THE HIGH COURT

[2017 No. 180 COS.]

IN THE MATTER OF ECOLEGACY LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Ms. Justice Murphy delivered on the 11th day of June, 2018

1. Before the court is the petition of the William Jay Gencarella Family Trust to wind up EcoLegacy Ltd on the grounds that the company is insolvent and unable to pay its debts and on the further ground that it is just and equitable that the company be wound up. The material facts upon which the petition is based are as follows:-

i. EcoLegacy Ltd. (hereinafter "the company") is a private company limited by shares bearing company number 499517 and was incorporated in the State under the Companies Acts 1963 to 2012 in the month of June 2011.

ii. The registered office of the company is situated at No. 1 Grants Row, Second Floor, Mount Street Lower, Dublin 2.

iii. The nominal share capital of the company is €1,000,000 dividend in to €89,870,650 "A" ordinary shares of €.01 and €10,129,350 "B" ordinary shares of €.01 each. The amount of the capital paid up or credited as paid up is €2,853,840 being comprised of a called up share capital of €13,916 together with a share premium account of €2,839,924.

iv. The object for which the company was established are to market, promotor, sell and/or lease new technology to the international funeral industry, maintain and support the technology, supply technological and operational consultancy to the international funeral industry, source and supply consumables to the international funeral industry for use in existing and new technologies and other objects set forth in the constitution thereof.

v. Council Regulation (EC) 1346/2000 of 29th May, 2000 on insolvency proceedings ("the Insolvency Regulation") does apply to these proceedings as the centre of main interests of the company is located within State. Furthermore, the registered office of the company is located within the State per Chapter 1, Article 3(1) of the Insolvency Regulation.

vi. To your petitioner's knowledge, no insolvency proceedings have been opened in respect of the company in a Member State of the European Union to which the Insolvency Regulation applies.

vii. All necessary inquires having been made by your petitioner, the company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency (NAMA) or a NAMA group entity (each within the meaning of the National Asset Management Agency Act, 2009).

viii. The petitioner is a creditor and shareholder of the company. The petitioner holds 32,650 "A ordinary" class shares since in or about January 2012, the company has continued to operate a trading loss. Between January 2012 and Marc 2014, the company operated a trading loss in excess of €416,000.

ix. The petitioner being a creditor of the company and seeking reassurance regarding the security of its investments, inquired by correspondence through its solicitor as to the financial position of the company. By letters dated 24th March, 2017 and the 27th March 2017 the petitioner formally called upon the company to assure the petitioner that all debts, actual or contingent, could be discharged as they fell due. No response confirming this position was forthcoming.

x. Your petitioner was desirous of securing the repayment of the sum of €750,000 outstanding on foot of loans certificates issued 12th February, 2016 and the 25th April, 2016 and demanded same of the company by letter dated 27th March, 2017. It was an express element of the demand that should the company fail to discharge the sums due and owing that the petitioner would rely upon same as evidence of the company's insolvency within the meaning of s. 570 of the Companies Act, 2014.

xi. More than twenty one days have now passed since the demand was made. To date the company as neglected to discharge or otherwise to satisfy the sum in whole or in part are to make any offer to your petitioner to secure same.

xii. The company is insolvent and unable to pay its debts.

xiii. In the circumstances it is just and equitable that the company be wound up.

2. The company, through its current Managing Director, Mr. Andrew Dorn, has not contested the substance of the petition, nor the insolvency of the company, but has asserted that the presentation of the petition is an abuse of process because the petitioner had an ulterior motive and/or improper motive in its presentation and on that basis he seeks an order dismissing the petition.

3. The court has before it three affidavits from William Gencarella, trustee of the William Jay Gencarella Family Trust and three affidavits from Andrew Dorn, current managing director of EcoLegacy Ltd, upon which they were cross examined during the course of the hearing. In addition the court had evidence from Mr. Thomas Kavanagh of Deloitte on behalf of the petitioner and Mr. Jim Luby of Luby MacStay who prepared a report on behalf of the company. Each accountant was dependent on instructions received from their respective clients and neither had conducted an independent audit of the company's accounts.

4. Two founding members of the company Tony Ennis and Brian McKimm, featured extensively in the evidence adduced on the hearing, both on affidavit and on cross-examination, but neither provided direct evidence to the court. The hearing was not so much '*Hamlet*' without the prince as '*Two Gentlemen of Verona*' without the two gentleman. During the course of the hearing there were allegations and counter-allegations that both had misappropriated company funds over the years. The court has the impression that in many respects the hearing of this petition was a proxy war between the two founding members, in which the petitioner has been ill-served and was liable to suffer collateral damage. The court is conscious that neither was directly represented at the hearing. The court wishes to make it clear that the allegations and counter-allegations that have been made are just that, allegations, which in due course will have to be explored elsewhere.

General background

5. In April 2017 Mazars, at the request of the then board, produced a draft report which summarised the issues then facing the company. While it is based on the instructions of Mr. Brian McKimm, in whom the current Managing Director, Andrew Dorn, has not merely no faith, but in fact a deep mistrust, the court considers that it presents a fair reflection of the issues that ultimately gave

rise to this petition and accordingly proposes to adopt it as a summary of the general background.

6. EcoLegacy Ltd was incorporated on 1st June, 2011, having been set up by Mr. Tony Ennis who acted as CEO, along with Mr. Brian McKimm, the company's financial adviser and Mr. Alan O'Driscoll, the company secretary. The company is the brainchild of Mr. Ennis, whose idea it was to develop an environmental and ethical alternative to burial and cremation, called 'ecoLation' which results in organic nutrient rich remains which can be buried or scattered without harm to the environment. The company's shareholder agreement requires the consent of 100% of the shareholders to pass any shareholder resolution. This as shall be seen below created significant difficulties in 2016 and 2017.

7. Under the heading 'Route to Market' Mazars reported as follows:

> *"ecoLation is a new technology, commercially unproven in its target market, and the company is still in start-up phase. Funding of circa €7.2m has been secured through a number of investment rounds, which has been used to fund engineering development, sales and marketing and corporate overheads.*
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> *In early 2016, the company entered into agreements with the Dublin Cemeteries Committee t/a Glasnevin Trust (GT) for the installation, commission and operation of an ecoLation unit at the Trust's Dardistown cemetery. The agreements envisaged the parties forming a Joint Venture (JV) for operation of the facility, with each party investing €750k by way of a loan to fund the cost of the machine (which was expected to cost in the region of €1.5m). The objective of the partnership was for GT to assist ecoLegacy with both bringing the ecoLation technology to market, but also refining the commercial and operating model for ecoLation, in particular with funeral directors. The intention was for the Dardistown installation to serve as a reference site for ecoLegacy, to which visitors and prospective clients from around the world could come to experience the new ecoLation technology first hand.*
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> *From a commercial perspective, a key principle of the GT agreement was that ecoLegacy would underwrite, by way of guarantee, the €750k loan from GT to the JV, thereby providing the assurance required by GT's board in respect of capital preservation. I understand this provision was designed to insulate GT from the risk that the Local JV (in Ireland) might underperform (and struggle to repay the GT loan), whereas ecoLegacy, with GT's assistance, might flourish elsewhere.*
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> *I am advised that as 2016 progressed and the development of the pilot machine continued apace in Germany, it became clear that a number of planning and permit related matters had arisen in respect of the Dardistown site, an existing building with space for 2 cremators, one of which was earmarked for an ecoLation unit. I understand it emerged that, rather than the existing planning permission being adequate for the installation of ecoLation at the site, a full planning application would be required, with the likelihood of delays in commissioning the plant. As a work-around, and pending the submission and securing of the planning consent, it was agreed that the pilot machine would be installed on a temporary basis in the company's facility at Airton Road, until Dardistown was ready. I understand that the planning consent has not as yet been received.*
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> *In the interim, I understand testing and commissioning of the ecoLation unit continued at Airton Road, leading to the acceptance criteria set out in the 'Put and Call' agreement being met and signed off by Thyssenkrupp on the 24 November 2016. Completion notices were then served on GT in line with the contract on 25 November 2016, but completion did not take place. Subsequent correspondence with GT raised concerns about the operability of the machine and a desire on their part to witness a full system test (human cadaver) prior to completion. I understand that while GT remain willing to proceed with the JV and ecoLation. they require assurances regarding both the operability of the technology and also the financial strength of ecoLegacy Ltd (the parent) as a backstop for their loan. Until these matters are satisfactorily resolved, they are unwilling to advance the €750k in investment monies envisaged by the agreements."*

8. Under the heading '*Intellectual Property/Product Development*', the Mazars report summarizes the position as follows:

> *"I understand that in early 2016, the company entered into an agreement with ThyssenKrupp ('TK') whereby TK would observe the development of a pilot unit for Glasnevin Trust by the ecoLegacy in-house engineering team, with the co-operation covered by an NDA. Subsequently, the parties agreed a Technical Co-Operation Agreement (TCA) dated 27 June 2016 which stated that all IP developed during the collaboration would be shared jointly by the parties in return for TK industrialising the pilot plant design for mass production. As part of the TCA, the company (ecoLegacy) granted TK, for the lifetime of the agreement, a royalty free licence over all IP developed by the company prior to 1 January 2016, which consists of two active/pending patents registered in 2012. Those relate to: (1) the processing of human remains by pyrolysis; and (2) the processing of human remains by cryogenic freezing. As of today's date I understand application (1) to the U.S. patent office has been refused (by way of a non-final order) which has serious implications for the company and its underlying value.*
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> *The Company capitalised development costs of €3.4m by 31 December 2016 being an accumulation of all engineering development and related costs incurred by the company in developing the technology to the current state of readiness over a four year period. I am informed that these costs have no recoverable or measurable value and essentially reflect the effort that had gone into developing the technology over a four year period. A further €2.2m was reported in WIP as at 31 December 2016 relating to the cost of developing the pilot unit for Glasnevin Trust and includes costs (including consultancy and fabrication fees paid to TK, among others) directly attributable to that plant only. I understand TK have subsequently confirmed that the pilot plant, while functionally viable, is not operationally stable and requires further significant investment (expected to be in the region of €300k -€400k (before removal costs) before it is capable of being operated commercially at Glasnevin. On a breakup basis, I understand the plant is worth in the region of €300k, subject to a detailed assessment by TK.*

The petitioner and the company

9. Mr. Gencarella, trustee of the William Jay Gencarella Family Trust, the petitioner, first became acquainted with the company in 2014, when he met Mr. Tony Ennis. At that time Mr. Ennis and Mr. McKimm were in search of potential investors to finance the continuing development of the ecoLation unit. In March 2015, initial contact was made with Glasnevin Trust with a view to the installation of an ecoLation unit in the Trust's crematorium at the Dardistown cemetery. Three months later on 2nd June 2015, Mr. Gencarella through another of his investment vehicles, advanced the first of three convertible loans to the company. This loan in the

sum of €232,796 was subsequently converted into shares. Following this investment Mr Gencarella was appointed to the board of the company.

10. In January 2016, the joint venture agreement was entered into with Glasnevin Trust, whereby Glasnevin Trust were to advance €750,000 to the company to put the first ecoLation unit in place. This contract was of enormous significance to the company. The very fact of the contract was of assistance to the company in securing further investments and the successful completion of the contract would lead to the rollout of further sales of the ecoLation unit. It is alleged that at this time, other parties had expressed interest in investing in the company but were unwilling to do so until such time as they could see that the company's aim of creating a working ecoLation unit was attainable.

11. Armed with the Glasnevin contract Mr Ennis and Mr. McKimm embarked on a further fundraising drive in the U.S. On 12th February 2016 the Gencarella Trust advanced a further €450,000 to the company by way of a convertible loan note and on 25th April 2016 it advanced a further €300,000 by way of a further convertible loan note. It was undoubtedly envisaged that on the successful completion of the ecoLation unit these loan notes would be converted to shares as was the case with his earlier loan note of 2015. The loan notes did, however, contain provisions for the repayment of the loans if called for on the 12th February 2018 and the 25th April 2018. There was also provision in the loan note agreements for the earlier demand for repayment of the loans in the event of default of specified terms contained in the loan notes.

12. Subsequent to these advances the company concluded its Technical Co-Operation Agreement with ThyssenKrupp on the 27th June 2016. Following this, Mr. Gencarella introduced Mr. Ennis and Mr. McKimm to other American investors, who between them invested €3.35 million in exchange for shares. One of the terms of their investment was that the company's shareholder agreement be amended so that shareholder resolutions could be passed by a simple 51% majority rather than the 100% agreement contained in the original shareholder agreement. The uncontroverted evidence of Mr. Gencarella is that it was a condition precedent to the drawdown of this investment that the shareholder agreement be amended. This was not done because shareholders holding 2% of the issued shares blocked the change. The American investors are also alleging that they were materially misled in the Memorandum of Offering presented by the company.

13. Throughout this period, unknown to Mr. Gencarella but presumably known to Mr. Ennis, the evidence is that Mr. Brian McKimm was a bankrupt in Northern Ireland. The evidence is that he was a bankrupt between November 2015 and November 2016.

14. In July 2016, Mr. Gencarella visited the manufacturing site in Germany with Mr. McKimm. He found that the development of the unit was not as advanced as Mr. Ennis had led him to believe. There was a planned launch of the ecoLation unit on 7th October 2016, when a conference of ASCE (Association of Significant Cemeteries of Europe) was due to be held in Dublin. Because the planning issues in relation to the installation of the unit in Dardistown had not been foreseen, it was not possible to install the unit in Dardistown. The unit was installed instead at the company's premises at Airton Road. This entailed additional costs being incurred in due course in transferring the unit to Dardistown.

15. Mr. Gencarella avers and the court accepts, that throughout this time he was pressing Mr. Ennis about progress on sales, the engineering process and the business generally, but received little feedback. At this point Mr. Gencarella avers and the court accepts that he queried Mr. Ennis about the lack of board meetings which were required as one of the conditions of his loan notes and he queried him in relation to the governance of the company generally. There had been no board meetings since Mr. Gencarella's appointment to the board more than a year earlier in 2015.

16. A board meeting was eventually held on the 22nd November 2016. At that board meeting, Mr. Dorn, currently Managing Director, resigned from the board for reasons which have not been made clear to the court. At that meeting Mr. Ennis stated that there were plans to sell some nineteen units in 2017. At that meeting it also became clear that the company did not yet have a properly functioning ecoLation unit. It was noted that until completion of a full system test, i.e. the processing of a human cadaver by the ecoLation unit, Glasnevin Trust would not invest the €750,000 agreed in the joint venture agreement of January 2016.

The crisis

17. By January/February 2017, it became increasingly clear that the company was approaching a crisis point. It had an ecoLation unit that did not work, and it had no confirmed sales. Glasnevin Trust were refusing to pay over the €750,000 agreed under the joint venture agreement until a functioning unit was produced. It would take additional time and additional funds to complete the unit which it was then suggested would be available for a full system test on a human cadaver in May 2017, with a commercial production date of September 2017. Without the infusion of the Glasnevin Trust monies, the company was technically insolvent.

18. A board meeting was scheduled for 22nd February 2017. Mr. Gencarella flew into Ireland on 20th February. On the 21st February, there was an advisory board meeting attended by the Chairman Mr. Stephen Barclay, who had been appointed to that role by the CEO Tony Ennis in March 2016, Mr. Ennis, Mr. McKimm, and Mr. Gencarella, as well as Baroness Mary Goudie and Professor Mark Dodgson, who were both specialist advisors to the company. At that meeting it was recommended that Mr. Ennis change his role in the company and that professionals be brought in to handle the sales process. The concern was that the two key contracts with ThyssenKrupp and Glasnevin Trust could eventually be rescinded. The new role proposed for Mr. Ennis was that of President/Founder. It was envisaged that he would retain his shareholding of 35% and would remain a director. Mr. Ennis refused to consider the suggestion.

19. At the board meeting the following day the 22nd February 2017, a meeting which was surreptitiously recorded by Mr. Ennis, the multiple problems facing the company were discussed at length over a four-hour period. It was acknowledged more than once in the course of that meeting that the position of the company was such that the petitioner was then entitled to call in his loan notes. In attendance at that board meeting was Mr. Barclay, Mr. Ennis, Mr. McKimm and Mr. Gencarella. The meeting was also attended by a solicitor, standing in for Mr. O'Driscoll, the company secretary.

20. There were detailed discussions about the difficulties with the ThyssenKrupp agreement; the Glasnevin Trust contract; the absence of sales; (notwithstanding Mr. Ennis's assurance at the earlier board meeting on 22nd November 2016 that there were nineteen sales in the pipeline); the fact that the ecoLation unit installed at the company's premises at Airton Road was still not capable of processing a human cadaver and wouldn't be until May/June 2017; the urgent need to raise further financing and the likely high cost of same given the current state of the company's operations; and the desirability of writing down the company's research and development costs on the grounds that the company was now moving into the phase of commercial development of the unit.

21. Following those discussions, Mr. McKimm and Mr. Ennis were asked to withdraw and a conversation then ensued between Mr. Gencarella and Mr. Barclay. The solicitor was asked to remain. Unknown to them their conversation was being recorded. They discussed the fact that Mr. Gencarella's loan notes were now payable because of events of default by the company. Mr. Gencarella

made it clear that his desire was to make the company strong. They discussed the removal of Mr. Ennis as CEO and his retention as a director and Founder of the company. Mr. Gencarella expressed his frustrations at not being kept in the loop for the previous eight months about the financials and how the company had moved from being in a great financial position at the launch date (October 2016) to effective insolvency. He expressed dismay that Mr. Ennis had apparently instructed Mr. McKimm not to send Mr. Gencarella certain financial information.

22. Having discussed the matter and having decided that Mr. Ennis should be removed as CEO, Mr. Ennis and Mr. McKimm returned to the meeting. Mr. Barclay first of all referred to the advisory board meeting the previous day attended by Baroness Mary Goudie and Professor Mark Dodgson and stated:-

> *"We listened yesterday your presentation which was excellent. We listened to Mark (Dodgson), his recommendations and we had our discussions and we think that you should become founder and president and we should put in interim management with Brian as CEO".*

23. Mr. Gencarella said "*the point is you should stand down as CEO for a number of reasons*". Mr. Barclay than gave the reasons, "*first of (sic) the sales position. Secondly, the Glasnevin position, thirdly the cash position, fourthly the lack of communication, fifthly the lack of respect position, sixth the lack of confidence the executive management have.*" This was followed by an extensive discussion in which it is fair to say that Mr. Ennis resisted his removal as CEO and indicated his intention to take legal advice.

24. The petitioner maintains that the removal of Mr. Ennis as CEO was a necessary step due to Mr. Ennis's behaviour. He instanced his repeated failure to provide a true account of the state of the company; the fact that during his time as CEO the company had "burned through" more than €7 million in investment funding and at the end of it had no sales contracts; an ecoLation unit that was not working properly; and his fraught relationships with core contractors, namely ThyssenKrupp and Glasnevin Trust. It was also decided at the meeting that Mr. McKimm would assume the role of interim CEO.

25. One of the matters discussed at that meeting was the treatment of the research and development costs in relation to the first ecoLation unit. It was suggested that those be written down against reserves on the basis that the company would shortly go into commercial production and the writing down of the research and development costs would render the company more attractive to investors. While there was no vote on the matter, no dissent was expressed to the proposed approach. In the report prepared for and produced for the meeting, the capitalised research and development costs were shown as an asset on the balance sheet thereby showing a positive balance of €4.946 million, of which €618,000 was held in cash.

26. A further decision of the meeting was that Mr. McKimm would generate a cost reduction report along with monthly cash flow reports in order to monitor the company's cash burn with a goal of slowing down its expenditure. Given the events which subsequently happened this did not materialise. At the board meeting, directors were asked to submit all outstanding travel expenses. It was also decided that the board would issue a monthly newsletter to shareholders in order to keep them informed as to the company's progress.

27. On the same day the 22nd February 2017, following the board meeting, there was a meeting with Glasnevin Trust. It became evident that Glasnevin were not close to giving the company the €750,000 pursuant to the joint venture agreement. They expressed their reluctance to do so on the basis that they had been prevented from seeing visual confirmation of the prototype ecoLation unit's evolvement.

28. On 11th March 2017, Mr. Barclay sent a letter to the shareholders which outlined the launch of the model of the ecoLation unit at the ASCE (Association of Significant Cemeteries of Europe) conference, the previous October. He pointed out that though several parties had expressed interest in acquiring the machine, they would not commit to purchase until a set of human remains had been processed. The letter notified the shareholders that an arrangement had been made for a full system test on human remains for May/June of that year, in consultation with Glasnevin Trust and the Royal College of Surgeons of Ireland. The shareholders were also updated on relations with Glasnevin Trust and with ThyssenKrupp. The letter referred to the organisational changes and concluded:-

> *"We believe that the future of your Company remains bright, provided on-going financial support can be secured, and that much can be achieved to ensure your shares have a significant value."*

29. On 13th March 2016, two days after the shareholders' letter, Mr. Ennis served notice of an E.G.M to be held on 4th April 2016, for the purpose of appointing additional directors to the board. His goal appears to have been to have himself reinstated as CEO. A further two days later on 15th March 2016, Mr. Barclay notified the directors that a board meeting would be held on 30th March 2017. The respondent contends that this was intended as a counter attack on Mr. Ennis's summoning of an E.G.M and that the intention of Mr. Barclay was to maximise the number of permitted directors under the company's Articles of Association so as to prevent the intended appointments at the E.G.M scheduled for 4th April.

30. On 16th March 2017, Mr. Gencarella wrote a lengthy letter to Mr. Ennis and, though marked "*personal without prejudice*", it was referred to and relied on by the respondent company as being indicative of the petitioner's mind set. The court agrees that it is an important letter. The letter states:-

> *"Dear Tony,*
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> *It deeply disturbs me to write you this letter. Since the last board meeting I have become aware of further information about your conduct that I find hard to believe, but since I have not heard from you and you have not responded to my email, I am lead(sic) to believe everything I have heard and found out is true. Those actions include intentionally concealing information from me, your entire board of directors, from your shareholders, and in some cases misleading us on the extent of your actual sales and progress. Your failure to document hundreds of thousands of Euros worth in expenses and your focus on grandiose 'reveal' events rather than completion of the company's first functioning unit has jeopardized the company's ability to meet its cash flow needs before the critical first client installation. These actions have serious and lasting consequences and I need you to understand the legal impact of what you have done."*
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> *1. Acceleration of the Convertible Notes*
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> *The Convertible notes contain very specific provisions which you have caused the company to breach. Section 16.2(a) requires the company to 'conduct its business and affairs in a proper manner, keep proper accounting records and comply with its obligations' under the Companies Acts. Financial statements were not prepared in a timely manner, lack of accounting for expenses is a failure to keep proper accounting records and failure to hold board meetings as called for*

by the Shareholders' Agreement is a failure to comply with the company's charter and a violation of the Companies Acts. These actions alone would be sufficient to constitute an Event of Default which would accelerate repayment of the loans, but there is more.

Section 16.2(c) requires the company to 'keep the Noteholders informed of the progress of its business and furnish the Noteholders with particulars of any matter concerning the activities of the Group.' Instead of doing what was required by this section, you specifically and intentionally instructed Brian to withhold information from me in particular, and from your other Directors and shareholders. This concealment of information constitutes at best a gross misrepresentation of the situation and at worst amounts to a fraud on your fellow directors and shareholders which is not only a breach of your obligations under the Convertible Notes and the Shareholders' Agreement but potentially criminal in nature. You mislead(sic) us as to the status of sales that were in progress or completed, stating that there were 3 deposits but failing to mention that there were no signed sales agreements with anyone. We have now discovered that you also did not reveal your intention to potentially litigate with Glasnevin and led us to believe that it was they who were unwilling to perform.

The specific requirements in Section 16.2(c) subsection (ii) for quarterly management reports including a profit and loss statement, balance sheets and cash flow statements within 14 business days from the end of every three month period, in subsection (iii) for a detailed management report within 20 business days of a request from any Noteholder, which you will recall I requested many, many times and never received, and in subsection (iv) for a copy of the annual capital and operating budgets not less than 30 business days prior to the end of each financial year, were all missed, and all would individually justify an Event of Default and acceleration of the repayment of the notes.

Further, Section 16.2(a) requires that the company carry on and conduct its business and affairs in a proper manner and in accordance with its obligations under the Companies Acts, which includes complying with the terms of its organizing documents. Section 4.1(d) of the Shareholders' Agreement prohibits the company from undertaking any of the matters listed on Schedule 2 without written approval in advance by the Shareholders holding 51% of the shares. Schedule 2 prohibits many things without shareholder approval, including at (6) entering into any material contract or transaction; at (13) entering into any capital expenditure exceeding €50,000, of which there were many, and at (20) employing or retaining the services of any person at an annual basic salary of in excess of €50,000. All of those actions were clearly taken by the company without prior approval of shareholders, constituting a further breach of the Convertible Notes and of the company's obligations under the Companies Acts.

You may believe that I would be unwilling to call the notes because it would liquidate the company, but the liquidation process would allow others to acquire the intellectual property and assets of the company and continue where the prior firm left off.

2. Forced sale of your shares.

Section 8 of the Shareholders' Agreement specifies that if any shareholder commits or suffers an Event of Default, then the non- defaulting shareholders shall be entitled at their discretion to require the defaulting shareholder to sell all or part only of the shares held or beneficially owned by the defaulting shareholder. Section 8.2.5 defines an Event of Default as a shareholder 'being in material breach of his obligations under this Agreement or the Memorandum and Articles of Association of the Company and failing to rectify such material breach to the satisfaction of the Company within 30 business days of being so specifically requested to do so by the Company in writing specifying the material breach.'

As described above, your repeated and intentional failures to provide requested information in a timely manner, to conduct regular board meetings, to disclose material information, report true and accurate sales results are material breaches, and to obtain shareholder approval of material contracts, hires and capital expenditures are all breaches of your obligations, and they cannot be cured. Your failure to document €250,000 in expenses is also a material breach of your obligations and fiduciary duties as a director which would constitute an Event of Default.

These Events of Default would permit any shareholder to begin proceedings to have the company appraised and to force you to sell your shares at the prescribed price. As you know, the company will not survive without additional capital infusions and currently has only one prototype unit that has still not been successfully tested with a human cadaver. I do not expect that an independent party will place much valuation on the company in that condition, especially if the notes are called as described above.

3. Potential Criminal consequences

The United States Securities Laws offer swift and severe penalties of both a civil liability and criminal nature, including both fines and incarceration. These penalties are generally the result of false or misleading statements or omissions made in connection with the purchase or sale of a security.

When you presented the company's history to the investors and described in the Confidential Private Offering Memorandum (the 'Offering Memorandum') that the company has secured 'approximately €5m investment in total to date' you indicated that you had personally invested over one million Euros of that amount. I have now seen that this was not true, and you knew it was not true when I witnessed you making those statements to my friends who invested. Once again this was a false and misleading representation of the facts but on which people made an investment. In anyone's book this is fraudulent misrepresentation.

Later in your personal letter to the shareholders which was included in the Offering Memorandum materials, you state that 'I am pleased to inform you that we have closed €5m in cash and conversion of time and/or services that otherwise would have been billed.' There is no evidence to support that number in the company's records unless you are including your own compensation, which was at that point not yet agreed upon by the board.

Further the 'Use of Proceeds' section of the Offering Memorandum stated that the offering proceeds would be used to construct the first three units. The proceeds from the offering have not been able to produce even one completed and functional unit yet and you knew at the time that cost estimates for the unit would be higher than were included in the financials or included as part of the Offering Memorandum.

Individually and collectively, these misrepresentations in the Offering Memorandum are actionable under Irish Company

Law and U.S. Securities Laws and will result in personal liability to you. In particular they will create rescission rights for all the shareholders who purchased in that round of financing and cause them to be considered creditors in the liquidation proceedings and therefore equity owners in the successor company. In Ireland, they can sue you for their loss due to your misrepresentation which will also include substantial legal cost.

While I am no expert in Irish Companies laws(sic), I expect that failing to seek shareholder consent when required to do so, intentionally instructing subordinates to withhold information from your Directors, and spending vast amounts on unaccounted travel while the company was having serious financial difficulties could all result in serious civil and criminal penalties under Irish law.

To be perfectly clear, I have no desire to see any of the above happen. I certainly would prefer not to accelerate the convertible notes. I have no desire to see you incarcerated and separated from your family. However, your recent actions have been so destructive to the company and so misleading to your friends who have been trying to help you that I cannot see how this company can continue with you in an executive role. I would support allowing you to pay back any amounts you owe to the company through selling a portion of your shares but it is essential that you accept the role of Founder, and like me, benefit from the company's success primarily through your shareholdings.

If you are not willing to accept this new role, and instead attempt to poison the water with our shareholders, persuade employees to leave or disparage the company in the market, I would consider taking all of the above steps. I want to see this company succeed now more than ever and I am committed to seeing your vision became a reality, to our long term mutual benefit. Please allow us to help bring this company over the finish line in a way that can provide for you and your family's long term comfort and security. All the other alternatives described above will be extremely unpleasant for everyone.

I hope you will seriously consider this as the only way forward that can still be a win- win for everyone and I look forward to hearing from you by the close of business on Monday March 20th, 2017 confirming your acceptance of my terms. Failure to do so will result in a course of action which I do not wish to take, but one which I must follow to protect our investment and the value in the Company and prevent any further losses arising from your actions.

Sincerely,

Will Gencarella."

The multiple corporate failings and misconduct of Mr. Ennis identified by Mr. Gencarella in this letter were not controverted or challenged in the course of the hearing of the petition.

31. Worse news was to follow from the petitioner's perspective. On 21st March 2017 a meeting was held with ThyssenKrupp in Germany. ThyssenKrupp had specifically requested the attendance of Mr. Gencarella as the company's main funder. The object of the meeting was to discuss the ongoing collaboration between the parties in light of the lack of purchase orders received from Ecolegacy Ltd. Concerns were raised by ThyssenKrupp regarding the ongoing viability of the company as a commercial unit and the funding of any future trading.

32. At that meeting Mr. Gencarella learned for the first time that the prototype unit, which was sitting in the company's premises at Airton Road, was not fit for purpose and could not be made fit. While functional, it was not operationally stable, and the building of an entirely new unit was required. It also emerged that ThyssenKrupp had, in fact, been working on a new unit since November 2016 and had incurred costs of in excess of €400,000 in respect of work on the second unit since that time. It also emerged that if work on the second unit were to proceed, that unit would not be available for a further twelve months, being March 2018. The initial ecoLation unit which had cost €2.2 million to build was now estimated as being worth €300,000 in spare parts.

33. None of this had been disclosed to the petitioner during the board meeting on 22nd February, where it was represented to him that the ecoLation unit in Airton Road would undergo a full system test with a human cadaver in May/June 2017, and it was further represented that commercial production could begin in August/ September 2017.

34. On the same day that Mr. Gencarella, Mr. Barclay, and Mr. McKimm met with ThyssenKrupp, Mr. Ennis's solicitors wrote to EcoLegacy Ltd seeking an undertaking that the proposed board meeting and appointments of new directors scheduled for 30th March would not proceed, and stated that, in default, he would seek injunctive relief.

35. On 22nd March 2016, a meeting took place with Mazars to discuss the solvency of the company. The news which had come from ThyssenKrupp had considerably worsened the level of insolvency. Mazars were asked to prepare a summary of options which were open to the company at that point and to advise members as to their statutory responsibility. Based on figures produced by Mr. McKimm, the acting CEO, Mazars concluded that there was an excess of liabilities over assets in the amount of €1.2 million. Mr. Gencarella's loan notes, were stated in their report to be technically on demand. Mazars expressed the view that in order to continue to trade the company needed significant and immediate investment, most likely in the region of €1.6 to €2 million and pointed out that that investment could be reduced should the existing loan note holders be willing to restructure their loan notes and continue to support the company. They concluded that without such investment the company is insolvent and the directors need to consider their options. They concluded that the options open to the directors were as follows:-

1. Open negotiations with creditors with a view to securing forbearance while efforts are made to secure the investment necessary to fund the works required to the plant at Glasnevin Trust.

2. To source new investment at the level indicated above – this would need to be secured immediately.

3. Seek court protection for the company through a formal examinership process.

4. Resolve to place the company into liquidation.

36. Mr. Gencarella accepts that he was in the building when this consultation process with Mazars was ongoing, but states that he only attended a portion of the meeting. The court considers it likely that his attendance was due to the fact that his attitude in respect of the repayment of his loan notes was central to the assessment of the company's future and observes that that issue is specifically referenced in the draft report from Mazars dated the 10th April 2017.

37. The next day 23rd March 2017, Sherwin O'Riordan solicitors wrote to Mr. Ennis on behalf of all of the American investors, including the petitioner, intimating a claim for misrepresentation, deceit and breach of contract. The claim was stated to relate to false and misleading representations made by him to all of the American investors in relation to the company, in which he was the promotor, majority shareholder and Founder. It sets out many of the matters raised by the trustee of the petitioner in his letter of the 16th March. It alleges that in reliance on, and induced by the misrepresentations, the American investors invested approximately €3.75 million in the form of subscription for shares and convertible unsecured loans. In the absence of an admission of liability, the right to bring proceedings for fraudulent misrepresentations, deceit, breach of contract, as well as an order for rescission and damages was reserved. The letter also intimated that in the absence of a full response by the 30th March, the solicitors were instructed to report the matter not only to the Director of Corporate Enforcement but also the Fraud Unit of An Garda Síochána. The letter also advised that the American investors would be seeking redress in the U.S., under the securities and wire fraud legislation, which carry both substantial fines and also the likelihood of a prison sentence.

38. On the 24th March 2017, a letter was sent by Sherwin O'Riordan on behalf of the petitioner, to the directors of EcoLegacy Ltd care of Mr. O'Driscoll, company secretary. It sought confirmation that the company was financially solvent and able to pay its debts as they fell due for the next three months, including repayment of the petitioner's loan notes should an event of default arise under the various loan note instruments. This was a pro forma letter to the extent that, by then, Mr. Gencarella was well aware that the company was not in a position to meet his loan notes. No response was received.

39. A further solicitor's letter was sent on 27th March which, having noted the absence of a response to the letter of the 24th March, proceeded to demand the repayment of the petitioner's loan pursuant to the loan certificates of 12th February 2016 and the 25th April 2016. The letter went on to specify that if the said sum was not paid within seven days of the date of the letter, the petitioner's solicitor intended applying to court under s. 570 of the Companies Act 2014 seeking a petition to wind up the company. The usual period specified in such letters is the twenty one day statutory period within which payment or arrangement must be made. The respondent points to the fact that seven days from the date of the letter was the 3rd of April, the day before the E.G.M was due to be held.

The injunction

40. On 28th March 2016, Mr. Ennis launched proceedings in the High Court seeking *inter alia* an injunction restraining the board from appointing new directors at the board meeting scheduled for the 30th March. In his grounding affidavit he swore that he held the position of CEO pursuant to a contract which entitled him to a salary, plus guaranteed bonus and other benefits, totalling over €500,000 per annum and that he had been dismissed in breach of that contract and in breach of fair procedures. Mr. Ennis had disclosed no such contract in his Offering Memorandum to the American investors in June 2016. He had specifically assured them in June 2016 when fundraising €3.35 million that all contracts had been disclosed to them. Interestingly, in the course of the hearing Mr. Dorn on behalf of the company gave evidence that Mr. Ennis had no such contract and that he had told the SEC investigation in the U.S. that he had no such contract. Mr. Luby of McStay Luby, in reporting on creditors, accruals and contingent liabilities states:

> *"I am instructed that Mr. Ennis has confirmed that he has no claim against the company [no confirmation seen]."*

If that is so, then Mr. Ennis has seriously misled the High Court in the course of his injunction proceedings.

41. There is no doubt that the inclusion of such an alleged contract in his grounding affidavit created the necessary sense of urgency to underpin his court application, and Mr. Ennis was granted an interim injunction by Gilligan J restraining the appointment of new directors at the meeting scheduled by Mr. Barclay on 30th March, until further order. The matter next came before the court on 31st March, and the proceedings were adjourned with the interim injunction continuing in effect.

Further developments

42. On 29th March, Sherwin O'Riordan on behalf of Mr. Steve Smith, who had been involved with the sales force of the company, wrote to the company seeking payment in respect of outstanding consultancy and commission fees accrued between September 2015 and February 2017 in the sum of €260,000. This letter, unlike the letter on behalf of the petitioner on 27th March, was specified to be a twenty one day warning letter, which is the usual format of such correspondence. The respondent has pointed out that the company's agreement with Mr. Smith was that he was to be reimbursed in the form of shares as set out in the company balance sheet as of 31st January 2017, and they challenge the validity of this claim in this form.

43. Notwithstanding the agreement as to the necessity to reduce costs, arising from the board meeting on February 22nd over €450,000 was paid out of the company's accounts by Mr. McKimm, between the date of the board meeting and the end of March 2017. A significant amount of these payments took place on the 24th March, when €241,316 was paid out of the company's bank account in one day. While the court has absolutely no evidence to suggest that these payments were in anyway invalid, it is striking that they were made on the very day that the petitioner's solicitor wrote seeking confirmation of solvency.

44. Mr. McKimm prepared a further set of accounts on 28th March 2017. The net asset position had changed from €5.041 million on 31st December, 2016 to - €765,000 as of March 28th 2017. The change is explained in Mr. McKimm's report as " *Required Financial Adjustments*". The adjustments listed are the write-down of capitalised research and development at €3.388 million which is stated to be a year end audit adjustment agreed at the board meeting at 22nd February 2017. On checking the transcript of the board meeting it does appear to the court that such a step was in effect agreed at the board meeting and a rationale given for it. There is a 50% write-down on the Airton Road plant in the sum of €1.110 million. There is a conversion of a Mr. Smith and a Mr. Alain Rollier to the status of creditors, rather than parties who were to be compensated for fees due, by the allotment of shares. There is a further write-down of the Airton Road plant to break up value, which ThyssenKrupp had valued at €300,000. There is a write-down of the Airton Road fixtures and fittings to resale value and there is the inclusion of the ThyssenKrupp work in progress, being the work done from November 2016 to March 2017 on the new ecoLation unit as an accrual in excess of €400,000. This changed the balance sheet from a positive €5,041,000 to a minus €765,000.

45. The E.G.M which had been scheduled for the 4th April was adjourned to the 11th April 2017. At that meeting three new directors were appointed: Mr. Edward Ennis, brother of Tony Ennis, Mr. James McLeod, from Melbourne and Mr. Darren Connolly, from Dublin. These three joined the existing directors, Mr. Tony Ennis, Mr. Gencarella , Mr. McKimm and Mr. Barclay, who remained as Chairman of the board. Despite having the support of the majority of the board, Mr. Tony Ennis was not in fact reinstated as a CEO of the company. On the same date that the new directors were appointed, ThyssenKrupp formally terminated their contract with EcoLegacy Ltd.

46. Between the board meeting on 22nd February and the issuing of the petition on 18th May, 2017, the petitioner was willing to introduce fresh capital into the company, but in the light of his experiences outlined above, he required changes so as to allow for the recalibration of control and accountability for the purposes of monitoring and regulating the company's cash burn and its overall

direction and governance. On 26th April, a letter was sent to all shareholders in the company on behalf of a shareholder group which did not include the petitioner but did include Mr. Gencarella in his capacity as an investor through Claremont Investments Ltd. It also included the balance of the American investors who had provided in excess of €3 million to the company in June of 2016. The letter reads:-

> *"Dear Shareholders,*
>
> *As you are probably aware, the company is on the verge of liquidation. It does not have sufficient cash reserves to make its next payroll, has recently been denied its patent application, has just received notice of termination of its development relationship with ThyssenKrupp, and is embroiled in various forms of litigation between its shareholders and founder and indeed between the founder and the company itself. Most external advisors would suggest that the Shareholder Group walk away from their substantial investment in the company and take the loss. That is something they are prepared to do.*
>
> *However, they are willing to make one final effort to move the company forward and save not only the €4 million (plus) they have already invested but also the funds invested by all other investors, by investing additional funds in the company. This can only happen if we can cure the problems that have brought us to this point. Accordingly, we enclose documents for your signature that will implement a reorganization plan. In order to effect this plan, ALL shareholders must agree to the plan and sign the enclosed documents.*
>
> *At a very high level, the plan includes:*
>
> > *(1) The existing shareholders' agreement will be replaced with the attached new form of agreement. Significantly, the threshold for amending the agreement is reduced from 100% to 51%.*
> >
> > *(2) The Shareholder Group will invest between €600,000 and €1,000,000 as part of the reorganisation plan and will in return receive approximately 2,500,000 shares of a new Series C equity security. It will also agree to waive all existing defaults, claims and settle all litigation with the company and Tony Ennis.*
> >
> > *(3) Existing shareholders will retain their shares, but suffer substantial dilution.*
> >
> > *(4) Tony Ennis will sell the majority of his shares to us, agree to settle all outstanding litigation, and will have no role in the future management of the company.*
> >
> > *(5) A new equity compensation plan will be adopted authorising the issuance of up to 1,500,000 shares to the new management team that would vest over time to ensure continued performance and commitment to the company.*
> >
> > *(6) Going forward the company will hold regular monthly board meetings, communicate quarterly with shareholders to provide an honest and transparent statement of our prospects and financial condition, and put all our efforts into completing the first functioning unit as quickly and efficiently as possible.*
>
> *The reorganisation shall also include the restructuring of the board of directors which shall include Mr. Will Gencarella, Mr. Robert Ming, Mr. Brian McKimm, Mr. James McLeod and one other Shareholder Group appointee. Mr. Brian McKimm shall take up the position as interim CEO.*
>
> *We have been able to reach a settlement agreement with Tony Ennis to support this plan and settle all outstanding litigation, contingent on all shareholders agreeing to the enclosed documents and Mr. Ennis fully supports this reorganization plan.*
>
> *Please bear in mind there is no guarantee that we will be able to negotiate a successful reengagement with ThyssenKrupp, that Glasnevin Trust will still host our first operating unit, or that we will able to install the first unit without additional financing. There are still many pitfalls ahead, but this is the plan my clients are prepared to offer to move us beyond the present conflict and hopefully preserve some value in both your investment and theirs.*
>
> *Unfortunately, time is limited and we must therefore ask that you consider the attached document and return a scanned and executed copy to us by close of business this Friday 28th April in order to confirm your acceptance of the reorganisation plan."*

47. The proposed reorganisation plan received the support of 90% of the shareholders who held 98.5% of the shareholding. Under the existing shareholder agreement, 100% was required. The failure to adopt the new shareholder agreement meant that the company remained insolvent with no working ecoLation unit, no agreement with ThyssenKrupp, no prospect of funding and was riven by internal strife resulting in litigation and further prospective litigation. On the 30th April, Mr. Barclay resigned as Chairman of Ecolegacy Ltd.

48. On 12th May, an email exchange took place between Sherwin O'Riordan and the proposed liquidator, Mr Taite, upon which the respondent placed significance as showing an ulterior motive on the part of the petitioner. The material part of the email reads:-

> *" It was hoped that we could avoid liquidation and when we sent the email dated the 26th April, it seemed we would only get a few of the signatures, however we received over 90% which put the brakes on this last week. While on the face of it (sic) would appear that everybody other than the two non-signing shareholders, are satisfied with the reorganisation plan and are happy to proceed, it now appears unfortunately , all of the sounds coming from the other side are that they are lining things up to sue the company and/or the US investors and/or some of the officers (as can be seen from some of the correspondence above) if the rescue plan that was proposed is put in place and the substantial investment is made. Therefore, it seems that we have to consider all options which might allow the company survive (sic) while also protecting it from litigation. This may include the option to proceed to liquidation. One of the issues of liquidation is that the contract with TK and GT (I will explain) may be terminated unless they consent to the reorganisation - which they have done informally - as these are critical to the viability of the company.*
>
> *……*

As you know, there is some IP in the company including the name however the US investors, being the largest creditors, want to make sure that they get the IP on that basis. I said I would check with you first and perhaps we can have a chat about this too."

49. It is clear from the email that the American investors were interested in acquiring the IP in the company in the liquidation process, with a view to continuing the project. While Mr. Gencarella has denied knowledge of this particular correspondence, (and the court accepts his evidence in this regard) he has made no secret of his interest in acquiring the intellectual property of the company in a liquidation process. He had already made this clear in his correspondence to Mr. Ennis on the 16th March 2017. If the investors are so interested, they will have to bid and pay for it in a liquidation to the benefit of all of the creditors.

50. On foot of the letter of inquiry of the 24th March 2017 and the letter of demand of the 27th March 2017 the winding up petition was presented on the 18th May 2017. At a meeting on the 12th June 2017 Mr. Andrew Dorn, a former director who had resigned at the board meeting on November 22nd 2016, was appointed Managing Director of EcoLegacy Ltd. Mr. Dorn created a subcommittee comprising Mr. Edward Ennis, Mr. McLeod and Mr. Connolly for the stated purpose of embarking on an investigation into the company. The focus of Mr. Dorn's investigation was on the various COO reports prepared by Mr. McKimm in January, March and May of 2017 and, indeed, Mr. McKimm's alleged misappropriation of company funds. In his May COO report Mr. McKimm added to the list of creditors and accruals "contingent liabilities" in the sum of €5.118 million. These were stated to arise from the American investors claims for rescission against the company and Mr. Ennis's claim for breach of contract against the company as averred to in his grounding affidavit in his injunction proceedings. This brought the company's total potential liabilities to a sum in excess of €7 million.

51. Mr. Dorn was neither a party to nor a participant in any of the events which had occurred from February to June 2017 and was therefore reliant on information that was provided to him by others. It appears to the court that Mr. Dorn was heavily reliant on information provided by Mr. Tony Ennis. Mr. Ennis provided him with an excerpt from his surreptitious recording of the board meeting of the 22nd February 2017, but failed to tell him that he had, in fact, recorded the entire meeting. Mr. Dorn only became aware that the entire meeting had been recorded during the course of the hearing, and memorably remarked "*he got a right rocket from me as well*". Had Mr. Dorn had the benefit of that recording during his investigations, he would have known that there was a discussion as to the advisability of writing down the research and development costs, and that there was an acknowledgment that the financial situation and the absence of proper governance was such that Mr. Gencarella would at that stage have been entitled to call in his loan notes. He would also have known that the directors were specifically requested to submit any outstanding travel expenses.

52. Mr. Dorn's interpretation of the events that occurred between February and June 2017 was that it amounted to collusion between Mr. Gencarella , Mr. McKimm, and Mr. Barclay to engineer a takeover of the company or alternatively to take its business opportunity. Mr. Dorn makes a number of serious allegations against Mr. McKimm in relation to misappropriation of company monies. The court notes that Beauchamps solicitors have threatened defamation proceedings in relation to these and other allegations made against Mr. McKimm. Mr. Dorn asserts that the company's financial position had been manipulated by the petitioner in collusion with Mr. McKimm, in order to give the impression that the company was insolvent so that it would be collapsed and that Mr. Gencarella could thereby acquire its business opportunity.

53. Mr Gencarella was cross-examined as to his relationship with Mr. McKimm. He stated that he did not see any reason not to believe Mr McKimm's account of the company's finances at the relevant time, given his previous experience as an accountant with KPMG. Mr Gencarella later submitted these figures to be verified by an independent firm, and stated "*when I make decisions I rely on experts*". In his third affidavit Mr. Gencarella said of Mr McKimm that "*I have always found him to be a person of competence and integrity, who conscientiously carried out his function and duties within the Company. I do not believe that a person of such qualification and integrity would misrepresent the financial status of the Company at any time or prepare reports of accounts other than in accordance with generally accepted accounting principles*." Mr. Gencarella stated in his cross-examination that while he did not question Mr. McKimm's suitability as a financial advisor, he questioned his engineering background. When asked whether he was aware of Mr. McKimm's bankruptcy between November 2015 and November 2016 he stated that he was unaware of the fact at the time, but he suspects that this must have been known to both Mr. Barclay and Mr. Ennis. Mr. Gencarella only found out about the bankruptcy in early 2017 and has stated that he does not attach too much significance to this, and that bankruptcy is a more forgivable offence in the US. Mr Gencarella maintained throughout the course of his cross-examination that his goal was for the company to become a success: "*I am an investor in companies. I have never in my entire business career taken over companies. I invest in what I think are good people that will produce success*."

54. In Mr. Dorn's affidavit in response to the petition he disputes some of the listed creditors and accruals in the COOs report prepared for the meeting of the 12th June. While disputing the treatment of certain creditors, accruals and contingent liabilities, at no stage does Mr. Dorn assert that the company is other than insolvent. Despite the fact that he had been Managing Director for approximately six months, Mr. Dorn had no financial plan for the future of the company, let alone one that was credible. The respondent relied on the fact of the petition as an explanation for the absence of a financial plan and suggested that if more time were afforded to the company alternative investors might be found. There is not a shred of evidence before the court that this is so. It is simply not credible that any investor would be willing to advance money to this company in its current state of strife and disarray.

55. On the 16th June Sherwin O'Riordan wrote to the company offering examinership to be conducted by a mutually agreeable examiner. The letter highlighted the fact that the company did not appear to have the necessary funding for the purposes of developing a second ecoLation unit as advised by ThyssenKrupp and as the anticipated payment from Glasnevin was predicated upon there being a viable working and fully tested unit, that the sum of €750,000 payable under the joint venture agreement of January 2016 was not imminently payable or indeed payable with certainty. Sherwin O'Riordan pointed out it was evident that the company was insolvent and in the absence of an agreement to pursue examinership there could be no other option available other than to seek to have the company wound up. The company did not respond to this letter.

Insolvency

56. In the course of the hearing the court made a finding that this company, as of the date of the petition, and for a considerable time before that, was insolvent. Indeed at the date of the board meeting on 22nd February 2017 it was recognised by all in attendance that the failure to obtain the €750,000 from Glasnevin Trust in effect rendered the company insolvent. The criteria identified by Laffoy J in *Re Connemara Mining Company plc* [2013] 1 IR 661 that solvency would be determined by looking at:-

"a) the inability to pay debts including the inability to pay debts as they fall due;

b) only readily realisable assets can be used to determine the company's solvency; and

c) any "purported" future funding of the company must be credible."

Applying those criteria to the facts of this case, it is not disputed that the petitioner has loan notes to the value of €750,000 plus agreed interest. These loans are currently due for repayment as of 12th February 2018 and 25th April 2018. The company does not have the funds to pay them and is unlikely to obtain future financing in order to discharge this debt. The petitioner is therefore entitled to a winding up order *ex debito justitiae*. The court does of course retain a discretion to refuse the petition.

57. In *Re Burren Springs Ltd* [2011] IEHC 480 Laffoy J. quoted with approval the description of the nature of the court's discretion contained in MacCann and Courtney, *Companies Acts 1963-2009 (Bloomsbury Professional, 2010)* at p 446, where the authors state that "*Nevertheless the Court still retains an overriding and unfettered discretion to refuse to order to wind up the company, albeit that it will only exercise this discretion sparingly and where good cause is shown*". The only basis therefore, upon which the court should refuse to grant this petition, is if the court is persuaded that the petitioner has not brought this petition bona fide qua creditor of the company and for the benefit of all creditors of the company. The issue for the court therefore is whether the respondents have made out a case that the Gencarella Trust, in maintaining this petition, has done so for an improper or ulterior motive.

58. There are assets for distribution among the creditors. On the basis of submissions made to court during the hearing there is a little in excess of €60,000 in cash in the bank. It , appears that there is a VAT repayment due of €58,000. There is the breakup value of the first ecoLation unit that has been valued by ThyssenKrupp at €300,000. On evidence before the court on this petition, there may be quite sizable sums due to the company by Mr. Ennis and/or Mr. McKimm which are as yet unascertained. There is also the as yet, unascertained value of the IP upon which neither party has attempted to put a value.

The Law

59. In *Re Bula Ltd* [1990] 1 IR 440, the company was "*hopelessly insolvent*" with debts in excess of 30 million with no plan to recover from insolvency. While the company was already in receivership, the banks presented a petition in order to defeat a judgment mortgage which had been registered by an unsecured creditor just four days prior. McCarthy J ruled that the petition was "*avowedly for the purpose*" of defeating the claim. 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 the 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."*

60. *Re Genport* [1996] IEHC 34 is a further example of the application of the Bula principles in considering whether a winding-up petition was presented for an ulterior motive. The petitioner was one of four defendants in an action against Genport and, when costs awarded went unpaid, issued a petition to wind up the company. Having quoted from the *Bula* decision McCracken J found that, although the prevention of litigation might not be "*a sufficient ulterior motive*" so as to allow him to exercise his discretion, he found that the combination of this factor along with the fact that the winding-up "*may not be of any real benefit to ordinary creditors*" was decisive so as to warrant dismissal of the petition. On re-entry of the petition to wind up Genport in 2001, McCracken J noted that the action between Crofter and Genport was still ongoing and therefore chose not to grant the petition but instead adjourned the application.

61. In *Re Goode Concrete* [2012] IEHC 439, the petitioner wished to place the company in liquidation so that competition proceedings against it might be brought to an end. It was alleged that the petition was issued with an ulterior motive of stymieing an action by the company against the petitioner. Having considered the cases cited above, Laffoy J came to the conclusion that she could infer motive on the behalf of the petitioner and that the only creditors who would stand to benefit were the petitioner and its co-defendants:

> *"(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."*
>
> *(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.*
>
> *(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."*

On this basis, the petition was adjourned.

62. In the case of *Re Irish Asphalt Ltd (No. 1)* [2017] IEHC 524, while Irish Asphalt was undoubtedly insolvent, the petitioner was found to be seeking a litigation advantage by putting the company into liquidation. O'Connor J considered the decisions in *Bula*, *Genport* and *Goode* and distilled from those decisions the following principles, while maintaining that each case is to be considered on its own merits:-

> *"(i) A creditor of an insolvent company has a prima facie entitlement to a winding up order ("an order").*
>
> *(ii) The probable or possible unavailability of assets for a liquidator does not preclude the making of an order but it can be one of the factors which the Court may take into account.*
>
> *(iii) When the insolvent company, a creditor of the insolvent company or a contributory has a real basis to claim that the petitioner has an ulterior motive, a burden shifts back to the petitioner to show that it is not motivated by an*

ulterior motive. The shifting of the burden does not depend on the motive being improper or illegal.

(iv) If an ulterior motive is recognised by the Court, the petition may be refused, adjourned or granted subject in each case to conditions or without conditions as may be deemed fair and just. The statutory discretion of the Court is exercised in a principled and reasoned manner. Overriding and public policy reasons may apply. Moreover, s.569(1) of the 2014 Act mentions the Court's opinion about whether it is just and equitable to make an order which also invites a reasoned approach.

(v) The nature of the ulterior motive is not out ruled as a point for consideration by the Court in the exercise of its discretion.

(vi)The impact on litigation for an insolvent company and the effect on each class of creditors may be considered by the Court in a petition.

(vii) Timing and tactics of the petitioner, the company and its creditors whether secured, unsecured or contingent may also form part of the equation.

(viii) The Court's discretion under s.569 of the 2014 Act should be exercised justly and fairly in a principled manner."

63. The most recent authority on the issue is *Tweedswood Ltd & Ors v Revenue Commissioners* [2017] IESC 81. In this case, the Supreme Court was asked to review a decision of the High Court made nine years previously, where the compulsory winding up of several companies was granted pursuant to the petitions presented by the Revenue Commissioners. These companies were seeking to appeal the decision on the basis that the High Court judge had erred in law by wrongly exercising his discretion in making the order to wind up the companies amidst allegations of improper purpose and/or ulterior motive. MacMenamin J, the other judges concurring, rejected this contention in ultimately deciding that the petition was rightfully granted as the improper purpose and/or ulterior motive was not established to the satisfaction of the court. While several issues arose for consideration that are not of relevance to the present case, namely the application to admit new evidence that was not part of the initial High Court trial, several principles emerged from this decision which are of significance to the court in the present case.

64. *Tweedswood* effectively consolidates the previous case law into one point of reference by citing both *Bula* and *Genport*, among others, in its review of the decision of the High Court, and by reaffirming the principles outlined in those cases:-

"As the two main authorities make clear, the first step is that a petitioner must be shown to be, in fact, actuated by a motive different from the ostensible purpose of the petition. The mere absence of goodwill, or even the presence of ill-will between the parties, is not sufficient. Then, a company must go further, and establish on cogent evidence, that not only is the petition actuated by reasons other than the ostensible motive, but that the actual underlying motive is improper in the sense of being tantamount to an abuse of process. (Bula). Thus, the company must establish there is conduct, generally proximate to the initiation of the petition, which amounts to abuse of process."

65. MacMenamin J was unequivocal in stating that each case is to be dealt with on its own facts and that there is no set formula to be applied in deciding such cases. It has been well-established that the court maintains residual discretion in that regard. In applying the *Bula* test, the court found that there was "*nothing to indicate that he did not exercise his discretion correctly and in a bona fide way*." The court confirmed that in Bula the evidential burden shifted but this was based on the facts of that case, as a consequence of the admissions of ulterior motive made by the petitioners, and that in general, the situation is otherwise. The court found that the onus could not be said to have shifted to the Revenue on the facts of the case:-

"A series of events, disparate in nature, cannot be gathered together, and conflated in order to shift the onus where, seen objectively, the evidence simply does not reach the required threshold of proof even to reverse the onus, still less to set aside the winding-up orders."

The court found that the debts due to the Revenue Commissioners were substantial and were owed *ex debito justitiae.* Further, there was no cogent evidence that the petition had been actually brought for reasons other than an express and proper purpose.

Submissions on behalf of the respondent

66. The respondent submits that there is clear jurisdiction to dismiss a winding up petition even where a company might be insolvent. Where it has been established that the petition has been presented for an ulterior motive and not for the benefit of the class of creditors to which the petitioner belongs the court has a discretion to refuse the petition. The respondent contends that a petition can only be granted where the motive for the petition is for the benefit of the class of creditors in which the petitioner belongs. The respondent contends that in no case where an ulterior motive has been identified has the petition been granted. The respondent alleges that the petition is being brought to take control of the respondent company's assets, and as such it is not being brought for a proper purpose and should be dismissed as an abuse of process.

67. There is, they submit, ample proof that the petitioner colluded with Mr. Barclay, Mr. McKimm and Mr. Gencarella in order to engineer the alleged event of default so as to trigger the acceleration of the petitioner's right to call in the loan notes and to pressurise shareholders into ceding control. The headline point in this regard they say is that the company went from being a start-up with €618,000 cash in the bank at the start of February 2017 to allegedly being insolvent by the end of March 2017.

68. As evidence of the alleged collusion they point to the contents of the COO Report of February 2017 portraying an optimistic overview of the company's prospects, to a position of -765,000 in March, and to a position of -7million in a report prepared on 12th June after the petition was presented.

69. As evidenced in the audio recording of the February board meeting, a conversation took place wherein the company's solicitor was asked to advise the petitioner as to whether or not the loan notes could be called in. The respondent suggests that, quite tellingly, Mr. Barclay in particular appears to express full support for the accelerated repayment of the loan notes despite this being against the best interest of the company. This recording also makes it clear that Mr. Gencarella was going to make the threat of liquidation if he could.

70. The respondent further asks the court to consider the recording of the February board meeting in totality rather than taking account of segments of it in isolation. The respondent says that all comments that were made flowed from the same conversation, and that the only reasonable interpretation is that Mr. Gencarella never disagreed with Mr. Barclay when Mr. Barclay referred to the threat of calling in the notes, in order to get Mr. Ennis to step down. This is entirely consistent with the subsequent issuance of the

letters of demand.

71. They submit that, while the removal of Mr. Ennis and the plot against the company are significant events, it is equally significant that the minutes of the February board meeting make no reference to the company being on the brink of liquidation, nor do they make any reference to the alleged agreement to immediately write down over €3 million of the company's research and development costs. The respondent is of the opinion that Mr. McKimm manipulated the write down of the company's assets. Only one month previously per the January COO Report it is clear that the plan was to write down the assets over a ten year period, while the accelerated write down appeared in the company's March COO Report and therefore permitted the removal of these assets from the company's balance sheet. Though it may have been discussed, the respondent disputes the contention that the decision to write down such costs was actually resolved. It is claimed by the petitioner that this sea change was brought about on advice of the auditors of the company, Ernst & Young, though Ernst & Young were not then the company's auditors.

72. The letter dated 16th March from Mr. Gencarella to Mr. Ennis is relied on by the respondent as evidence that Mr Gencarella had previously threatened the company with liquidation. Mr. Gencarella wrote to Mr. Ennis threatening to call in the loan notes on the basis of a claim that the company had failed to furnish the petitioner with certain information, and it is this fact that is repeatedly relied upon by the petitioner. This echoes, according to the respondent ,the recorded comments of Mr. Barclay at the February board meeting, where Mr. Gencarella suggested that the loan notes could be called in on that basis. According to the respondent, there appears to be little or no substance to this allegation, as it was never in fact relied upon as an event of default.

73. The respondent also disputes that Mr. Gencarella was left out of the affairs of the company when he had the facility of Mr. McKimm available to him due to the friendship they maintain. The respondent suggests that it is significant that the date of the letter, 16th March, is just eleven days prior to the petitioner deeming the company insolvent; that the principal of the petitioner, Mr. Gencarella neither mentions the alleged imminent insolvency, nor does he seek to rely on it as an event of default in that letter. In his letter Mr. Gencarella states that if the company is liquidated the process would allow others to acquire the assets of the company including its intellectual property and continue where the prior firm left off. Mr. Gencarella has since confirmed the petitioner's intention to participate in the sale process of the assets of the company if it is liquidated.

74. As a result of what the respondent calls the "exceptional changes" the company was deemed to be insolvent and unable to pay its debts. Mr McKimm recommended at the 12th June meeting that a liquidator be appointed with immediate effect. The respondent contends that at the same meeting the petitioner lost control of the board of the company and Mr. Dorn was appointed to investigate the affairs of the company.

75. The respondent submits that the pattern of payments from the company's bank account after the February board meeting is both revealing and damning, and that the evidence of the manipulation of the company's books and the depletion of the company's cash reserves is overwhelming. It was agreed at the February board meeting that Mr. McKimm would generate a cost reduction report for the board's consideration, but considerable payments were made thereafter. As of the 22nd February 2017 the company's cash in bank stood at €517,125.98. From that date until the 29th March 2017 Mr. McKimm paid out €456,415.00, despite agreeing to reduce costs. The respondent submits that the timing of these payments cannot be ignored, given that the frequency of these payments rose on the very day that the company received a letter questioning its solvency, the 24th March 2017. This spending the respondent says was unprecedented and unwarranted when compared to previous spending patterns of the company.

76. The respondent says that Mr. McKimm would have been aware that a plan was being put into action in order to reduce the company's cash burn. Mr. McKimm was present at the meeting with Mazars on 22nd February. Additionally, Mr. McKimm is the only person who knows the reason these payments were made and the respondent considers it telling that Mr. McKimm has not sworn an affidavit to that effect. Mr. McKimm maintains his position as a company director yet has refused to cooperate with the company, and has instead chosen to cooperate with the petitioner for the purpose of Mr. Kavanagh of Deloitte's report. In Mr. Dorn's cross-examination he stated that it was agreed that Mr. McKimm would aid the company in its investigations but that Mr. McKimm has not done so. Mr. Dorn further commented that Mr. McKimm is aware of the serious nature of the allegations made against him personally and has issued a letter threatening defamation proceedings.

77. The recipients of these payments is also of considerable concern, according to the respondent. Mr. Gencarella himself was paid €12,218.00 on the 28th March (which he maintains was in respect of travel expenses owed), at a time when the petitioner deemed the company to be insolvent, Mr. McKimm (or his related entities) received in excess of €40,000 during this period, while Mr. Barclay received approximately €70,000.

78. According to the respondent, it is clear that Mr. Gencarella was representing the petitioner given the presence of the Petitioner's U.S. and Irish lawyers with Mr. McKimm at the meeting that was held with Mazars. This, according to the respondent, is a further demonstration of collusion between the directors and the petitioner in order to secure the accelerated repayment of the loan notes so as to force the liquidation of the company. Directors of a company who were acting properly and in the company's best interests would not permit a creditor and his lawyers to attend such a meeting.

79. The respondent argues that Mr. McKimm manipulated the creditor position of the company. Any payment due to Mr. Smith and Mr. Rollier is according to the respondent due in the form of equity in the company in lieu of monetary compensation as is noted by Mr. McKimm in the February COO Report. Yet in March 2017 both of these debts are converted into monetary debts and the parties are listed as creditors. On this basis, the respondent submits that the creditor claims are not well-founded. Further, the company's contingent creditors are made up of potential claims by the American investors, all of whom are people associated with Mr. Gencarella over alleged misrepresentation and deceit, and the timing of these claims cannot be ignored as they occurred at the time, the respondent alleges, that Mr. Gencarella was attempting to take control of the company in March 2017.

80. The respondent suggests that the petitioner has brought the claim based on the COO Reports drafted by Mr. McKimm, that list the creditor position of the company to include each of the above claims, all of which add up to a figure above €7 million. As previously outlined, the respondent contends that some of these claims are not well-founded. Even if they are to be believed, the effect of such claims leaves significantly less money for the petitioner and other creditors to recover from the company in the event of liquidation. Any value that is to be found between the value of the first ecoLation unit and the cash in the bank will inevitably be used to fund the liquidation, and so there would be a serious question as to what would be left thereafter to distribute among creditors. The respondent suggests that it is wholly unrealistic to expect the liquidator to carry out his own investigation into the company given the limited amount of funds. The proposed liquidator will have to tender a report to the Director of Corporate Enforcement and to conduct an inquiry in to the running of the company during the crucial period of 2016.

81. The respondent submits that there are other avenues open to Mr. Gencarella in which to pursue his claim. The respondent submits that the court must find as a fact the ongoing power struggle of the board and that it follows from such that the petition issued on

foot of demands dated 27th March is contaminated.

82. The respondents argues that while Mr. Gencarella may have been entitled to call in his loan notes, he was not to entitled to invoke a court process that was not intended for the specified purpose. They suggest that he could instead have pursued an alternative course of action. To say that he was correct in his approach would, they say, be to ignore the timeline of events that have occurred. They submit that while the court may be sympathetic to the position of the petitioner (and other creditors) the respondent believes that this does not warrant the court making an order in their favour as it would be an abuse of process.

83. The respondent further takes issue with the fact that the letter dated 24th March was sent to the company's secretary, Mr O'Driscoll, rather than directly to Mr McKimm.

84. The respondent also questions how the petitioner can say that the company was insolvent as of 27th March, when one month later Mr Gencarella was proposing to save the company and attract new capital as per the proposed shareholder agreement, and that such is inconsistent with the reason which the petitioner claims is the basis for this petition.

85. It is clear, according to the respondent, that the petitioner's motive was to gain control of the company as, under said proposed shareholder agreement, it was proposed that the US investors would become C-shareholders and that, upon issue, the C-shareholders would hold 68% of the entire issued share capital of the company. As long as they held at least 20% of C shares they were entitled to appoint six persons as directors so that they could gain effective control of the company going forward.

86. The respondent states that no one disputes that the company's project is a good idea, and the respondent asks the court to consider dismissing the petition so as to grant the company an opportunity to gain the necessary investment for the company to continue, or indeed to get an answer for the court as to whether it can, in fact, continue.

87. The respondent iterates that the petition has proved a serious obstacle for the company in raising finance. If a petition is brought after the company has been given a breathing space in which to seek to raise fresh investment, the company could not then, in such circumstances, raise issue with the fact that it never had had an opportunity to go to market without the petition hanging over its head.

88. The respondent reasons that the only way for Mr. Gencarella to get his money back is if new finance is brought into the company. Those who worked for sweat equity or in exchange for shares will only be able to recover from the company if it is to continue as a going concern. If the company is to be liquidated, those individuals will be cut off before the company has had an opportunity to ascertain whether or not it has a future.

89. The respondent maintains its position that the company is a start-up, pre-revenue company that has taken six years to get to this point and has not had the opportunity to go to market. As such the company's situation is entirely different to that of an established trading company that has run into cash flow difficulties and therefore should be wound up for the protection of creditors.. The respondent submits that Mr. Dorn has significant experience in science and engineering and has a plan for the company going forward, despite the fact that a financial plan has not been put in place.

90. The respondent requests that any allegations made against the company in relation to Mr. Ennis are best left out of the court's consideration as they are currently the subject matter of proceedings in the US.

91. The respondent submits that, in order for the court to find in favour of the petitioner, it must find that at some stage the petitioner's motive changed from a personal motive to a proper motive, i.e. to benefit the class of creditors. In the respondent's opinion, it has not been so established because there is no money in the company to benefit the petitioner and/or other company creditors.

92. The respondent contends that if the alleged employment contract of Mr. Ennis is to be believed, together with the ongoing proceedings of the American investors, there is nothing to be gained from the liquidation, as these matters also exist as liabilities of the company. They say that though these figures are that of Mr. McKimm, Mr Gencarella has relied on them and adopted them by referencing them in his affidavit and by providing them to Mr. Kavanagh for the purpose of his expert report. According to the respondent, because the petitioner has relied on these figures, it cannot now credibly dissociate itself from them.

93. The respondent submits that where improper motive has been found in previous case law, the petition has never been granted, and has either been adjourned or dismissed.

94. The jurisdiction identified in *Bula* provides that on the hearing of a petition a court will have a true discretion which is to be exercised in a principled manner based on the principles of fairness and justice to grant, dismiss or adjourn a petition. There are also parameters in place to guide the court as to how such discretion is to be exercised. While a creditor may in principle have a right to a petition if its debt is undisputed, where issue is joined on the matter and a case made out, the burden of proof that the granting of the petition is both fair and just lies with the petitioner. The respondent considers that it would be inconsistent with the above principles to order the company to be wound up, which would, in effect, sanction the petitioner's actions of depleting the reserves of the company and the dismantling of its accounts. The court can take into consideration all relevant factors which may influence the exercise of its discretion.

95. In this case, the respondent suggests that issue has been joined in relation to the petitioner's motive and an overwhelming case has been made out that the petitioner has colluded with some of the company directors, first to take over the company and then when that failed, to damage the company. While it is difficult to identify a starting point, it is clear that the unlawful plan was in place prior to the February board meeting. Similar to *Bula* there is little doubt, if any, that the petitioner's motive is to obtain the company's assets and start again.

96. It is unclear according to the respondent whether Mr. Ennis's response to his removal alters the nature of the petitioner's plan. It may have been envisaged that Mr. Ennis might issue an employment claim following his dismissal, but it is less likely according to the respondent that he would seek to regain control of the board. This, the respondent says, is evidenced by the blunt response of the existing directors to max out the number of directors at the board meeting planned for 30th March.

97. There are no creditors supporting the petition, which reflects the reality that most persons who provided services to the company did so in exchange for shares. In the case of the petitioner, it invested in the company in the expectation that its investment would be converted into shares. This is what happened in relation to the June 2015 loan note and as stated in the January 2017 COO Report, it was understood that this was likely to occur in respect of the loan notes. It is also the case according to the respondent

that, even had dispute not erupted, it was highly unlikely that the loan notes would have been repaid by the repayment dates of 12th February and 25th April 2018 as the company would not have been in a position to repay, and the loan notes would have had to be converted.

98. The respondent submits that *Bula* is the starting point for legal authority and that in that case McCarthy J commented that debt collection is a doubtful purpose for bringing a petition. *Bula* also emphasises the fact that solvency is not a crucial factor when exercising improper motive jurisdiction, and the courts have not found insolvency to be an obstacle when exercising their discretion. On this point the respondent submits that the alleged motive for bringing the petition, to obtain the company's assets, is not altered by the fact of the company's lack of assets.

99. As noted in *Irish Asphalt*, the court can take account of the nature of the ulterior motive. The respondent submits that the petitioner has contrived the insolvency of the company in order to effect its plan to secure the company, or in default its assets, in particular its intellectual property. The nature of the petitioner's motive is according to the respondent, far more worthy of disapproval than the ulterior motive identified in *Bula*, where the Supreme Court dismissed the petition.

100. The respondent maintains that if the petition is dismissed, the company will have the opportunity to reengage with ThyssenKrupp, who will be invited to tender along with other interested parties, and with Glasnevin Trust. It will also be able to pursue clear expressions of interest that it has had in the ecoLation units but that it is not possible to build upon these so long as the petition is hanging over the company.

101. In support of its case the respondent relies on the decision of *Re a Company* [1983] BCLC 492. In that case the company negotiated for the renewal of its lease. The renewed lease contained a provision that if a petition to wind up the company was presented before 1st April 1983, the landlord would terminate the lease and grant a new lease to the petitioner. On 10th February 1983 the petitioner served a statutory demand on the company for €2,700. At first the company disputed the debt and brought an action to restrain the petitioner from proceeding on its statutory demand, but subsequently the company paid the debt, and the action was dismissed with costs to the petitioner on 15th March 1983. That same day, the petitioner presented a petition to wind up the company on the grounds that the costs order, though not taxed or agreed, made the petitioner a prospective creditor.

102. The respondent contends that once the shareholder agreement was rejected in late April 2017, the petitioner switched its focus to acquiring the company's IP and the respondent suggests that the petitioner was involved in the correspondence dated 12th May 2017 which, it submits, provides evidence of the petitioner's personal motive. Mr. Gencarella has expressed an interest in acquiring the company's IP in the event of liquidation and while one is entitled to have such an interest, this is not what a petition is for. As per *Re a Company,* the respondent submits that the petition is not for a proper purpose if it has been brought for the purpose of putting pressure on the company. In that case Harmon J dismissed the petition concluding:

> *"(1) In a petition by a creditor to wind up a company, there is not a true lis between the parties as the creditor was invoking a class right on behalf of himself and all others of his class. Accordingly, it was improper for a creditor to present a petition for some private purpose. However, if petition was genuinely for the benefit of the class, ill motive or malice on the part of the petitioner did not render the petition improper. On the facts, the petition in this case was improper because it was designed to confer on the petitioner an advantage not shared by the other creditors.*
>
> *(2) It was an improper use of the Companies Court to present a petition on the basis of an unascertained debt which has never been demanded and for which no opportunity to repay had been given.*
>
> *(3) It was arguable that until costs awarded against a party have been taxed or agreed upon, the debt between the parties was a disputed debt."*

Harman J emphasised that it has been well-established that the Companies Court should not be used as a debt-collecting court and that there are several, more appropriate remedies available in that regard. Harmon J continued:

> *"The true position is that a creditor petitioning the Companies Court is invoking a class right, (see Re Crigglestone Coal Co [1906] 2 Ch 327), and his petition must be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view. It has long been the law that a petition presented for the purpose of putting pressure on the company is not properly presented: see in Re a Company [1894] 2 Ch 349 and in a slightly different context Re Bellador Silk Ltd [1965] 1 All ER 667."*

Submissions on behalf of the petitioner

103. According to the petitioner, Mr. Gencarella has fairly and fully set out why the present petition is being pursued and wished to draw the court's attention in particular to the following from his second affidavit:

> *"Given:*
>
> *a. the company was insolvent, and with no alternative source of funding and with no sales in the pipeline*
>
> *b. the delivery of a fully functioning ecoLation unit was delayed by 12 months*
>
> *c. the company was riven with shareholder disputes and had no alternative source of funding needed*
>
> *d. that very serious doubt existed as to whether Glasnevin Trust contract was now enforceable and performable,*
>
> *e. the petitioner was left with no choice but to seek to wind up the company."*

104. In response to the charge that the petition was a means of pressurising shareholders and/or that the petitioner was prepared to collapse the company and take its business opportunity, Mr. Gencarella responded in his second affidavit at paragraphs 70 and 71:-

> *"70. First, this argument entirely overlooks the fact that the petitioner is owed a sum of €750,000 and that the company has not until the very late affidavit of Mr. Dorn sought to dispute this liability, nor has it discussed how this liability might be satisfactorily addressed.*
>
> *71. Secondly, the present petition seeks the winding up of the company, which will lead to any appointed liquidator*

undertaking the usual steps of realising the company's assets, investigating all relevant matters and (depending on the results of those investigations) bringing such proceedings as may be warranted to increase the estate of the company in liquidation for the benefit of the creditors. It is clear that the company has certain disposable assets and residual cash. In that regard, in his affidavit under "The Future of the company" Mr. Dorn makes reference to the prototype ecoLation unit which the June COO reported is valued at €300,000. The proceeds of any such disposal, together with the disposal of other assets of the company including its knowhow, goodwill, intellectual property or client connections, will yield a fund which, has the potential to fund dividends to the unsecured creditors including the petitioner therein."

105. In the current case the alleged ulterior motive in the eyes of the respondent is that the petitioner may seek to acquire all or some of the company's assets in the event of liquidation. The petitioner has made no secret of his interest in engaging in the sale of the company's assets. An existing member or creditor of the company is not precluded from participating in the sales process of the company's assets if the company goes into liquidation, and so the petitioner is not precluded from participating in this process. However the petitioner denies any involvement with the correspondence that took place on 12th May in relation to the inquiry that was made into acquiring the IP of the company.

106. The petitioner contends that the facts presented in this petition are wholly different to situations in which an abuse of process or improper purpose has been found in existing jurisprudence, and cites a number of cases in support of its claim as outlined below. In each of these well known cases, the petitioner did not seek (whether primarily or at all) a benefit qua creditor; rather the petitioner sought some incidental benefit which often ran contrary to the interests of the general creditors.

107. The petitioner suggests that if the court is to follow the test of justice and fairness as laid out in *Bula*, then it follows that the conduct and propriety of both parties is material to the exercise of the court's discretion and not just that of the petitioner. The petitioner argues that the respondent puts forward a skewed perspective of the petitioner's conduct so as to subject the petitioner to court scrutiny, despite the respondent's failure to explain its own conduct. The petitioner maintains that the conduct of the petitioner was reasonable in all of the circumstances of the case. The petitioner also emphasises that the conduct of Mr. Ennis and/or that of Mr. McKimm must be considered separately to that of Mr. Gencarella, and that Mr. Gencarella cannot be held accountable for their actions. Mr. Gencarella was not part of the decision to write down the research and development costs, nor was he involved in the plan to remove Mr. Ennis as CEO of the company. Therefore, he ought not reasonably be expected to defend to the hilt the conduct of others when the length of, and the resources expended on these proceedings, will diminish the very thing which the petitioner wishes to obtain.

108. The petitioner submits that each case is to be assessed on the basis of its own facts as they are so presented, as was iterated in the *Bula* decision. The petitioner submits that the *Bula* case dealt with a technical advantage which would accrue to the petitioner and which had nothing to do with the liquidation of the company. The petition was for a purpose that was not contemplated within the specific legislative liquidation provisions. As found by McCarthy J, the petition was "*avowedly for the purpose of defeating the claim of the judgment mortgagee*".

109. In the Genport case the petitioner contends that the motive was not necessarily improper but, if the winding up was ordered the lease in the premises would be forfeited, and this would leave very little in the way of assets for remaining creditors at a time when the company was still trading successfully. This combination of motive and the fact that the winding up was not of benefit to the creditors generally was deemed sufficient for the court to exercise its discretion to refuse the order.

110. In *Re Goode Concrete* the petitioner sought to place the company in liquidation so that competition proceedings against the petitioner might be brought to an end. Laffoy J concluded that it was clear the company had no unsecured assets, which allowed her in turn to infer that the petition had been brought for an ulterior motive. There it was held that the court must take account of the view of creditors insofar as they are expressed under s.309 of the Companies Act 1963 and that the petition should be dismissed on grounds of public policy. In reaching its decision the court found that there were no unsecured assets which could be utilised to meet the petitioner's claim and the claims of other unsecured creditors. While that fact does not entitle refusal of an order it allowed the court to draw the conclusion that the petitioner had some other motive other than securing company's indebtedness for bringing the petition.

111. In the case of *Irish Asphalt*, the petitioner was found to be seeking a litigation advantage by putting the company into liquidation and O'Connor J adjourned the petition to allow the ongoing litigation to play out.

112. Counsel for the petitioner relied on the decision of *Ebbvale Ltd v Hosking* [2013] 2 BCLC 204 in which counsel suggests the petitioner had dual motives for bringing the petition. In addition to being a creditor, the petitioner had a claim against the Bahamian company which he thought might be more efficiently and cost effectively dealt with through liquidation. The court found that it was not necessary for the petitioner's principle purpose in seeking the winding up order in the Bahamas to be to secure a substantial advantage in his capacity as petitioning creditor. A winding up order in the Bahamas was likely to be advantageous to him in both his capacities as claimant in the English action and also as the petitioning creditor in the winding up. The winding up order would likely save him the costs of the English action as he was unlikely to recover if he won, and an independent assessment by the liquidator would be in furtherance of his interests as petitioning creditor of an unsecured debt owed by an insolvent company. The court referred approvingly to the decision of Sargant J in *Re Amalgamated Properties of Rhodesia* (1913) Ltd [1917] 2 CH 115 who stipulated:-

"petitioners, as judgment creditors for this very large sum, are prima facie entitled ex debito justitiae to a winding up order, and it seems to me to be impossible to displace that prima facie position without the very strongest proof that the petition is being improperly made us of for some ulterior motive."

113. In the *Burren* case Laffoy J says that the discretion to refuse a petition is to be exercised sparingly. It is submitted on behalf of the petitioner that what is critical and attested to in the cases cited above is that the petition be of benefit to the petitioner and all other creditors. The company does not have the resources to continue, and there are realisable assets in liquidation to mitigate the petitioner's position qua creditor.

114. In the present case the alleged ulterior motive is that the petitioner may seek, in liquidation, to acquire some or all of the company's assets. It is far from clear that this is a relevant ulterior purpose. A liquidator is charged with the effective realisation of assets in the best interests of the creditors, and an existing member or creditor is not precluded from participating in the sales process. The petitioner has made no secret that it would wish to so participate. The liquidator, as an officer of the court, if it turns out he has saleable assets of interest to the petitioner, will be required to sell to someone else if it is in the interests of the creditors.

115. It was open to the respondent to seek examinership at any time and an open offer was made to Mr. Dorn and the other

investors to facilitate this. The petitioner suggested in oral argument that that offer was made prior to the presentation of the petition. In fact the court notes that it was made after the presentation in June 2017. The petitioner contends that sufficient emphasis has not been placed on this offer having been made. The examinership process is undertaken independently of those running the company. It allows for assessment of any plan for the company's future and the potential financing of that plan. Anyone who has a plan and who can finance the plan, can participate, if they have the money and wherewithal to do that. The offer of examinership was not taken up, and no alternative plan was put forward which might permit the survival of the enterprise. It would, it is submitted on behalf of the petitioner, be perverse to stop the winding up of an insolvent company because the petitioner has attempted to rescue the company at any given time. The petitioner maintains that it was ultimately left with no option but to proceed with the petition in order to salvage something from the corporate failure of the company.

116. The petitioner submits that the respondent has failed to provide any cogent evidence that the company will receive the necessary investment to continue so as to allow it to become successful and in due course repay the petitioner's loans.

117. The petitioner disputes the respondent's submission that Mr. Gencarella will get nothing out of the liquidation, as it has been established in cross-examination that Mr. Gencarella is hoping to get some residual out of his investment by reason of the fact that it was a loan that is due for repayment.

118. The petitioner regards as an over-simplification, the respondent's submission that it is commonly accepted that a petition to collect a debt is an abuse of process and should be struck out. In cases where the petitioner does not have information as to insolvency and is asserting a debt which is in dispute, resorting to a petition as a coercive measure may well be regarded by a court as an abuse of process. This, the petitioner contends, is not such a case.

119. In the *Bula* decision, the petitioner accepted that there would be no dividend or payment advantage to the petitioner in following through with a liquidation, as opposed to letting the existing receivership play out.

120. In response to the respondent's contention that a petition has never been granted in cases where an ulterior motive has been found. The petitioner submits that there is no case that says an improper motive means that the court cannot consider the interest of creditors or public interest or in the interests of justice and fairness. In the present case the petition will advance the interests of unsecured creditors, of which the petitioner is one.

121. The petitioner referred to the non-exhaustive list of principles as set out by O'Connor J in *Re Irish Asphalt Ltd* to guide the court, while stressing that each petition is to be considered on its own merits. The petitioner pointed in particular to item (iv) in O'Connor J's list:-

> *"If an ulterior motive is recognised by the Court, the petition may be refused, adjourned or granted subject in each case to conditions or without conditions as may be deemed fair and just. The statutory discretion of the Court is exercised in a principled and reasoned manner. Overriding and public policy reasons may apply. Moreover, s.569(1) of the 2014 Act mentions the Court's opinion about whether it is just and equitable to make an order which also invites a reasoned approach."*

122. In respect of the respondent's submission that dismissing the petition would afford the company the opportunity to raise finance, the petitioner argues that this will not solve the issue of the ongoing proceedings against the company in the US which is likely to hamper the company's efforts to raise its much needed capital. Additionally, the petitioner submits that the availability of any alternative source of finance is not credible. There is nothing stopping a potential investor from indicating a willingness to negotiate an investment if the petition is lifted. Not one potential investor has been identified.

123. The company is insolvent with no immediate real prospect of gathering further finance and has at its central management and control Mr. Dorn, who has announced in court that he is going to scrap the original project and embark on something entirely new. The petitioner submits that this is a scenario that is clearly hazardous and that it is in the interests of creditors generally that it be put to an end.

124. It is submitted that, on the basis of the report drafted by Mr. Kavanagh of Deloitte there are several identifiable creditors, and that therefore the petitioner is part of a class which would collectively benefit from having the company wound up.

125. The petitioner also noted that the company had appointed Mr. Dorn as Managing Director for the purpose of conducting an investigation into the financial affairs of the company, yet Mr. Dorn has made no inquiry into the recipients of the funds that have gone out of the company in and around the date of 24th March, which the respondent contends to be significant evidence in its case to prove that the petitioner colluded with Mr. McKimm so as to give the appearance that the company was insolvent. The petitioner is of the belief that, if such a problem exists, the proper statutory mechanism to deal with it is by way of the appointment of a liquidator.

126. The petition is not a matter for oppression proceedings. A creditor faced with an insolvent company is invoking part recovery of his debt, as he is so entitled, to bring regulatory provisions into play so as to allow the liquidator to track down funds and hold accountable any participants in any misappropriation and/or misleading conduct.

127. Mr. Gencarella's primary purpose now may be to recover dividend but he is allowed to have an ancillary purpose, that being, to rescue the company and ensure appropriate controls. At the very least, a liquidator can investigate and take whatever steps s/he deems necessary to recover monies and also to hold corporate officers to account under the statutory regime. If monies have been misappropriated, as the respondent alleges, then the liquidator is the person to uncover such.

128. The petitioner submits that, even if the court were to hold that on one hand, the petitioner wished to bring a petition but, on the other hand, was also trying to save the company, it would be unfair for the court to hold that the principal petitioner's attempts to save the company, whilst also demanding repayment of his loan notes, was such as to render his motive for bringing the petition, improper or ulterior.

Decision

129. The court was impressed by Mr. Gencarella who gave evidence on behalf of the petitioner. The court considers him to have been honest and truthful in his evidence. He invested over €1 million into this start-up company, €750,000 of which came from the petitioner. Not only that, he also introduced a number of his friends to Mr. Ennis and Mr McKimm who, on his recommendation, invested over €3 million. In 2016 alone, American investors gave the company over €4 million, the bulk of which was advanced in June 2016. By February 2017 when the crisis board meeting occurred, there was a little over half a million left. It was clear at that stage

that the company was in trouble. It had a product that did not work, and it had no sales in the pipeline. An anticipated investment of €750,000 from Glasnevin Trust was not forthcoming and fresh funding was urgently needed if the company was to survive.

130. Having had an advisory board meeting the previous day and having discussed the matter in the absence of Mr. Ennis and Mr. McKimm, at the board meeting of the 22nd February 2017 the board, as it was entitled to do, decided to remove Mr. Ennis as CEO, in the interest of the company. The proposal was that he remain as a director and assume the title of President/Founder and benefit from the company through his substantial shareholding of 35%.

131. From the outset Mr. Gencaraella's stated purpose in agreeing to this course of action was "*to make the company strong*", and the court is persuaded that all of his actions in the turbulent weeks which followed were directed to that end.

132. Clearly, following the removal of Mr. Ennis as CEO and the appointment of Mr. McKimm as interim CEO, Mr. Gencarella was dependent on Mr. McKimm for information on the workings of the company. At that time Mr. Gencarella trusted Mr. McKimm because he had no reason not to. He did become aware of his prior bankruptcy but did not attach much significance to it. Bankruptcy is a common feature of business life in the U.S. and does not have the same significance as is attributed to it in this jurisdiction. The fact that, during the months of March and April 2017, Mr. Gencarella trusted Mr. Mc Kimm does not mean or prove that he was colluding with him. Serious allegations of misconduct and misappropriation of company funds have been made against Mr. McKimm during the hearing of this petition. The court is satisfied that Mr. Gencarella was unaware of these allegations at the relevant time and that had he become so aware he would have taken steps to deal with the allegations made. If the allegations levelled against Mr. McKimm during the hearing of this petition prove to be well-founded then he will have to answer to the creditors in due course. It would also mean that the unfortunate Mr. Gencarella has been duped and undermined by both the Founders of this company at different times; Founders who are now at loggerheads with each other.

133. In the days following Mr. Ennis's removal as CEO, Mr. Gencarella learned much that troubled him about Mr. Ennis's stewardship of the company. There were serious governance issues in relation to the management of the company; the keeping of appropriate financial records; and reporting to the directors and shareholders. There was a potential misappropriation of company funds by Mr. Ennis in a sum in the region of €250,000. Further Mr. Gencarella learned that Mr. Ennis had apparently misled the American investors the previous summer in the "Offering Memorandum" presented to them.

134. In the much referred to letter of the 16th March 2017, which is quoted in full earlier in this judgment, Mr. Gencarella openly lays his cards on the table in his efforts to persuade Mr. Ennis to desist from his destructive course in resisting his removal as CEO. The court is satisfied that Mr. Gencarella's motivation at that stage and throughout this period was to save the company. He was prepared to invest further monies but only if proper management and governance were put in place.

135. There is no doubt that, in attempting to persuade Mr. Ennis, Mr. Gencarella used his loan notes as leverage. Mr. Gencarella pointed out that he was now entitled to call in his loan notes and that, if necessary, he would do so, stating:-

> " *you may believe that I would be unwilling to call the notes because it would liquidate the company, but the liquidation process would allow others to acquire the intellectual property and assets of the company and continue where the prior firm left off."*

It seems to the court that Mr. Gencarella was perfectly entitled to leverage his loan notes in this way. He and his fellow American investors had pumped €4 million into this company less than a year earlier and all there was to show for their investment was an ecoLation unit that did not work, with a resultant absence of sales and a badly managed company which was quickly running out of money. Mr. Ennis, in the court's view, foolishly declined this offer and instead served notice of an E.G.M for the 4th April 2017.

136. The burgeoning crisis deepened significantly as a result of the meeting with ThyssenKrupp on the 21st March 2017. The company's situation was in fact far worse than Mr. Gencarella had previously realised. At that meeting, he learned for the first time that the ecoLation unit sitting at the company's premises at Airton Road which had cost €2.2 m to develop was operationally unstable and could not be made fit for purpose, and that ThyssenKrupp had in fact been working on a second unit since the previous November at an additional cost of in excess of €400,000. Even if work on the second unit proceeded, there would be nothing available to sell until March 2018. The court considers it reasonable to infer that it was the dispiriting news emanating from ThyssenKrupp which prompted the flurry of activity in the last week in March 2017.

137. Following the meeting with Mazars on 22nd March a series of letters was sent by Sherwin O'Riordan to the company and to Mr. Ennis. On the 23rd March those solicitors wrote to Mr. Ennis intimating a claim for fraud and misrepresentation on behalf of the American investors. On the 24th March they wrote to the company seeking an assurance of solvency. On the 27th March they wrote the letter of demand on which the petition is based. On the 29th March they wrote a twenty one day warning letter on behalf of a contractor, Mr. Smith. At the same time Mr. McKimm, on the 24th March, paid out company debts totalling €241,316. There is no doubt that Mr. McKimm's disbursements made the company's insolvency appear much more stark. However, Mr. Gencarella has sworn that he did not direct Mr. McKimm to make those payments and the court accepts his evidence in that regard. In light of the allegations made in the course of the hearing, it is possible that Mr. McKimm had his own agenda in making these payments. In any event, there is no evidence before the court that these payments were in anyway invalid or were not paid in respect of sums due and properly payable by the company. Absent these payments, the company was still hopelessly insolvent.

138. The court is satisfied that this series of correspondence at the end of March was strategic and was designed to make Mr. Ennis and his supporters come to the table to agree the future of the company. The letter of demand of the 27th March which gave seven days for payment was, in the courts view, timed to coincide with the E.G.M. called by Mr. Ennis for the 4th April. 2017. This fact does not make it improper. The court is satisfied that at that point Mr. Gencarella was still trying to save the company and was using his loan notes to apply pressure to Mr. Ennis. Mr. Gencarella was simply following through on that which he had said openly in his letter of the 16th March. It seems to the court that that was a legitimate strategy for him to pursue. This pressure is not comparable to the improper pressure applied by the petitioner in *Re A Company* where the bringing of the petition was designed to secure for the petitioner the only asset of the company to the detriment of the other creditors of the company.

139. The day after the demand letter, Mr. Ennis sought an injunction in the High Court restraining a board meeting planned for the 30th March at which it was proposed to appoint new directors to the board, two of whom had been members of the advisory board. In his grounding affidavit he swore that as CEO he had a contract worth €500,000 per annum. On the evidence before this court *prima facie* that appears to be untrue and Mr. Ennis may have materially misled the High Court to grant the injunction which was sought.

140. In any event, at the E.G.M which ultimately took place on the 11th April 2017, Mr. Ennis's preferred directors were appointed to

the board, thus giving them control of the board. Mr. Gencarella made one last effort to save the company. He circulated a proposed new shareholder agreement pursuant to which the American investors would advance the necessary monies to complete the second ecoLation unit, in return for which their shareholding would be increased and they would obtain control of the board. Having regard to the experience of the petitioner over the previous year, the price of further investment was by no means extortionate. It seems to the court that a third party financier investing in this troubled company is unlikely to have sought less. The court is satisfied that the genuine intent of the petitioner was to create a company with proper structures, proper management and proper governance, in which the management of the company would be answerable to the board and the shareholders. It was only when this last effort to save the company was rejected that the petition to wind up was presented on the 18th May 2017.

141. The respondent sought to make much of an email sent by a solicitor in Sherwin O'Riordan on 12th May 2017 to a potential liquidator which referred to the desire of the American investors to acquire the company name as well as the IP and the solicitor's desire to "chat" to the liquidator on the topic, as evidence of ulterior motive on the part of the petitioner and of his desire to collapse the company and take its opportunity. Mr. Gencarella gave evidence that he was unaware of that communication and again the court accepts his evidence on this issue. In the court's view the likely source of that email was Mr. McKimm, who the court was surprised to learn in the course of the hearing, is also represented by Sherwin O'Riordan. The court's surprise stems from the fact that a letter threatening defamation proceedings on behalf of Mr. McKimm which was produced in evidence, was sent by Beauchamps solicitors and not by Sherwin O'Riordan, leading the court to assume that Beauchamps were in fact Mr. McKimm's solicitors.

142. In any event the court is satisfied that in his dealing with the company the trustee of the petitioner acted openly and in good faith. Throughout the crisis his genuine wish was to save the company. This company has been brought to its knees, not by any predatory action of Mr. Gencarella, but by the mismanagement and intransigence of Tony Ennis and, on the basis of the evidence of the allegations and counter-allegations made by and against Mr. Ennis and Mr. McKimm, during the course of the hearing, was potentially contributed to by the misappropriation of company funds by both of them. That is a matter that requires to be investigated by the liquidator in the course of the liquidation.

143. The test, as set out in *Bula* and *Tweedswood* above, is that the petitioner is entitled *ex debito justitiae* to the order so as to shift the burden to the respondent to prove ulterior motive on behalf of the petitioner. The respondent in the circumstances herein has not discharged the burden on him to "*establish on cogent evidence, that not only is the petition actuated by reasons other than the ostensible motive, but that the actual underlying motive is improper in the sense of being tantamount to an abuse of process*", such as would shift the burden back to the petitioner to establish that it is fair and just to grant the petition. Accordingly, the court is of the view that the petitioner is entitled to his order to wind up the company and the court will make an order to wind up the company, and direct that the liquidator investigate payments made by the company to both Mr. Tony Ennis, former CEO, and Mr. McKimm, former COO and acting CEO, in the course of the liquidation.