyway.

3.7 In relation to the subsequent course of events, I have already alluded to the fact that the Petitioner obtained an absolute order of garnishee, in consequence of which the debt due by the Company to the Petitioner was reduced by the sum of €230,000, which came from Hammond Lane. As to why the directors of the Company sat back and let that happen, the oral evidence of Mr. Patrick Boardman was that there was a sum of €150,000 of the "last money" (i.e. presumably, the final instalment), due from Hammond Lane actually due to the Petitioner and the balance of €80,000 was due to the Company and the directors of the Company thought they would get the balance of €80,000 back. Further, the directors believed that Mr. O'Regan was going to fund litigation against Hammond Lane.

3.8 As I understand the position, after the garnishee order was made absolute, Hussey Fraser had no further involvement on behalf of the Petitioner. The Petitioner at that time was taking advice directly from Mr. O'Riordan. On Mr. O'Riordan's advice, Mr. O'Regan sent a letter dated 22nd November, 2010 to the Company requesting payment of the sum of €596,802 on foot of judgment. It seems strange that Mr. O'Regan would have, as he averred, retained Mr. O'Riordan, an accountant, to assist him in recovering the debt. Rather, one would have assumed that he would have relied on the solicitors who acted for him in the Commercial Court proceedings to recover the debt.

3.9 In any event, Mr. O'Riordan's evidence was that he was first consulted by Mr. O'Regan in November 2010. He advised him to make the demand for payment and he further advised him that, in the absence of an acceptable response to the demand, Mr. O'Regan should ask to meet the directors so that he could "personally press them for payment". Starting with a meeting at the Aisling Hotel in Dublin on 10th December, 2010, at which Mr. O'Regan was accompanied by Mr. O'Riordan, and which was attended by the four directors of the Company, and further meetings, the objective of which, according to Mr. O'Riordan, was to recover the Petitioner's money from the Company, an agreement was reached between the directors of the Company, Mr. O'Riordan and Mr. O'Regan on 29th March, 2011 at the Midway Hotel, Portlaoise, which was reduced to writing. While Mr. O'Regan was not expressed to be a party to the agreement, he did execute it, as did the four directors of the Company and Mr. O'Riordan.

3.10 The agreement was expressed to be made between the Company, and Mr. O'Riordan as "Assignee", and the four directors. Having recited the contract between the Company and Hammond Lane dated 21st August, 2007, the Company assigned that contract to Mr. O'Riordan and irrevocably authorised Mr. O'Riordan to take legal proceedings in the sole name of the Company arising out of the contract. The agreement was expressed to be "in consideration" of Mr. O'Riordan including in the statement of claim, as part of the claim of *circa* €12.5m plus costs and damages due from Hammond Lane, two sums expressed as follows:

> "a. €596,802 payable to Louis J. O'Regan Ltd. on foot of the Judgement arising from a prior High Court Action (included in the 12.5 million stated above)
>
> b. the further sum of €5,243,604 as per Louis J. O'Regan Ltd. invoice 10120 dated 21/03/2011 (included in the 12.5 million stated above)."

It was further provided that after payment of such costs/fees as might be incurred by Mr. O'Riordan and his advisory team, the net monies received from the litigation were to be "split 50/50" between the Company and the Petitioner in full and final resolution of all issues between the Company and the Petitioner. Mr. O'Riordan averred in his affidavit that there was no mention in that agreement of there being "any restriction or prohibition" on the Petitioner collecting the sum of €596,802 due under the judgment of 27th October, 2010 in the Commercial Court proceedings and, presumably, he had not been informed that €230,000 of that sum had been received by the Petitioner on foot of the order of garnishee. He further averred that none of the directors of the Company ever mentioned such restriction or prohibition to him, or in his presence, despite all of the meetings he had with them in relation to the matter.

3.11 In his first affidavit sworn on 3rd February, 2012, Mr. Patrick Boardman averred that after 11th October, 2010 Mr. O'Regan continued to liaise with the directors of the Company in what was "an absolutely clear and common goal, namely the pursuance of Hammond Lane ... on foot of the contract". It was suggested that it was in that context Mr. O'Riordan was introduced by Mr. O'Regan to the directors of the Company and that Mr. O'Riordan advised both the Company and Mr. O'Regan at various stages in relation to matters involved in the contract with Hammond Lane. Further, Mr. Patrick Boardman averred that the Petitioner's acquiescence was further demonstrated by the fact that documentation used in the Commercial Court proceedings was furnished to the Company's current solicitors, Brian Long & Co.

3.12 Although he made the case in his first affidavit that, should the Company be wound up, it would not be in a position to pursue the action against Hammond Lane and that it would not be in a position to discharge any significant portion of the Petitioner's judgment, Mr. Patrick Boardman did not in his first affidavit disclose to the Court that by e-mail dated 3rd September, 2011 to Mr. O'Riordan, he had informed Mr. O'Riordan that he had "no permission to act on behalf of [the Company] or its directors in the collection of the Hammond Lane monies". It emerged in the course of cross-examination that prior to that, James Riordan and Partners, the solicitors acting on behalf of the Petitioner on this petition, by letter dated 19th July, 2011 to Eversheds O'Donnell Sweeney, the solicitors for Hammond Lane, significantly naming the Company as their client, had claimed payment of the sum of €12,023,944.94, the subject of an invoice dated 4th May, 2011, from Hammond Lane and threatened legal proceedings in the event that the sum was not paid. The response dated 26th July, 2011 from Eversheds O'Donnell Sweeney was to the effect that that firm had authority to accept service of any proceedings issued, but it was stated that Hammond Lane would be seeking security for costs against the Company and that they had instructions to pursue the Company and its directors (in their personal capacity) for any loss and damage and legal costs incurred by Hammond Lane, including, but not limited to, damages for malicious abuse of the civil process of the courts. A point made on behalf of the Company was that Mr. O'Regan did not disclose that threat to seek security for costs to the directors of the Company until 27th February, 2012, the inference which the Court was invited to draw from that fact being that it was because of the threatened application for security for costs that Mr. O'Regan changed his mind and served the s. 214 demand and initiated this petition.

3.13 There is no evidence before the Court from which it would be reasonable to infer that the Company is in a position to pursue its claim against Hammond Lane through litigation. In fact, nothing seems to have occurred since Mr. Patrick Boardman purported to terminate Mr. O'Riordan's authority by the e-mail of 3rd September, 2011.

4. The law

4.1 The powers of the Court where a creditor seeks to have the debtor company wound up are outlined in the judgment of Keane J. in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd*. [1996]1 I.R. 12. Keane J. stated (at p. 24):

"It is clear that where the company in good faith and on substantial grounds, disputes *any* liability in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before the court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. That was the effect of the decision of Ungoed-Thomas J. in *Mann v. Goldstein* [1968] 1 W.L.R. 1091, which was subsequently approved of by the Court of Appeal in *Stonegate Securities v. Gregory* [1980] Ch. 576, both of which decisions were expressly adopted by O'Hanlon J. in *In re Pageboy Couriers Ltd*. [1983] I.L.R.M. 510.

The words 'any liability' are, however, important: where a company admits its indebtedness to the creditor in a sum exceeding [€1,269.74] but disputes the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a petition."

4.2 Later, Keane J. stated (at p. 27):

"Although the fact that the company is insolvent is not, of itself, a ground for allowing a petition to proceed which is clearly an abuse of process, it remains an important factor in every case where the court is exercising its equitable discretion in granting or withholding injunctive relief. The court must approach the position of such a company with the interests of the creditors particularly in mind. As Street C.J. put it in *Kinsela v. Russell Kinsela Pty. Ltd. (in liquidation)* [1986] 4 N.S.W.L.R. 722:-

> 'In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.'

This statement of the law has been expressly approved by both the High Court and Supreme Court in *In re Frederick Inns Ltd*. [1991] I.L.R.M. 582 and [1994] 1 I.L.R.M. 387."

4.3 Finally, in a passage relied on by counsel for the Company, Keane J. stated (at p. 29):

"It is also clear that, where parties to a contract enter into a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties. This doctrine, sometimes referred to as 'promissory estoppel', first appeared in English law in *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439 and was given renewed life by *Central London Property Trust Ltd. v. High Trees House Ltd*. [1947] K.B. 130. A not dissimilar approach was adopted by the Supreme Court in *Webb v. Ireland* [1988] I.R. 353."

4.4 Counsel for the Petitioner relied on the passage from the judgment of McCarthy J. in *Re Bula Ltd*. [1990] 1 I.R. 440, which appears at p. 448:

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

I do not see the relevance of that passage because, unlike the situation which arose in *Bula Ltd.,* where the petition was presented by secured creditors whose security attached to the entire assets of the debtor company and who had appointed a receiver whose power of sale was, effectively, at least as great as that of a liquidator, from which it was reasonable to infer an ulterior motive, as I understand the case made on behalf of the Company it is not suggested that the Petitioner brought the petition for an ulterior motive. The case made on behalf of the Company is that the Company, in good faith and on substantial grounds, disputes any liability to the Petitioner because, it is alleged, the Petitioner represented to the directors of the Company that, if they did not defend the Commercial Court proceedings, the Petitioner would not enforce the judgment, so that the Petitioner is now estopped from enforcing the judgment by means of the winding up of the Company.

5. Application of the law to the facts

5.1 Notwithstanding that each side had an opportunity to cross-examine the deponents on the other side, it is very difficult to determine whether all of the facts are before the Court and where the truth lies. There are some very peculiar aspects to this case. On the one hand, the Petitioner has a judgment from this Court. It was a judgment that was obtained in the absence of the Company; not with the consent of the Company. However, it is a judgment which was partly satisfied on foot of the absolute garnishee order by monies which Hammond Lane acknowledged were due to the Company. It was partly satisfied obviously in the knowledge of the Company and without any objection from the Company.

5.2 On the other hand, the Petitioner, rather than retaining the firm of solicitors which acted for it in the Commercial Court proceedings to enforce the judgment, as would be the normal course to adopt, dealt directly with the Company on the advice of an accountant, who ultimately became, with the approbation of Mr. O'Regan as evidenced by his execution of the agreement referred to at para. 3.9 above, the principal of the Petitioner, the "assignee" of the contract between Hammond Lane and the Company with the objective of pursuing Hammond Lane for the debt alleged to be due to the Company, to include the amount of the Petitioner's judgment against the Company and the further sum in excess of €5m alleged to be due to the Petitioner by the Company. The fact that Mr. O'Regan executed the agreement of 29th March, 2011 clearly indicates that, after the Petitioner had obtained judgment, there was an arrangement between the Petitioner and the Company that the Petitioner's judgment would be satisfied via the pursuit of the Company's claim against Hammond Lane. While certain facts point to the possibility that the Petitioner represented that it would not enforce the judgment against the Company, such as the fact that the Petitioner did not require its then solicitors to serve a s. 214 demand immediately after it had obtained judgment and proceed to winding up at that stage, on the evidence as it stands, I do not think it would be appropriate to conclude that, as a matter of probability, either on 11th October, 2010, or at some later date, Mr. O'Regan, on behalf of the Petitioner, represented that he would not enforce the judgment against the Company or move to have the Company liquidated. I think the reality of the situation is that it was the prospect of liquidation which was of concern to the

directors of the Company. However, I am not satisfied that the evidence adduced on behalf of the Company demonstrates that the Company has substantial grounds for contending that the Petitioner is estopped, by representations of Mr. O'Regan, from proceeding to a compulsory winding up of the Company.

5.3 Aside from that, the totality of the evidence is strongly suggestive of the Company being insolvent. The most recent Abridged Financial Statements of the Company filed in the Companies Registration Office (CRO) were for the period ending on 28th February, 2009 and were received by the CRO on 12th July, 2010.

Even at that stage, the notes disclosed that since "the period end" the Company had experienced a large decrease in demand for its services and was experiencing an ongoing monthly shortfall in its income to cover its existing overheads. It was stated that management was keeping costs to a minimum and exploring new markets for its services. It was also noted that the Company's cash reserves had been very significantly reduced since the period end. In fact, matters have deteriorated since that note was prepared, which was obviously around March 2010. The evidence of Mr. Patrick Boardman under cross-examination was that the Company is not trading currently and that it ceased to trade between twelve and eighteen months ago. Currently, the Company has no employees. He also acknowledged that the cash in bank is "close to zero".

5.4 As regards the accounts for 2010 and 2011, Mr. O'Sullivan, a partner in Moylan Mulcahy & Co., chartered accountants, the Company's auditors, testified that, as regards the finalisation of the 2010 and 2011 accounts for the Company, he was waiting to be put in funds. On 17th February, 2012 the Petitioner served notice under s. 371 of the Act of 1963 on the Company requiring it to make good its default in failing to file the statutory annual returns pursuant to the provisions of the Companies Acts 1963 to 2009. While the CRO printout which has been put in evidence shows the status of the Company as normal, the reality of the situation is that the prospect of the Company being struck off for failure to comply with its statutory obligations in the not too distant future is real.

5.5 Having regard to the foregoing circumstances, I consider this is an appropriate case in which to make a winding up order.

6. Form of order

6.1 While I propose making a winding up order, as I have already indicated, I do not think it is appropriate that Mr. Sean O'Riordan, by reason of his previous involvement, should be the official liquidator of the Company. Accordingly, I propose adjourning the petition to enable the Petitioner to nominate an alternative official liquidator and to provide evidence of his or her suitability.

6.2 Having regard to the involvement of James Riordan and Partners, *ex facie* as solicitors for the Company, in the correspondence with Eversheds O'Donnell Sweeney referred to at para. 3.15, I consider it inappropriate that that firm should continue to act for the Petitioner.