Neutral Citation Number: [2008] IEHC 3

THE HIGH COURT

[2003 No. 1125 S]

BETWEEN

KANWELL DEVELOPMENTS LTD

PLAINTIFFS

AND
SALTHILL PROPERTIES LTD (IN RECEIVERSHIP)

DEFENDANTS

AND
THE HIGH COURT

[2007 No. 383 COS]

IN THE MATTER OF PORTERRIDGE TRADING LTD
AND
IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006

Judgment of Mr. Justice Clarke delivered the 11th day of January, 2008

1. Introduction

1.1 These two connected matters form part of the extensive litigation ("the substantive proceedings") that has stemmed from the collapse of the Cunningham Group of companies by the appointment by First Active plc ("First Active") of a receiver, Mr Ray Jackson ("Mr Jackson"). A significant number of different associated cases have been under case management for some time and are now nearing the stage of trial. However, two discreet issues have arisen in the above entitled proceedings which, although in one sense generally connected with the broad issues which arise in the substantive proceedings, are nonetheless, at one level, independent of the those proceedings. As will become clear the issues which arise in the above two proceedings are connected.

1.2 In substance the first above named proceedings ("The Kanwell Proceedings") involve an application in respect of the appointment of a garnishee over certain debts. The second above named proceedings ("The Porterridge Petition") involves a petition seeking to have the company named in the title thereof ("Porterridge") wound up by the court.

1.3 As will become clear there is an indirect connection between the two proceedings and, for that reason, both were heard together. This judgment is directed towards the issues which arise in both cases.

1.4 In those rather complicated circumstances it is, perhaps, appropriate to start by a brief description of the issues which were before the court in the respective proceedings before going on to describe, in somewhat more detail, the relevant facts. I turn first to the Kanwell proceedings.

2. The Kanwell Proceedings – The Issues

2.1 On the 26th of November of last year the plaintiffs in those proceedings ("Kanwell") made an *ex parte* application to this Court (Peart J.) for an order *nisi* of garnishee. That application was successful. The application was based upon the fact that Kanwell had already obtained judgment in these proceedings against the defendant ("Salthill") on the 22nd of October, 2003 for the sum of €5,229,000 and costs. In separate proceedings, being those bearing Record No. 2004/23 COS entitled "In the Matter of Salthill Properties Ltd and in the Matter of the Companies Act, 1963 – 2001", and in an appeal arising out of those separate High Court proceedings which bore Supreme Court Record No. 492/2004, it was said that sum of €108,505.09 was due by Porterridge to Salthill arising out of costs orders made in both courts ("the 2004 Companies Act application").

2.2 The order *nisi* required the Secretary of Porterridge to attend before this Court on the 29th of November, to show cause why Porterridge should not pay to Kanwell the relevant sum of €108,505.09. Thereafter, two applications came before me. The first was the return date to that order *nisi* of garnishee on which Kanwell sought to have made absolute the order of Peart J.. The second application was brought on behalf of Salthill (through Mr Jackson as receiver) which sought that the order *nisi* be discharged on the grounds of what was alleged to be material nondisclosure in the course of the *ex parte* application before Peart J.

2.3 In this matter there are, therefore, two issues. The first is as to whether there was any or any sufficient act of nondisclosure on the part of Kanwell on the occasion of the *ex parte* application to warrant, in all the circumstances of the case, the discharge of the order *nisi* of garnishee. In the event that the order *nisi* is not so discharged the second issue is as to whether an absolute order of garnishee should be made. In order to fully understand the basis upon which the receiver opposed, in the event that the order *nisi* was not discharged, the making absolute of the order *nisi*, it is necessary also to understand the issues which arise in the Porterridge petition and the factual interconnection between the two cases. I, therefore, turn first to the issues which arise in the Porterridge petition.

3. The Porterridge Petition – The Issues

3.1 On the 25th of September, 2007, Salthill, acting through Mr Jackson as receiver, petitioned this court for the winding up of Porterridge. The stated basis for the winding up was an assertion that Porterridge was insolvent and unable to pay its debts. That assertion was made in the context of the fact that a sum of €108,505.09 was stated to be due by Porterridge to Salthill, to have been demanded, and that a period of more than three weeks was said to have elapsed since the demands were made during which Porterridge was said to have neglected to satisfy the demands in whole or in part.

3.2 It is clear that the sum due to Salthill which forms the basis for the petition is the same sum as is at the heart of the garnishee application. That sum amounts to the costs awarded in respect of the 2004 Companies Act application to which I have referred which have now been taxed and ascertained together with interest on the sums so taxed and ascertained.

3.3 It is not contested but that the sum is due and owing, and to understand the basis upon which the petition is resisted by Porterridge it is necessary to say a little more about the background facts to both of these applications.

4. Background Facts

4.1 As indicated earlier there has been a complex series of actions maintained by various companies under the control of Mr Cunningham arising out of the collapse of the Cunningham Group by reason of the appointment by First Active of Mr Jackson as receiver. Amongst those cases was the 2004 Companies Act application which was, in substance, an application for directions on the part of Mr Jackson as receiver concerning priorities relating to properties in Galway in which Salthill had an interest. It is unnecessary to refer further to the details of the issues which arose in that application for the purposes of this judgment. Suffice it to say that

certain cost orders were made both by this Court (Laffoy J.) and by the Supreme Court to the effect that the petitioner should recover costs against Porterridge, such costs to be taxed in default of agreement.

4.2 I should, in passing, note that immediately before the hearing of these two matters commenced before me, counsel for Mr Jackson quite properly brought to my attention the fact that the form of the relevant orders for costs made, indicated that the costs might be due to Mr Jackson as receiver rather than to Salthill, being the company of which he was receiver. It was indicated that the orders might be in error in that regard. In those circumstances I gave all sides an opportunity to consider the point that had been raised. When I sat again it was indicated on the part of all parties that each was content that both cases should proceed on the understanding that the relevant sum of €108,505.09 ("the taxed costs") was due from Porterridge to Salthill rather than to Mr Jackson personally. If it had been otherwise, then a grave difficulty with both sets of proceedings would have existed, in that the garnishee order was predicated on the relevant sum being due to Salthill, while the petition to wind up Porterridge was also predicated on the sum being due to the petitioner in the winding up, that is to say, again, Salthill. However, by virtue of the agreement of all of the parties which I have just noted, it did not become necessary to go further into this question which might well, in the absence of such agreement, have necessitated an adjournment to allow the form of the cost orders made to be clarified with the courts which had originally made those orders.

4.3 The underlying factual basis, by agreement between the parties, for all of the matters before the court, was, therefore, that Porterridge was indebted to Salthill in the amount of the taxed costs. *Prima facie*, therefore, Salthill would be entitled to have Porterridge wound up by virtue of the non payment of those sums and also, *prima facie*, Kanwell would be entitled to an order of garnishee to direct that the sums due from Porterridge to Salthill be paid, instead, to it, in part discharge of the more substantial judgment which it already had against Salthill and which, also, remained undischarged.

4.4 Those two *prima facie* situations were, however, potentially complicated, both by the overall background to the wide ranging litigation currently in being between various companies in the Cunningham Group on the one hand and First Active, Mr Jackson and others on the other hand, together with the complications which arise from the fact that both the petition and the garnishee application are based upon the same debt. I propose briefly outlining the facts relevant to both of those complications, starting with the interaction of the matters which I now have to decide with general issues arising in the substantive proceedings.

4.5 In those substantive proceedings a number of companies in the Cunningham Group (including Porterridge) make allegations which include contentions which, it is said, would lead, if substantiated, to a court determination that Mr Jackson was not properly appointed as receiver in the first place. In those circumstances it is said, on behalf of Porterridge, that Porterridge may succeed in obtaining relief against either or both of First Active and Mr Jackson which would have the effect of putting it in funds to meet the costs which it currently owes to Salthill or might otherwise lead to an entinguishment of Porterridge's liability to Salthill. It is, of course, the case that no relief is claimed in the substantive proceedings against Salthill itself. The issue under this heading centres therefore, amongst other things, on the question of the courts discretion or jurisdiction to decline to make a winding up order (or perhaps more realistically, to postpone a decision on whether same should be made) in circumstances where there is not a cross claim against the petitioner for winding up as such but rather a connected claim against a different party.

4.6 Under the second heading it is asserted by both parties that respectively the petition and the application for garnishee are not *bona fide* made. The basis for the assertion that the petition is not *bona fide* stems from the fact that, it would appear, Porterridge has no assets other than its possible claim in the substantive proceedings. In those circumstances it is said that the only basis for seeking to wind up Porterridge must be either to:-

> A. Take the conduct of the substantive litigation, at least insofar as it relates to those aspects of the claims maintained by Porterridge, out of the hands of Mr Cunningham and into the hands of a liquidator; and/or
>
> B. to give effect to a termination of leases which Porterridge holds which leases would, on their terms, terminate on Porterridge being put into liquidation and where, it is said, First Active's interests would be advanced by such a termination.

4.7 Likewise it is asserted that the garnishee application is not *bona fide*. It is clear that Kanwell cannot hope to receive any money directly from Porterridge for the very same reason that I have already identified in the context of the allegations of a lack of *bona fides* in the Porterridge petition proceedings – that is because Porterridge has no assets. In order for the garnishee order to have any practical effect, it follows that Porterridge would have to procure (presumably by borrowing) funds from elsewhere within the Cunningham Group (i.e. from companies within that Group which are not in receivership), pay those monies on foot of the garnishee to Kanwell and thus, by operation of the garnishee order, discharge all of Porterridge's debt to Salthill, and a portion of Salthill's debt to Kanwell. The net effect of all of this is that Porterridge's liabilities would change from being to Salthill (being a company which is in receivership) to another company within Mr. Cunningham's control which was not in receivership. In those circumstances it is said that the application for an absolute order of garnishee is not *bona fide* made.

4.8 It seems to me that the logical starting place in relation to a consideration of the issues raised is to deal firstly with the application made on behalf of Salthill to discharge the order *nisi* of garnishee on the grounds of non-disclosure as that application is not, to any material extent, interconnected with the other issues.

5. The non-disclosure application

5.1 The basis of the application to discharge the order *nisi* of garnishee on the basis of material non-disclosure is set out in an affidavit sworn by Mr. Jackson on 27th November, 2007. In that affidavit he points out that the petition to wind up Porterridge had, in fact, been in being since 25th September, 2007 and thus was in place for almost two months prior to the ex-parte garnishee application. In addition, it is pointed out that the petition had already been before the court and had been adjourned until 27th November, 2007 when a significant number of other matters relating to the substantive proceedings generally were to be before the court. It is, correctly, said that Peart J. was not told of the existence of the petition or its current status. In fairness, it should be said that Peart J. was told that other connected matters were to be heard before me on 27th November and, therefore, specified that the return date for the garnishee order was to be that date and before me.

5.2 The starting point has to be a consideration of the effect of a garnishee order *nisi*. The service of the garnishee order *nisi* does not have the effect of making the judgment creditor a creditor of the garnishee in respect of the debts specified in the order but the judgment creditor at once acquires a right over those debts which entitles him to prevent the garnishee from paying his creditor although the judgment creditor cannot, until the order is made absolute, insist on payment to himself. See Halsbury's Laws of England, 4th Edition, para. 535 vol. 17. A garnishee order *nisi* has, therefore, an effect in substance. It can be distinguished from the type of matter where an *ex parte* application is purely a required procedural method for initiating a substantive application, but where the making of an order at the *ex parte* stage has no substantive effect on the rights and obligations of parties other than to permit the

substantive application to come before the court.

5.3 I have engaged in this analysis because it seems to me that the status of the *ex parte* application, in relation to which an allegation of non-disclosure is made, needs to be considered as one of the factors to be taken into account. It seems to me that this is an additional factor to those which I have already identified in *Bambrick v. Cobley* [2006] I.L.R.M. 81. In that case, I set out, at p. 89, the factors which, in my view, were most likely to weigh heavily with the court in considering an application based upon material non-disclosure at an *ex parte* stage in the following terms:

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place. Applying those criteria to the facts of this case it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above there is a very real possibility that the court would either have made no order or potentially required short service and considered an order only in respect of a significantly lesser sum had it been apprised of the full facts."

5.4 It is important to emphasise that the obligation of candour lies on any party making an *ex parte* application to the court, irrespective of the nature of the order which might be made in the event that the *ex parte* application was successful. However, it does seem to me that amongst the factors which the court should properly take into account in deciding what to do about any non-disclosure, is the extent to which the order sought on the *ex parte* application might be regarded, on the one hand, as largely procedural or, on the other hand, as affecting rights and obligations. Where a third party (not before the court) has their rights and obligations altered on an application made *ex parte*, then the court should be even more anxious to ensure that the party who obtains the benefit of the order has made proper disclosure.

5.5 The first question which must be addressed is, however, as to whether there was, in fact, a material non-disclosure in the first place. That the existence of the petition to wind up Porterridge and the current status of that petition was not disclosed is clear. The question is as to whether its existence could have been material to the garnishee application.

5.6 I have come to the view that it would have been material. It is clear that in a case where a petition to wind up a company is successful, the winding up order relates back to the time of the presentation of the petition as a result of the provisions of s. 220(2) of the Companies Act, 1963. During a period where a petition for the winding up of a company is, therefore, pending, the possibility that the petition may be granted, and the company wound up, has the potential to have an effect on any actions taken by the company during that period. The possibility that a winding up order, if ultimately made, might affect a dealing in the company's assets and liabilities by means of a garnishee cannot be ruled out. It is also clear that the making of a garnishee order is discretionary. It is, therefore, possible that the existence of a petition to wind up a proposed garnishee could be a material factor in the exercise of the court's discretion. It should, of course, be pointed out that it might well be that had Peart J. been informed of the existence of the petition, he would, nonetheless, have made the order *nisi* and allowed all questions concerning priorities to be thrashed out on the return date. On the other hand it is possible that, on being informed of the existence of the petition, and the fact that it was before the court on 27th November, Peart J. might have taken the view that it would have been more appropriate to defer a decision on the making of an order *nisi* until that date and adjourned further consideration of the application so that it could be considered in conjunction with the petition. It is unnecessary to reach any conclusion as to what the proper course of action might be in such circumstances. It is only necessary to note that the existence of the petition is a factor which could, potentially, have affected the exercise of the court's discretion or the manner in which the court might have dealt with the application and must, therefore, objectively speaking, be regarded as material.

5.7 As I pointed out in *Bambrick v. Cobley*, materiality is to be considered objectively but also not on a basis which would impose an excessive burden on a party making an *ex parte* application. It does not seem to me that an obligation to disclose the existence of the petition could be regarded as excessive. In those circumstances I am constrained to take the view that there was a material non-disclosure.

5.8 Applying the criteria identified in *Bambrick v. Cobley* (to which I have already referred), and the addendum noted at paras. 5.3 and 5.4 above, it seems to me that, while material, the extent of the materiality of the matter not disclosed should not be overstated. The truth is that the garnishee issue was going to come back before me to consider whether an absolute order should be made and, to the knowledge of the judgment creditor, I would also be dealing with the petition on that date. Secondly while, for the reasons which I have analysed earlier in this judgment, a garnishee order *nisi* is substantive rather than purely procedural, it would not, to the knowledge of the judgment creditor, have been likely to have any practical effect in the circumstances of this case where there were no assets available to pay any debts in any event. In all the circumstances I could not place the materiality at anything other than a moderate level.

5.9 I accept the explanation given by counsel on behalf of the judgment creditor to the effect that it was not considered to be material to disclose the existence of the petition. While I have come to an opposite view as to the materiality of the matter in question I do not consider, in all the circumstances, that the failure to disclose was deliberate or, indeed, significantly culpable. It was based on a stateable, if, in my view incorrect, view of the law.

5.10 Finally, it seems to me that any question of non-disclosure is outweighed, in the balance of justice in this case, by the need to address appropriately and fairly, the competing issues which arise in the substantive garnishee application and under the petition.

5.11 In all those circumstances it does not appear to me to be appropriate to exercise the court's discretion in favour of discharging the order *nisi* notwithstanding my finding that there was a material non-disclosure.

5.12 It follows that it is necessary to go on to consider the merits of the application to make the garnishee order absolute in conjunction with the connected question of whether the company should be wound up on the petition. I now turn to those issues.

6. A Competing Winding Up Petition and Garnishee Application

6.1 The starting point seems to me to require a consideration of the legal situation that should pertain, in principle, where the same debt is sought to provide the basis for the winding up of the company who owes the debt and also in respect of which a third party

seeks to obtain an order of garnishee.

6.2 At one level there is a similarity between the process leading to, on the one hand, the winding up of a company by the court on foot of a petition and, on the other hand, the making of an absolute order of garnishee. In both cases there is a preliminary step being, in the case of a winding up, the presentation of the relevant petition to the court and, in the case of a garnishee order, an application *ex parte* for an order *nisi*. While it is true to say that the preliminary steps can be distinguished by the fact that the petition can be issued without leave of the court whereas the order *nisi* of garnishee requires a successful court application, it nonetheless remains the case that the consequences of taking the relevant preliminary steps are quite similar.

6.3 In both cases there is a sense in which the freedom of action of the party allegedly owing the debt is constrained pending the final decision of the court. While the presentation of a petition does not, of itself, operate to freeze the assets of the company (including the relevant debt and any assets which might be available to meet that debt) nonetheless the company's freedom of movement is significantly constrained. As I have pointed out earlier, in the event that the petition is ultimately successful, the consequences of the winding up will relate back to the date of the presentation of the petition and any disposition of the company's assets in the intervening period will be open to being reversed by the court. Thus while not formally frozen, the company's freedom of action in relation to its assets is significantly interfered with.

6.4 Likewise, as soon as notice of the making of the order *nisi* has been served upon him, the proposed garnishee is constrained in relation to dealing with the debt which he allegedly owes to the judgment debtor.

6.5 Given that position, it seems to me that the logical approach to the competing demands of a petitioner to wind up a company on foot of a debt and a third party seeking to have the same debt be made the subject of an order of garnishee, should be determined on the basis of the times when the respective procedures were initiated. It seems to me that such an approach is both technically correct and also conforms with first principles and fairness.

6.6 The approach is technically correct irrespective of which process is initiated first. As soon as a petition to wind up a company has been presented all of the assets of the company are contingently subject to the possibility that the petition will be successful and that intervening dispositions will, retrospectively, be treated as invalid. It would, in my view, be wholly inappropriate for a court to intervene during such a period (in the absence of the sort of good reason that would have entitled the court to prospectively validate a transaction in exercise of the jurisdiction identified in *Joyce v. Wellingford Construction* [2005] IEHC 392) so as to interfere with the orderly disposition of the company's assets in accordance with insolvency law. In those circumstances it seems to me that a court should, generally, lean against permitting the invocation of a garnishee procedure in respect of a company's assets at a time when the company is subject to an, as yet undetermined, petition for its winding up.

6.7 Likewise it seems to me that a court should lean against winding up a company solely on the basis of a debt owed to a petitioner where that debt had, prior to the presentation of the petition, been the subject of an order *nisi* of garnishee. I fully appreciate that this latter situation is more complex, in that the rights and entitlements of other creditors of the company and, indeed, its members come into play in the exercise of the court jurisdiction in relation to winding up. The making of a winding up order does not, therefore, in most cases, involve only a consideration of the debt of the petitioner. Indeed it is clear that even if the debt of the petitioner has been discharged in the period between the presentation of the petition and same coming on for hearing, the court may nonetheless be constrained to wind up the company if it is, in all the circumstances, appropriate so to do having regard to the interests of the other creditors. However where the only party pressing for a winding up order is a creditor whose debt had, prior to the presentation of the petition, been the subject of a garnishee order *nisi*, which, if made absolute, would lead to the debt being extinguished by a requirement to pay a creditor of the petitioner, then it seems to me that those circumstances would amount to a weighty factor which would lean against the winding up of the company.

6.8 Very many questions concerning the entitlements of parties to payment in cases of difficulty of recovery do, ultimately, depend on timing. A party who by diligence or chance registers a judgment mortgage in advance of a competing creditor may well be paid in circumstances where the competing creditor may not. Other examples could be given. There is nothing, therefore, wrong in principle with entitlements in relation to insolvency, or difficulty of obtaining actual payment, being determined on the basis of who got in first. On that basis I am satisfied that the ordinary position which should pertain in the case of competing winding up and garnishee applications, is that a prior petition to wind up a company should take precedence over a subsequent application to invoke the garnishee process. On that basis the *prima facie* position in this case is that the winding up petition in respect of Porterridge should take precedence over the garnishee application. In that context it is next appropriate to consider whether either of the matters advanced on behalf of Kanwell are sufficient to require the court, in equity, to alter that situation. I turn first to the contentions made by the parties as to the lack of *bona fides* in the respect of applications.

7. The Equities

7.1 There is a sense in which the point made by both parties is correct. The primary purpose of a garnishee order is to secure a real payment to the judgment creditor by the garnishee. It is not designed to achieve a tactical advantage by shifting a debt from one location to another which, in the particular circumstances of the case under consideration, happens to benefit one party rather than another. Similarly the real purpose of the winding up of a company where it appears to be unable to pay its debts, is to ensure that the company's assets are dealt with in accordance with insolvency law and the point, at least in many circumstances, of a winding up where the company has no assets or where the only assets which it might have are a chose in action against parties connected with those petitioning for its winding up, is not immediately apparent.

7.2 On the other hand it might be said that both parties are, nonetheless, technically entitled to invoke the processes which they have. Salthill is undoubtedly a creditor of Porterridge who has not had its ascertained debt discharged. Porterridge is a debtor to Salthill who in turn is a debtor to Kanwell which latter company is, again *prima facie*, entitled to invoke the process of garnishee.

7.3 There is an old adage to the effect that "where the equities are equal the first in time prevails". I have already indicated that, in my view, the technical *prima facie* position is that the first in time as and between a petition and a garnishee application both grounded upon the same debt, is that the first in time should prevail. I see nothing in the equities of the competing contentions concerning the *bona fides* or otherwise of the two competing applications in this case to suggest that they are other than equal. They do not, therefore, in my view, displace the underlying position which is, as I have pointed out, to the effect that the petition should prevail.

8. Interaction with Substantive Proceedings

8.1 That leads, finally, to the question of the interaction of the petition with the substantive proceedings. It is true to state that Porterridge cannot assert a cross claim in the traditional sense because it does not have a claim against Salthill whatever about Mr Jackson as the receiver. The jurisprudence of the courts concerning the disallowance of a petition to wind up which is grounded upon

contested claims or claims in respect of which there is a stateable cross claim sufficient to extinguish the claim grounding the petition, has, therefore, no application to this case.

8.2 However it does not seem to me that I can, legitimately, ignore the very close connection between the current debt and the substantive proceedings. The debt is owed to Salthill in its capacity as a company in respect of which Mr Jackson, as receiver, applied to this court for directions. Porterridge has a claim against Mr Jackson arising out of his position as such receiver in relation not only to Salthill but other companies in the Cunningham Group. While not, technically, a cross claim in the proper sense of the word, it seems to me that such a claim, nonetheless, must be regarded as analogous. Porterridge's claim is as against the receiver of the petitioner (Salthill) in his capacity as such receiver of both that petitioner and other connected companies. While it is, therefore, strictly speaking, against another party, it is, in my view, so closely connected with the petitioner that I should, in equity, treat it as being, for the purposes of this application, analogous to a cross claim.

8.3 I have already expressed the view in other judgments in the substantive litigation that I am not prepared, at this stage, to treat the claims made by the various companies in the Cunningham Group as being incapable of success. The same applies to the claim which Porterridge makes against Mr Jackson and First Active. If that claim is successful, it is possible that Porterridge will ultimately be in a position to discharge, or otherwise be absolved from, its liabilities to Salthill.

8.4 In those special circumstances it seems to me that the justice of the case would be met by postponing any further consideration of the petition until after the substantive proceedings have been determined, or at least sufficiently determined to allow the position of Porterridge in relation to Salthill to become clear.

8.5 However, it seems to me to follow from my earlier determinations that I should not make absolute the order *nisi* of garnishee. The petition continues to be pending. The *prima facie* situation which I have identified continues in place. The possibility that the petition to wind up may not be successful is dependant on the contingency that Porterridge succeeds to some sufficient extent in the substantive proceedings. If it does not, then there would be no basis for displacing the *prima facie* position which I have already identified which would be to the effect that the petition would take precedence over the garnishee application. Equally if Porterridge succeeds in the substantive proceedings in such a way as leads to an extinguishment of its debt to Salthill, then it would follow that the garnishee order could not, on that basis, either, be made absolute, for the very debt which would be at its heart would have been extinguished. Therefore the substantive proceedings will either lead or not lead to the extinguishment of the underlying debt. If they do so lead then there is no basis for the garnishee in the first place. If they do not so lead then, for the reasons which I have already identified, the petition must take precedence. In either event the garnishee could not be made absolute.

9. Conclusions

9.1 It, therefore, seems to me that the appropriate course of action to adopt is to adjourn further consideration of the petition until such time as the substantive proceedings have reached a stage which allows for a determination of the position of Porterridge in relation to Salthill. I will give liberty to apply in that regard to all parties when adjourning the petition generally. So far as the garnishee is concerned, I will decline, for the reasons which I have already indicated, to discharge the order *nisi* on the grounds of non disclosure but I will also decline, for the reason which I have just identified, to make absolute that order and it will, on that basis, therefore, be discharged.