THE HIGH COURT

[2012 No. 492 COS]

IN THE MATTER OF GOODE CONCRETE (IN RECEIVERSHIP)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 2nd day of November, 2012.

The petition

1. On 3rd September, 2012 Kilsaran Concrete (the Petitioner) presented a petition that Goode Concrete (the Company) be wound up by the Court under the Companies Act 1963 (the Act of 1963). The making of a winding up order was resisted by the Company on a number of grounds which will be outlined later. At the hearing of the petition two creditors, CRH Plc and Roadstone Wood Ltd. (the Co-defendants) were represented by counsel and they supported the petition for the winding up of the Company. Another creditor, Allied Irish Bank Plc (AIB), which is a secured creditor and the Company's largest creditor, which was also represented by counsel, did not support the petition. The stance of other creditors in relation to the petition had obviously been canvassed by Mr. Peter Goode (Mr. Goode), the Managing Director of the Company, and letters from those creditors were exhibited in affidavits filed on behalf of the Company, the contents of which will be outlined later.

2. The debt which the Petitioner claims is due to it and which forms the basis of the petition arises out of one aspect of proceedings which are pending in the Competition List in the High Court between the Company, as plaintiff, and the Co-defendants and the Petitioner, as defendants (Record No. 2010/10685P) (the Competition Proceedings). It is convenient to consider the course of the Competition Proceedings, insofar as they are relevant, at the outset.

The Competition Proceedings

3. In the Competition Proceedings, which were initiated in November 2010, the Company alleges various breaches of domestic competition law (ss. 4 and 5 of the Competition Act 2002) and of European Competition Law (Articles 101 and 102 of the Treaty on the Functioning of the European Union) on the part of the Petitioner and the Co-defendants, including that they engaged in predatory pricing with the aim of eliminating the Company from the ready-mix concrete market and that they engaged in collusive tendering in respect of bids for the supply of ready-mix concrete. In November 2011 the Company sought interlocutory relief against the Petitioner and the Co-defendants in the Competition Proceedings to restrain the Company and the Co-defendants from continuing the alleged anti-competitive practices. By order of the Court made on 20th January, 2011 the Company's application for interlocutory relief was refused and costs of the application were awarded to the Petitioner and the Co-defendants against the plaintiff, the said costs to be taxed in default of agreement.

4. The Competition Proceedings have continued to be prosecuted by the Company and the following steps in the process have been brought to the attention of this Court:

> (a) On 5th April, 2011 the Company delivered a statement of claim in which it sought declaratory relief and damages under various headings, including exemplary damages and aggravated damages.
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> (b) The Petitioner and the Co-defendants applied to Court for an order for security for costs. The Court delivered judgment on 21st March, 2012 ([2012] IEHC 116), wherein it was stated that the Court proposed to make an order requiring security to be given to both sets of defendants (that is to say the Petitioner and the Co-defendants) by the Company but on a phased basis, the first phase being limited to a sum appropriate to the completion of the exchange of pleadings and the making of discovery on either side. By order of 15th May, 2012, the Court ordered that the security in respect of the first phase be fixed in the amount of €110,000 in respect of the Co-defendants and €85,000 in respect of the Petitioner. The Company has complied with that order, in that the security ordered by the Court in relation to the first phase has been paid into Court within the timeframe set by the Court. In his response to the petition, Mr. Goode has averred that the security was provided by way of a loan from the Goode family to Mr. Tom Goode, the Chairman of the Company.
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> (c) The Competition Proceedings are next listed for case management before the Court on 13th November, 2012. While a defence has not yet been delivered by either the Petitioner or the Co-defendants, it was averred by Mr. Goode on behalf of the Company that it is envisaged that the Competition Proceedings will reach the stage of discovery in early 2013.

The current financial state of the Company

5. The Company ceased trading on 16th February, 2011 because, as averred to by Mr. Goode, the position of the Company was extremely precarious, given that it was unable to obtain new concrete tenders and had no prospect of obtaining contracts in the near future, which state of affairs the Company attributes to the actions of the Petitioner and the Co-defendants which are the subject of the Competition Proceedings.

6. On 24th June, 2011, AIB appointed David Carson (the Receiver) to be Receiver and Manager of the Company. While the relevant documentation has not been put before the Court, the Court has been informed that the security of AIB on foot of which the Receiver was appointed contains fixed and floating charges on all of the assets of the Company. Mr. Goode has averred that the Company's indebtedness to AIB is in the region of €26m. However, at the hearing of the petition, counsel for AIB clarified the position by informing the Court that the Company's indebtedness to AIB is in the region of €21m, and the Company also owes in the region of €5m to AIB Finance and Leasing Limited. From information obtained by Mr. Goode from the Receiver's firm, Deloitte, he has estimated the value of the assets of the Company as being in the region of €1.4m to €1.55m, the estimated value of land and quarries held by the Company being in the region of €1.2m to €1.35m, the estimated value of other assets (plant, equipment, vehicles and debts due to the Company) being €200,000. It is undoubtedly the case that, as things stand, the Company is hopelessly insolvent.

The Petitioner's debt and its standing to seek a winding up order

7. The order of the Court in the Competition Proceedings awarding costs to the Petitioner and the Co-defendants against the Company was not appealed. The costs of the Petitioner were taxed and a certificate of taxation in the sum of €56,763.33 was issued and taken up by the Petitioner on 19th July, 2012. On the same day, 19th July, 2012, solicitors for the Petitioner served notice on the Company demanding payment of the said sum of €56,763.33, stipulating that if the said sum was not paid within twenty one days of the service of the notice, application would be made to the Court to have the Company wound up pursuant to the provisions of s. 213(e) and s. 214 of the Act of 1963. The debt was not discharged within the period stipulated or at all. Accordingly, by virtue of s. 214 of the Act of 1963 the Company is deemed to be unable to pay its debts and by virtue of s. 213(e) of that Act the Company may be wound up by the Court on the petition of the Petitioner as a creditor of the Company.

8. I am satisfied that the Petitioner has complied with all of the requirements of the Act of 1963 and the Rules of the Superior Courts in relation to the petition and that all the formal proofs are in order. Therefore, but for the resistance of the Company to the making of a winding up order and the position adopted by some of the creditors of the Company, there would be no obstacle to the making of a winding up order.

Position adopted by the creditors

9. The only creditors who have come forward in support of the petition are the Co-defendants. The Court was informed that the Co-defendants have taxed the costs awarded to them against the Company in the order of 20th January, 2011 in the sum of €101,377.25 and have taken up a certificate of taxation dated 6th July, 2011 in that amount. As such, the Co-defendants claim that jointly they are a significant unsecured creditor of the Company and they support the winding up of the Company.

10. The Revenue Commissioners, to whom the Company owes in the region of €100,000, have advised the Company by e-mail dated 4th October, 2012 to the Company that it is adopting "a neutral position" in respect of the petition.

11. As I have indicated, AIB, which is owed in the region of €21m, is not supporting the petition on the ground, as articulated by its counsel, that it seems that the inevitable consequence of a winding up order would be that the Competition Proceedings would not be proceeded with. If the Competition Proceedings were proceeded with, it was submitted, they might have the result of bringing a return for the creditors which would not otherwise be available. AIB, as the secured creditor first in line, is interested in ensuring that such return comes to the Company, which is unlikely to happen if a winding up order is made.

12. As regards creditors which Mr. Goode referred to as "ordinary creditors", that is to say, certain unsecured creditors, he has exhibited letters from eight creditors, which are all in the same format, in each of which the existence of the petition due to be heard on 8th October, 2012 is referred to, the amount of the creditor's debt is set out, and the creditor confirms that it opposes the petition for the winding up of the Company. The eight creditors include the Company's former solicitors and the Company's auditors. The total amount of the debts due to the eight creditors, as set out in the letters, aggregate €504,350. Mr. Goode has averred that the Company is also indebted to Mr. Tom Goode in the sum of approximately €3.5m and he has exhibited a letter signed Mr. Thomas Goode confirming that he opposes the petition to wind up the Company. Mr. Goode has averred that the debts of the eight creditors who have confirmed their opposition to the making of a winding up order in aggregate value terms represent 46% of the value of the debts due to all unsecured creditors other than Mr. Tom Goode, whereas in aggregate the debts due to the Petitioner and the Co-defendants represent only 14% of the value of all the unsecured creditors other than Mr. Tom Goode. It is not possible to form a view as to the accuracy of those calculations, because Mr. Goode appears to have treated unsecured creditors who may have some preferential status (for example, the Revenue Commissioners and local authorities to whom rates are owed) differently from other unsecured "ordinary" creditors. Having said that, it cannot be gainsaid that there is very significant opposition from secured and unsecured creditors to the making of a winding up order.

13. As I have recorded earlier, it is obvious that the Company canvassed the views of the creditors in relation to the petition, as what counsel for the Petitioner described as the "*pro-forma*" letters which the creditors furnished to the Company clearly indicate. That, in my view, is wholly immaterial.

Outline of Company's grounds of opposition to a winding up order

14. Counsel for the Company advanced six reasons why the Court should either dismiss the petition or, alternatively, adjourn the petition pending the outcome of the Competition Proceedings, namely:

> (i) the Petitioner has an ulterior motive for seeking to wind up the Company and the Co-defendants have an ulterior motive in supporting the petition and that is to avoid the possible consequences of the Competition Proceedings;
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> (ii) the Company has a *bona fide* and substantial cross-claim against the Petitioner, which if successful would eliminate the Petitioner's debt;
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> (iii) the Company intends applying to the Supreme Court for an extension of time to appeal the costs order in favour of the Petitioner made on 20th January, 2011 in the Competition Proceedings and, if allowed, to appeal, so that the Petitioner's debt will be disputed;
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> (iv) the likelihood of a liquidator appointed by the Court prosecuting the Competition Proceedings to finality is remote, because there are no assets available in the Company which could be used to fund the prosecution of the proceedings;
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> (v) the Court must take into account the views of the creditors insofar as they have been expressed to the Court having regard to s. 309 of the Act of 1963; and
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> (vi) the petition should be dismissed on the grounds of public policy.

15. There is a large degree of cross-over between those grounds. The reason set out at (iv) seems to me to be a component of the reason set out at (i), so that it is appropriate to consider both reasons together. Subject to that, I propose considering each reason in turn, although at the risk of introducing an element of artificiality, because, of course, the reason set out at (iv) is also a component of the cross-claim argument and the implications of s. 309 have general application.

16. It is important, however, to emphasise that, at this point in time, the Petitioner has an order of the Court, which has not been appealed, for its costs of the interlocutory application against the Company and those costs have been quantified in the manner required by law, so that the plaintiff's status as creditor has been clearly established. Accordingly, it would not be proper to regard the presentation of the petition in this case as an attempt to utilise the winding up procedure as a debt collection mechanism, unlike many cases with which this Court has to deal.

Ulterior motive

17. Mr. Goode has averred that the Petitioner clearly has an ulterior motive in presenting the petition, which is to indirectly have the Competition Proceedings in which the Petitioner must defend serious allegations and in which it is exposed to possible damages, brought to an end, given that it is highly doubtful, having regard to the nature of the proceedings and the stage which they are at, that any liquidator of the Company would prosecute those proceedings to finality. Relying on a number of authorities, counsel for the Company submitted that such ulterior motive is sufficient ground for the Court dismissing the petition.

18. The earliest of the two Irish authorities on which counsel for the Company relied in support of his contention that the petition should be dismissed because the Petitioner has an ulterior motive in seeking a winding up order is the decision of the Supreme Court in *In re Bula Ltd*. [1990] 1 I.R. 440. There are certain similarities between the facts at issue in that case and the facts underlying this petition, for example, it was common case that Bula Ltd. was hopelessly insolvent and it was already in receivership. However, the facts are dissimilar in that in the *Bula* case the petition to wind up was presented by the secured creditors who had appointed the receiver. The making of a winding up order was opposed by a creditor, Muster Base Metals Ltd. (Munster), which had judgment against Bula Ltd. for approximately €690,000, which it had registered as a judgment mortgage over certain land of Bula Ltd. The ulterior motive alleged on the part of the petitioners was summarised as follows in the judgment of McCarthy J., with whom the other Judges of the Supreme Court concurred, (at p. 447):

> "... four days before the Munster judgment registered as a judgment mortgage would have achieved a certain priority as a secured creditor, the banks presented a petition for the winding up of Bula, which presentation, if the petition were granted by an order for winding up, would nullify the Munster claim to priority over unsecured creditors. It was avowedly for the purpose of defeating the Munster manoeuvre towards becoming a secured creditor that the petition was presented. It was not for the purpose of recovering the banks' debts...."

19. Dealing with the manner in which a court should adjudicate on a petition where there is opposition grounded on an allegation of ulterior motive on the part of the petitioner, in the *Bula* judgment McCarthy J., having referred to s. 213 of the Act of 1963, which provides that a company may be wound up by the Court if the company is unable to pay its debts, and s. 309, which provides that the Court may have regard to the wishes of the creditors or contributories of the company, in the case of creditors regard being had to the value of each creditor's debt, stated that s. 309 gives the Court "a true discretion which should be exercised in a principled manner that is fair and just" (p. 448). He continued:

> "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."

20. Later, in the context of addressing an argument, which had not been advanced at first instance, that a winding up order and consequent appointment of a liquidator, who would have statutory power of sale to be exercised under the control of the Court, would create a better prospect of a sale of the assets than the receiver's efforts, in a passage relied on by counsel for the Company, McCarthy J. stated (at p. 450):

> "More to the point, however, it is inevitable that a liquidator, court appointed, with all the independence of action and professional integrity that would be at his command would lack the enthusiasm and momentum that would be second nature to the guarantors, who, presently, control the progress of the action. This is indeed a step further in the argument; it is, in effect, saying that a liquidator, suitably monitored by the court, would be as effective in pursuing a legitimate claim of Bula as those presently in command. In my view, there is no reality in this suggestion. With the best will in the world, a court attempting such supervision is very much in the hands of the liquidator; it is his enthusiasm or lack of enthusiasm that will govern the decisions of the court – it is he who brings the matter to court – it is he who presents the case, so to speak, for continuing with litigation or ending it. In a real sense he is *dominus litis*, however vigilant the court may wish to be and however resourceful those upon whom notice must be given of any intended application to the court."

Those observations were clearly *obiter*, but they do reflect the reality of the situation under consideration in that case and, indeed, the situation under consideration in this case. McCarthy J. went on to hold that where a petition is brought by secured creditors whose security attaches to the entire assets of the debtor company and who have appointed a receiver whose power of sale is, effectively, at least as great as that of a liquidator, the Court should refuse its aid (p. 451). Accordingly, the petition was dismissed.

21. The other Irish authority relied on by counsel for the Company is the decision of the High Court (McCracken J.) in *Re Genport Ltd*. [1996] IEHC 34. Once again, there are certain similarities between the factual basis of that case and the facts underlying the petition under consideration here. The petitioner, who had been one of four defendants in an action brought by Genport Ltd. and another plaintiff had the benefit of an order for costs against the plaintiffs, including Genport Ltd., and had taxed the costs and had a certificate of taxation certifying the costs due to her. She served a s. 214 demand for the amount so certified on Genport Ltd., which was not complied with, and she then presented a petition to have Genport Ltd. wound up. However, there was a further set of proceedings in being between the same parties, which arose out of the original dispute between Philip Smith and Genport Ltd., on the one hand, and Hugh Tunney and Crofter Properties Ltd., on the other hand, the genesis of which was a landlord/tenant relationship in relation to Sachs Hotel on Morehampton Road in Dublin, which was ongoing. Having quoted from the judgment of McCarthy J. in *In re Bula Ltd*., McCracken J. stated (at para. 6):

> "In the present case it has at all times been alleged by [Genport Ltd.] that the winding up petition has been brought by the Petitioner on the instigation of her employer, Mr. Hugh Tunney, who had financed her litigation in the action in which the debt was incurred, and that the purpose of the application to wind up was to prevent [Genport Ltd.] from continuing proceedings against Crofter Properties Ltd."

22. In a passage in his judgment (at para. 8) relied on by counsel for the Petitioner, McCracken J. later stated:

> "It is further alleged that the real motive in bringing this Petition is not to recover the debt, but to prevent further litigation against Mr. Tunney and/or Crofter Properties Ltd. Taken by itself, I do not know that that is a sufficient ulterior motive to persuade me to exercise my discretion against the Petitioner. It is not necessarily an improper motive, as Crofter Properties Ltd. are themselves very substantial creditors of [Genport Ltd.], and therefore have a perfectly proper commercial interest in preventing [Genport Ltd.] from using its assets in litigation. It may well be in the interests of the creditors in many cases that a winding-up Order be made to prevent a highly litigious company from spending all its assets in what may be doubtful litigation."

It was submitted on behalf of the Company that the facts here are materially different to the facts under consideration by McCracken J., in that the Petitioner is not a substantial creditor of the Company but merely has an order for costs arising from the Competition Proceedings and, more importantly, there is no question of the assets of the Company being used to further the Competition Proceedings because the reality is that the Company has no unsecured assets.

23. In my view, the *ratio decidendi* of the judgment of McCracken J. in *Re Genport Ltd*. is to be found in the last paragraph (para. 10) of the judgment in which he stated:

> "Accordingly, while neither might in itself be decisive, in my view the combination of the ulterior, although not necessarily improper, motive and the fact that a winding-up may not be of any real benefit to the ordinary creditors are sufficient to persuade me to exercise my discretion in refusing to make the winding-up order."

The basis on which McCracken J. concluded that a winding up might not be of any real benefit to the ordinary creditors was that the principal asset of Genport Ltd. was the hotel, which was held by Genport Ltd. under a lease which would be forfeited if a winding up order was made, which would be greatly to the benefit of Crofter Properties Ltd., the lessor, leaving little in the way of assets for the remaining creditors. Genport Ltd. was still trading successfully in the hotel. Four trade creditors who appeared on the hearing of the petition all opposed the making of a winding up order. McCracken J. concluded that it was in the interests of the ordinary creditors that Genport Ltd. should continue to trade. McCracken J. stated that he was also influenced by the fact that there was substantial litigation between Genport Ltd. and Crofter Properties Ltd. which was part heard and it would be difficult for the liquidator to take up such an action at the stage which it had reached. He expressed the view that a liquidator might not continue the action, viewing it as pointless if the principal asset, the hotel, was gone.

24. As I have recorded, the outcome in the *Bula Ltd*. case was that the Supreme Court dismissed the petition. In the *Genport Ltd*. case, McCracken J. did not dismiss the petition but he merely put a stay on it pending the outcome of the pending litigation.

25. For completeness, it is appropriate to record that the petition to wind up Genport Ltd. was subject to a later judgment of McCracken J. delivered on 6th November, 2001, to which there is reference in *Troon Developments Ltd. v. Harrahill* [2009] IEHC 590, which was put before the Court by counsel for the Petitioner in this case. The outcome of the application to re-enter the petition was that McCracken J. adjourned the petition generally, but again with liberty to re-enter.

26. Having regard to the legal principles identified in those authorities, I have come to the conclusion that the following factors are relevant to the Court's determination on the petition in this case:

> (a) It is clear on the evidence that the Company has no unsecured assets whatsoever which a liquidator, if appointed, could utilise to meet the claim of the Petitioner and the claims of the other unsecured creditors. That factor on its own, of course, does not entitle the Court to refuse to make a winding up order because it is expressly provided in subs. (1) of s. 216 that "the court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets".
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> (b) However, that factor does allow the Court to draw the inference that the Petitioner has some motive other than securing discharge of the Company's indebtedness to it for bringing the petition. If the Company is wound up, the liquidator will have no unsecured assets available out of which he could fund the prosecution of the Competition Proceedings and, as a matter of probability, the liquidator will not prosecute the Competition Proceedings. That being the case, and the Petitioner being one of the defendants in those proceedings, the only reasonable inference to draw is that the petition has been brought by the Petitioner with the ulterior motive of permanently stymying the Competition Proceedings.
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> (c) The only creditors of the Company which would benefit from a winding up order being made are the Petitioner and the Co-defendants, who, as a matter of probability, will avoid having to defend the Company's claims against them in the Competition Proceedings. The Co-defendants are the only creditors who have come forward to support the petition. On the other hand, AIB, which is the Company's largest creditor and has security over all of the Company's assets, and the majority in value of the unsecured creditors who have made their views known to the Court have clearly formed the view that it is to the detriment of the creditors other than the Petitioner and the Co-defendants that a winding up order be made. By virtue of s. 309 of the Act of 1963 the Court must have regard to the wishes of those creditors.

27. Those factors lead to the conclusion that a winding up order should not be made at this juncture. The question which remains is whether the petition should be dismissed or adjourned pending the determination of the Competition Proceedings. If the ulterior motive ground was the only ground for not making a winding up order at this juncture, I am of the view that the appropriate course would be to adjourn the petition, rather than dismiss it. That view is partly informed by the fact that the Company ceased trading almost two years ago. Therefore, the factors which usually deter a court from granting a lengthy adjournment of a winding up petition are not present. For instance, it is unlikely that, if the petition was adjourned but a winding up order was made at some time in the future, the application of s. 218 of the Act of 1963, which avoids disposition of property and transfer of shares in the Company after the commencement of the winding up, which would date back to the presentation of the petition, that is to say, 3rd September, 2012, would come into play. However, the ulterior motive ground is not the only ground on which the Company contests the making of the winding up order. Therefore, I will return to the question of the appropriate remedy, having considered the other grounds advanced on behalf of the Company.

Company's cross-claim

28. In delivering judgment in the Supreme *Court in Re WMG (Toughening) Ltd. (No. 2)* [2003] 1 I.R. 389, McCracken J., with whom the other Judges of the Supreme Court concurred, outlined the legal basis on which a company may oppose a petition to wind up on the ground that the underlying debt is disputed or that the company has a cross-claim against the petitioner for monies in excess of the amount claimed by the petitioner from the company. He stated (at p. 392):

> "There is no real dispute between the parties as to the proper test to be applied by the court in the circumstances. That test is set out in the judgment of Buckley L.J. in *Stonegate Securities v. Gregory* [1980] Ch. 576 at p. 579, and has already been approved by this court in *In re Pageboy Couriers Ltd*. [1983] I.L.R.M. 510. The passage reads at p. 512:–
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> > 'If 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 a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed.'

> It is also accepted by the parties that the subject matter of the *bona fide* dispute may in fact not be the debt itself but rather a cross-claim by the company against the petitioner. The issue, therefore, is whether the company's claim in the present case is a claim made in good faith and on substantial grounds. It is clear that the issue is not whether the company will succeed in its claim, but whether it is a *bona fide* dispute which should be determined by the courts in the normal way without putting the company's existence at risk."

29. The last paragraph in the passage quoted in the next preceding paragraph was quoted in this Court by Clarke J. in *Re Emerald Portable Building Systems Ltd*. [2005] IEHC 301. Clarke J. also referred to the position adopted by the Court of Appeal in England and Wales in *In Re Bayoil S A* [1999] 1 All ER 374, quoting from the judgment of Nourse L. J., *inter alia*, the following passage (at p. 155):

> "I emphasise that the cross claim must be genuine and serious or if you prefer one of substance, that it must be one which the company has been unable to litigate and it must be in an amount exceeding the amount of the petitioner's debt."

Counsel for the Company also referred the Court to a passage from the judgment of Laddie J. delivering judgment in the Chancery Division of the High Court of England and Wales in *Re VP Developments Ltd*. [2005] 2 BCLC 607 (at p. 616) in which it was stated:

> "The relevant question is whether the cross-claim is closely related to the petition debt. If it is, the Court will allow one to be set off against the other. On the assumption that the cross-claim is serious and substantial, it may have the practical effect of eliminating the petition debt."

30. The Company's cross-claim is the substantive claim which is being litigated in the Competition Proceedings against the Petitioner and the Co-defendants and, in those circumstances, the term "cross-claim" is somewhat misleading. Nonetheless, it is convenient to use it in applying the relevant legal principles. As regards the criteria identified in the *WMG (Toughening) Ltd*. case and in the *Bayoil S A and VP Developments Ltd*. cases for determining whether a cross-claim is of sufficient substance to justify dismissing a petition, the application of those criteria to the cross-claim of the Company is as follows:

> (a) It is clear that the Company has a genuine cross-claim, which it is has been prosecuting for two years in good faith.
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> (b) The cross-claim is undoubtedly serious and is being prosecuted on substantial grounds.
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> (c) The cross-claim is unquestionably closely related to the petition debt. In reality, the petition debt is an off-shoot of the cross-claim.
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> (d) With the assistance of funding from the Goode family, the cross-claim has been litigated by the Company for the past two years, so that the issue of inability of the Company to litigate does not arise.
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> (e) The plaintiff's claim in damages is for an unliquidated amount. Mr. Goode has exhibited an independent accountant's report dated 22nd June, 2011 furnished by Smith & Williamson Freaney in connection with the Competition Proceedings. Counsel for the Company referred to a summary, in tabular form, in the report of the range of additional cash contributions which the Company could reasonably have expected but for the alleged anti-competitive practices of the Petitioner and the Co-defendants in the years 2007, 2008, 2009 and 2010 which ranges from €3.3m at the lowest level to €9.2m at the highest level. Counsel made the point that those figures do not represent the full extent of the plaintiff's claim, which relates to post-2010 alleged breaches and also includes the claim for aggravated and exemplary damages. It is neither possible nor appropriate to express any view on the suggested quantum of the Company's cross-claim against the Petitioner and the Co-defendants, other than to say that the Company has adduced sufficient evidence to allow the Court to conclude that the Company's claim against the Petitioner exceeds the amount of the Petitioner's debt (€56,763.33) which forms the basis of the petition, so that, if the Company is successful in the Competition Proceedings, the Petitioner's debt will be eliminated.

31. The fact that the Company initiated the Competition Proceedings just short of two years ago and has apparently prosecuted them diligently, even to the extent of lodging €195,000 in Court on foot of the order for security for costs, when viewed against the Petitioner's attempt to have the Company wound up with the obvious objective of, as I have found, stymying the Competition Proceedings, leaves one in no doubt that in order to exercise the Court's discretion under s. 216 of the Act of 1963 in a principled manner and justly and fairly the petition should be dismissed.

Disputing the debt: appeal

32. As I have emphasised, the Company did not appeal the order for costs made in the Competition Proceedings on 20th January, 2011 and the time for appealing that order has long since passed. However, in his first affidavit in response to the petition, Mr. Goode averred that he had asked his legal advisers to take steps to appeal the costs order. He also averred that it was the intention of the Company to seek leave to introduce evidence, which he averred he had recently obtained, that the trial Judge had held shares in CRH Plc, one of the Co-defendants, when the application for interlocutory relief in the Competition Proceedings was before the Court. He further averred that he was concerned that such evidence "may have given rise to bias or perception of bias in the determination of the application for interlocutory relief . . . and the subsequent costs award".

33. In response to those averments, the Petitioner's solicitors have exhibited a transcript of the Digital Audio Recording of a short hearing in relation to the Company's application for an interlocutory injunction on 26th November, 2010 at which the Company was represented which clearly discloses that the Judge informed the parties that he had "a vague feeling that a very small number of CRH shares feature somewhere in my pension fund". Despite that, the Company has adduced further evidence of enquiries made in relation to the extent of the shareholding and the Court was informed that the Company's legal team has instructions from the Company to dispute the debt due to the Petitioner by way of appeal. In response to a query from the Court, counsel for the Company informed the Court that the Company intended applying to the Supreme Court to extend the time for appealing and hoped to be in a position to do so "sooner rather than later".

34. Counsel for the Petitioner submitted that, even if an extension of time for an appeal was granted, which she argued was unlikely, it is highly unlikely that the Company would be successful in the appeal in circumstances where the Company was on notice of the issue it now seeks to raise. Counsel for the Co-defendants characterised the proposed attempt by the Company to have the order for costs set aside as "contrived" and designed to resist the making of a winding up order.

35. It is wholly unrealistic of the Company to expect this Court to make a determination by reference to, or even express a view on,

matters (whether there should be an extension of time to appeal the costs order and, if so, whether the costs order should be struck out) which are matters for determination by the Supreme Court. In any event, having determined that, because of the existence of the Company's cross-claim, the petition should be dismissed, it is not necessary to address this issue further. However, if it was necessary, all this Court could do would be to adjourn the petition for a short while to enable the Company to take the proposed steps in relation to the appeal expeditiously.

Public policy
36. The public policy argument advanced on behalf of the Company was based on observations made by the Court (Cooke J.) in his judgment on a separate motion in the Competition Proceedings, wherein the Petitioner and the Co-defendants, as defendants in the Competition Proceedings, sought to have affidavits filed on behalf of the Company on the application for security for costs struck out as scandalous or ruled inadmissible. In his judgment delivered on 28th July, 2011 (Neutral Citation [2011] IEHC 310) Cooke J. stated (at para. 11):

> "It must also be borne in mind in this regard that by virtue of the European Communities (Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty) Regulations 2004 (S.I. No. 195/2004) the High Court has been designated a competition authority for the purposes of Article 35 of Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty (as amended). As a result, the Court ought not to prejudge the future relevance or admissibility of evidence or unnecessarily preclude itself from receiving or examining possible future evidence alleging serious infringements of what are now Articles 101 and 102 TFEU, particularly if it is claimed that the consequences of such conduct are continuing or have continued until recently."

Counsel for the Company submitted that, as a matter of public policy, the Court should be very slow, if the matter were in the balance, to make an order the inevitable effect of which would be to cease the Competition Proceedings. The matter is not in the balance and, consequently, it has not been necessary to attach, and I have not attached, any weight to the public policy argument in determining how the petition should be dealt with.

Summary of conclusions and order
37. Although for convenience I have addressed the issues raised on the petition by reference to the reasons advanced on behalf of the Company for the dismissal or adjournment of the petition to some extent individually, it must be emphasised that the ultimate decision to dismiss the petition is based on a combination of the reasons advanced on behalf of the Company and the factors underlying them, with the exception of the intention to seek to appeal the costs order and the public policy argument.

38. There will be an order dismissing the petition.