Neutral Citation Number: [2013] IEHC 225

THE HIGH COURT

[2013 No. 30 COS]

IN THE MATTER OF CONNEMARA MINING COMPANY PLC

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 10th day of May, 2013.

Previous judgment

1. In a judgment delivered on 25th February, 2013 ([2013] IEHC 123) I outlined the then state of these proceedings arising from the presentation by Trampus Limited (the Petitioner) of a petition to wind up Connemara Mining Company Plc (the Company), a public limited company incorporated in this jurisdiction on 28th March, 2006 and listed on the AIM sub-market of the London Stock Exchange. Having heard the petition, the purpose of this judgment is to determine whether the Company should be wound up on foot of that petition.

2. Since the previous judgment was delivered, the petition has been advertised in accordance with Order 74, rule 10 of the Rules of the Superior Courts (the Rules) and the directions given in the previous judgment. The Company did not avail of the opportunity of filing a further affidavit. Accordingly, the state of the evidence on the substantive issues is as it was when the previous judgment was delivered.

3. The only creditors and contributories of the Company who gave notice of intention to appear and appeared on the hearing of the petition and the wishes in relation to the petition expressed on their behalf were as follows:

> (a) Davycrest Nominees, as a contributory holding 1,000,001 ordinary shares in the Company as nominee on behalf of the beneficial owner thereof, John Teeling (Mr. Teeling), who opposed the making of a winding up order on the instructions of Mr. Teeling;
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> (b) James Finn (Mr. Finn), a contributory holding 1,000,001 ordinary shares in the Company, who opposed the making of a winding up order;
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> (c) Mr. Teeling, as a creditor in the sum of €173,334, who, in that capacity, also opposed the making of a winding up order; and
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> (d) Mr. Finn, as a creditor in the sum of €150,000, who, in that capacity, also opposed the making of a winding up order.

As recorded in the previous judgment, Mr. Finn is a director and a secretary of the Company. Mr. Teeling is also a director of the Company. Between them, Mr. Finn and Mr. Teeling own approximately 7.78% of the issued share capital of the Company, whereas, as recorded in the previous judgment, the Petitioner has stated in the petition that it is the largest single shareholder in the Company and, at the date of the petition, beneficially owned 1,625,000 fully paid-up shares, representing a 6.32% interest in the Company. It appears from the list of shareholders put before the Court that the ownership of the remainder of the issued shares is spread over in excess of four hundred shareholders.

4. As was outlined in the previous judgment, the Petitioner seeks to have the Company wound up on two grounds: that the Company is unable to pay its debts, in reliance on s. 213(e) in combination with s. 214(c) of the Companies Act 1963 (the Act of 1963); and that the Court should form the opinion that it is just and equitable that the Company should be wound up in reliance on s. 213(f) of the Act of 1963. The Company's response is that, as a contributory which owns fully paid-up shares, the plaintiff has no *locus standi* to seek to have the Company wound up. Further, the Company's position is that the Company is solvent and that it is able to pay its debts and no ground has been demonstrated for winding up the Company on a just and equitable basis.

The issues

5. The crucial factual issue which arises on the petition is the current financial state of the Company. The questions of law which were raised and very thoroughly analysed in the comprehensive written submissions furnished by each side are what criteria should be applied by the Court in determining the following questions:

> (a) whether the Petitioner, as a fully paid up shareholder of the Company, has standing to bring a petition to wind up the Company;
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> (b) whether the Company is unable to pay its debts within the meaning of s. 213(f) and s. 214(c) of the Act of 1963; and
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> (c) whether it is just and equitable to wind up the Company.

Taking an overview of the matter, it is logical to outline first what is to be gleaned from the assertions made by the Petitioner and the evidence adduced as to the current financial state of the Company. As recorded in the previous judgment, the evidence on affidavit before the Court comprises –

> (i) the verifying affidavit of Mark Gregory Hardy (Mr. Hardy), the sole director of the Petitioner, sworn on 23rd January, 2013;
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> (ii) the affidavit of Mr. Finn sworn on 14th February, 2013, and
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> (iii) the replying affidavit of Mr. Hardy sworn on 18th February, 2013.

Assertions and evidence on current financial state of the Company

6. In the petition and in the affidavit verifying the petition sworn by Mr. Hardy, the Petitioner relied on facts extrapolated from documents issued by the Company, all of which were in the public domain before the petition issued.

7. First, the Petitioner relied on the unaudited Interim Report 2012, which was signed by Mr. Teeling, as chairman of the Company, on 24th September, 2012. The Petitioner pointed to the fact that, as regards the six month period which ended on 30th June, 2012, current assets are shown therein as €283,000, including cash and cash equivalents in the sum of €80,000. Current liabilities are shown as €363,000. Therefore, the Petitioner concluded, there was a net current deficit of €80,000. It was emphasised by counsel for the Petitioner that, as a matter of accountancy practice, "current assets" and "current liabilities" refer respectively to assets maturing and liabilities falling due within twelve months.

8. The Company's response to that assertion in the affidavit sworn by Mr. Finn, was that, in fact, the Interim Report 2012 shows a surplus of €2,175,000. That is, in fact, correct because "non-current assets", that is to say, intangible assets, are shown as €2,255,000, so that the total assets are shown as €2,538,000, as against liabilities in the amount of €363,000. It is clear from the Interim Report 2012 that the intangible assets include, *inter alia*, the Company's interest in joint ventures in relation to prospecting for zinc and gold in Ireland. One such joint venture is described in the Interim Statement as being with an entity referred to as "Teck of Canada" in relation to prospecting for zinc in the Stonepark area of Limerick.

9. Secondly, the Petitioner relied on its interpretation of a statement in the notes to the Annual Report and Accounts of the Company for the year ended 31st December, 2011 (the 2011 Audited Accounts), the interpretation, as articulated by Mr. Hardy in the verifying affidavit, being that "there were doubts about the Company's ability to continue as a going concern and [the directors] conceded that the Company had sufficient funds to continue operations only because of the existence of a then substantial cash balance". The note in question, which is headed "Going Concern", discloses that the Group (meaning the Company and all its subsidiaries) had incurred a loss of €397,121 in the year in question, and had a retained deficit of €2,066,974 "leading to concern about the group's ability to continue as a going concern". The note went on to state that the Group had a cash balance of €662,018 at the balance sheet date and that, accordingly, the directors were satisfied that it was appropriate to continue to prepare the financial statements on a going concern basis "as there will be sufficient funds in place to continue operations for the foreseeable future". In his verifying affidavit Mr. Hardy commented that the "substantial cash balance no longer exists", which comment is open to misconstruction. As is clear from the Interim Report 2012, the cash balance had diminished to €252,000 by 30th June, 2012; it had not ceased to exist.

10. In his affidavit, Mr. Finn took issue with the Petitioner's interpretation of the note in question stating that it was "a standard note used by junior exploration companies" and did not imply that the Company was in financial difficulty. In that connection, he averred that he had been informed by Deloitte & Touche, the Company's auditors, that –

> ". . . in accordance with International Auditing Standards reference was made to the risks and uncertainties which the directors were required to take into account in forming their judgment as to whether the going concern basis of accounting was appropriate."

He further averred that, as the note shows on its face, the directors concluded that, notwithstanding those risks and uncertainties, the going concern basis was appropriate and that the Company had sufficient funds in place for at least the foreseeable future.

11. Thirdly, the Petitioner relied on what was stated in a document entitled "Exploration Update" filed by the Company with the London Stock Exchange on 20th November, 2012. The aspect of that document to which the Petitioner pointed as reflecting the Company's "deteriorating financial position" and its "inability to pay its debts" related to the joint venture between the Company and Teck Ireland Limited in relation to what was referred to as "Limerick Zinc". Having outlined the position in relation to the joint venture, the prospecting which had occurred and the prospecting activity which would continue in 2013, it was stated in the document:

> "As a consequence, the board of [the Company] has decided not to subscribe its 25 per cent to its current and 2013 budgets. Based on proposed expenditure this would result in dilution of the [Company's] interest in Limerick from 25 per cent to 23.24 per cent. [The Company] can resume payments at the next budget."

12. Mr. Finn in his affidavit has explained that, as it was entitled to do under the terms of the joint venture, the Company had decided for business reasons not to subscribe cash to the exploration budget for 2013, but instead to dilute its interest in the joint venture, emphasising that the decision was not a failure on the part of the Company to pay a debt or to meet an obligation.

13. Finally, while acknowledging that the Company "has significant intangible assets representing its exploration and evaluation expenditure to date", the Petitioner asserted that the value of those intangible assets "cannot be protected or otherwise realised while the current management and directors of the Company remain *in situ*". The basis of that assertion was the involvement of Mr. Finn and Mr. Teeling in the legal proceedings in Dallas, Texas, to which there was reference in the previous judgment. In the context of the present discussion as to the current financial state of the Company, the Petitioner acknowledged that the Company's principal intangible asset is its beneficial interest in the joint venture with Teck Ireland Limited in relation to the prospecting for zinc in Limerick, which Mr. Hardy averred is valued at €1,234,543.

14. While Mr. Finn, in his affidavit did not comment on the value which the Petitioner ascribed to that asset, which, apparently, is represented by the Company's shareholding in a company registered under the name Limerick Zinc Limited, he did reiterate that the Interim Report 2012 shows a surplus of assets over liabilities in the amount of €2,175,000.

15. Anticipating, I surmise, that the Petitioner's argument would be that the so-called "cash flow test", rather than the so-called "balance sheet test", should be applied by the Court in determining whether the Company is unable to pay its debts within the meaning of s. 213(e) and s. 214(c) of the Act of 1963, Mr. Finn, in his affidavit, elaborated on the manner in which the Interim Report 2012 came to show net current liabilities of €80,000. He explained that the most significant portion, amounting to €230,000, of the Company's current liabilities as of 30th June, 2012, was in respect of directors' fees. At the Annual General Meeting of the Company on 26th July, 2012, the chairman had informed the shareholders that, if the Company did not have sufficient cash to enable payment of the directors' fees, then each of the directors would instead convert the amount due into shares at the time of the next round of share issue. Mr. Finn further averred that, with the exception of directors' fees, all current liabilities as of 30th June, 2012 had been dealt with, save one invoice for €31,808 in respect of which there had been "some discussions" with the creditor "as regards quantum and content", but the discussions had concluded and the invoice would be discharged and the Company had sufficient funds to discharge it. The conversion of the full amount owing to the directors into shares would leave the Company in a net current asset position of approximately €70,000, in consequence of which, Mr. Finn asserted the belief that the Company is in fact able to pay its debts as they fall due.

16. Lest there be concern that it was overlooked, it is appropriate to record that at the hearing the Company did not attempt to relate the sums aggregating €323,334 in respect of which it was represented that the Company is indebted to Mr. Teeling and Mr. Finn (as set out at (c) and (d) in para. 3 above) to the foregoing analysis. Mr. Teeling and Mr. Finn are two only of the four directors of the Company.

17. Mr. Hardy, in his replying affidavit, as he was entitled to do, disputed certain averments made by Mr. Finn. For instance, he disputed that the chairman did inform, or by reason of the Company's articles of association and the listing rules of the London Stock Exchange, could have informed, the shareholders that the directors would convert the fees due to them into shares at the next round of share issue. Obviously, the Court cannot resolve either that factual dispute or the legal issue thereby raised in this process. More significantly, in that affidavit, Mr. Hardy, wearing his hat as a person who trained as a chartered accountant and who was admitted to the Institute of Chartered Accountants in England and Wales in 1974, asserted that –

> ". . . reliance on intangible assets as an indicator of a company's financial position is problematic and, in particular, may give rise to a disparity between a company's value as per its accounting records, and its value as per their market capitalisation".

He also asserted that, in the case of the Company, the intangible assets recorded in its accounts represent past exploration costs which are unlikely to be realised in the short-term or to be of any use in meeting the Company's current liabilities.

18. Further, in responding to what he construed as an assertion by Mr. Finn that the Petitioner may have "an ulterior motive" for bringing the petition, Mr. Hardy acknowledged that the Petitioner did make an approach to purchase the interests of the Company in the joint venture with Teck Ireland Limited but no agreement could be reached. He exhibited three letters, the first dated 28th June, 2012 from the Petitioner to the directors of the Company, the second a response dated 31st July, 2012 on behalf of the Company from Davy Corporate Finance, and the third a further letter dated 9th August, 2012 from the Petitioner to Davy Corporate Finance. In the first letter the Petitioner's approach was represented as "an immediate, pre-emptive and protective offer" on foot of which the Petitioner would commit to provide funds to meet future exploration costs. In the response, it was stated that the Company did not then have any plans to dispose of its shareholding in Limerick Zinc, but might consider an offer which would enhance shareholder value. Davy Corporate Finance then set out what would be required to enable the Board of the Company to evaluate "any proposed offer for Limerick Zinc". In the third letter, following a series of complaints, Mr. Hardy set out the terms of the Petitioner's offer.

19. What was alleged by Mr. Finn, and what was construed by Mr. Hardy as an allegation of "ulterior motive" was that –

> ". . . the true purpose for which the winding-up petition has been presented is to put pressure on [the Company] to sell to the Petitioner its main asset at a reduced value or to secure the appointment of a liquidator from whom the asset can be purchased on more favourable terms".

It is impossible for the Court to form a definitive view on Mr. Finn's allegation or Mr. Hardy's response to it on the basis of that affidavit evidence alone and in the absence of cross-examination. Notwithstanding that, taking an overview of the position adopted by the Petitioner, it has to be said that it is so fundamentally riddled with inconsistencies and clear contradictions, that a question inevitably arises as to the Petitioner's true intention.

20. Mr. Finn had also made one very general statement in his affidavit pointing to how the Company proposes to finance itself in the future. Having stated that the Company is similar to most other junior exploration companies, in that it has no income from sales and that the funds required for exploration are raised from shareholders as the need arises, and having stated that the Company raised money in 2006, 2007, 2010 and 2011, Mr. Finn stated that the Company "will in the future raise funds from shareholders as required".

21. That prediction did not impress the Petitioner. Mr. Hardy pointed out in his replying affidavit that it presented a number of difficulties, which he enumerated in the following terms:

> (a) "it is pure speculation on the part of Mr. Finn as it provides no precise details of when or how the Company will return to the market";
>
> (b) "it is common knowledge that junior exploration companies are presently unable to raise funds by the issuance of new shares"; and
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> (c) in the current "tough times", as recognised by the directors of the Company in the Interim Report 2012, share prices for junior exploration companies "are at all time lows".

Mr. Hardy illustrated that last point by reference to the Company's share price as at the close of business on 15th February, 2013 of £0.076 per share, which was "far below" the Company's average share price since it was listed on the AIM sub-market. He observed that the Company's current share price is so low that it is unlikely that the Company will be able to raise any significant funds through a share issue in the near future. Notwithstanding that, it would seem from the evidence put before the Court by Mr. Hardy that, after 28th June, 2012, the Petitioner increased its shareholding, because the letter of 28th June, 2012 referred to earlier states that the Petitioner's then shareholding was 1,575,000 shares, whereas, according to the Petitioner, it was 1,625,000 shares when the petition was presented.

22. Omitting some very "broad brush" assertions made by Mr. Hardy in his replying affidavit, to which I will briefly allude later, the foregoing records the conflicting evidence before the Court on the current financial state of the Company. As will be clear, neither side adduced any expert evidence from an independent professional. Before considering the relevance of the evidence to the issues and making any findings, it is necessary to consider the criteria for determining –

> (a) whether the Petitioner has *locus standi* to bring the petition, and
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> (b) whether the Company is unable to pay its debts.

Criteria for determining *locus standi*

23. The Company accepts that the Petitioner is a contributory as defined in s. 208 of the Act of 1963 and is not precluded by s. 215 of the Act of 1963 from bringing the petition. It is common case that the Petitioner is a fully paid-up shareholder who is not liable for any contribution, if the Company is wound up. The essence of the Company's contention that the Petitioner does not have *locus*

standi is that the Petitioner is invoking a class right (citing *Re a Company* [1983] BCLC 492) and that the class of which he is a member, the class of fully paid-up contributories of a company, can have no financial interest in bringing a winding-up application on the grounds of a company's inability to pay debts, since it will neither benefit directly from the payment of those debts nor indirectly by the avoidance of a liability such as that which might have been visited upon a contributory whose shares were not fully paid-up. That proposition, which is framed in the abstract, is premised on the assumption that the company sought to be wound up is unable to pay its debts and will have no surplus to distribute amongst the contributories.

24. As I observed in the previous judgment, there is no Irish authority which gives clear guidance on the standing of the owner of a fully paid up minority shareholding in a public limited company to petition to wind up the company either under paragraph (e) or paragraph (f) of s. 213 of the Act of 1963, although I consider that, in the context of that issue, the distinction between a public limited company and a private company is not of relevance. In addressing the current law on the issue, I propose considering the authorities from the United Kingdom on which the Company relies first, and then setting out the approach which has been adopted in this jurisdiction.

United Kingdom authorities

25. The *fons et origo* of the principle that a fully paid-up shareholder who presents a petition to wind up a company must both allege in the petition and show by evidence that there are assets of the company of such an amount that in the event of a winding-up he would have a tangible share of surplus to receive is the decision of the Court of Appeal in In *re Rica Gold Washing Company* (1879) 11 Ch. D 36. The principle, which has been followed consistently by the courts in the United Kingdom since 1879, was stated by Jessel M.R. in the following passage (at p. 42):

> "Now I will say a word or two on the law as regards the position of a Petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a petition. That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say 'a sufficient interest,' for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must shew what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf."

Later, Jessel M.R., who had earlier observed that the petitioner had told the Court that he had "purchased the shares in the market", addressed the application of the principle to the facts of the case before him and, having read a paragraph of the petition, stated (at p. 45):

> "That is an allegation of insolvency, certainly of commercial insolvency, but there is nothing else in the petition to shew assets. . . . Therefore, really, when the petition is fairly looked at, there is no allegation of any assets left, much less of there being any surplus in which the Petitioner could participate after payment of the debts and costs of the winding-up. It seems to me as clearly a demurrable petition as I ever saw."

In the concluding paragraph (at p. 46), having referred to the fact that the petitioner held seventy five £1 paid-up shares, Jessel M.R. stated in relation to the petitioner, who had sought the winding up order on the ground that it was just and equitable that the company be wound up:

> "We must look at the extent of his interest as reasonable men, and as men having experience in these matters, and speaking as such, I have no doubt that, as the Vice-Chancellor says, this is not a *bona fide* petition, but a petition presented with a very different object than that of obtaining for the Petitioner the £75, or any part of it."

26. In the passages from the *Rica Gold Washing* case quoted above, in my view, Jessel M.R. was implicitly identifying what the winding-up of a company is about. In very broad terms, what it is about is the liquidator getting in the assets of the company, if necessary realising them, and distributing them in accordance with law, that is to say, in discharge of liability for the costs of the winding-up and the liability to creditors and, if there is a surplus, distributing the surplus amongst the shareholders. Jessel M.R. identified first that, given that the shares of the petitioner were fully paid-up shares, there would be no call on the petitioner to contribute to the assets of the company. Having regard to the fact that the petitioner was contending, which, apparently, the Court accepted, that the company was insolvent, there was going to be no surplus after the discharge of the costs and the company's debts to distribute amongst the shareholders. Therefore, the petitioner, as shareholder, was going to get nothing as a result of the process and, accordingly, he did not have standing to initiate the process.

27. One of the later cases in which the principle enunciated by Jessel M.R. in the *Rica Gold Washing* case was applied was a decision of the English High Court (Buckley J.) in Re *Othery Construction Ltd*. [1966] 1 All ER 145, in which the petitioner was the holder of thirty three fully paid-up shares, which represented thirty three per cent of the issued share capital, of the company. The petitioner alleged that the company was insolvent and unable to pay its debts and that it was just and equitable that it should be wound up. Having referred to the judgment of Jessel M.R., Buckley J. stated (at p. 147):

> "In my judgment it still remains a rule of this court that where a fully paid shareholder petitions for compulsory winding-up he must show on the face of his petition a *prima facie* probability that there will be assets available for distribution amongst the shareholders."

There is an interesting passage later on in the judgment in which Buckley J. stated (at p. 149):

> "I have been referred to no authority which suggests that when the circumstances are such that it is clear on the facts alleged in the petition that there will be nothing available for distribution among the shareholders, or that the petitioner himself has got no interest in the relief sought, he can act, as it were, as an *amicus curiae* and present the petition to the court merely with a view to bringing to the court's attention some state of affairs which he considers to be open to criticism in the way in which the company's business is being conducted.
>
> . . . it is no part of the business of a paid-up shareholder to present himself to the court either as an *amicus curiae* or as the friend of creditors of the company suggesting that the company ought to be wound up to protect the interests of those creditors. It may well be that on a petition presented by a party having a *locus standi* to present it, this company ought to be wound up. Nevertheless it remains the rule that, before a contributory can petition successfully for the

> winding-up of the company, he must show either that there will be a surplus of assets available for distribution amongst the shareholders or that the affairs of the company require investigation in respects which are likely to produce such a surplus."

Once again, in that passage, the focus was on the petitioning fully paid up contributory being able to show that he has a sufficient interest by reason of the outcome of the winding-up process being likely to be for his benefit.

28. One observation by Jessel M.R. in his judgment in the *Rica Gold Washing* case which has given rise to some controversy in the United Kingdom was the following observation (at p. 43):

> "There will be, no doubt, some exceptions."

Jessel M.R. gave as an example a situation where "the majority of the shareholders side with the directors or other persons who have committed the fraud, so as to prevent the company's bringing an action to make them liable". In *Re Expanded Plugs Limited* [1966] 1 All ER 877, the English High Court rejected an attempt to categorise the case before it as an exception to the general principle and held, in a situation where the company was in substance a partnership between the petitioner and the other beneficial owner of the shares, that the petitioner had no *locus standi* to present the petition as a contributory, since there was no surplus available for distribution. It was held that the analogy with a partnership did not confer on the petitioner the *locus standi* that he lacked by company law. Accordingly, a winding-up order was not made.

29. The principle in the *Rica Gold Washing* case was also applied in *Re Chesterfield Catering Co. Limited* [1976] 3 All ER 294. That was a decision of the English High Court (Oliver J.) in which the question of the range of the exceptions to the general principle was explored.

30. First, as regards the decision of the High Court in an earlier case, *Re Newman & Howard Ltd*. [1961] 2 All ER 495, in which the Court had declined to treat as demurrable a petition presented by a shareholder whose complaint was that no accounts had been furnished which would enable an allegation of solvency to be made, Oliver J. stated (at p. 298):

> ". . . I do not think that as the law now stands the exception goes beyond this: that a petition will not be regarded as demurrable on the ground of the petitioner's lack of *locus standi* if his inability to prove his *locus standi* is due to the company's own default in providing him with information to which, as a member, he is entitled. Thus, for instance, I cannot think that a petition presented by a fully paid shareholder on ground (b) of section 222 of the 1948 Act could be treated as demurrable because he was unable to allege that there would be a surplus of assets."

Ground (b) of s. 222 was if "default is made in delivering the statutory report to the registrar or in holding the statutory meeting" and it corresponded to paragraph (b) of s. 213 of the Act of 1963 in its original form. However, paragraph (b) was repealed by the Companies (Amendment) Act 1983 (the Act of 1983), which, coincidentally, saw the birth of the public limited company. While there would be obvious logic in what Oliver J. stated in relation to ground (b) of s. 222 if it stood alone, as will be demonstrated, the corresponding repealed provision in this jurisdiction did not stand alone.

31. Secondly, Oliver J. went on to comment that the references to "a surplus" or to "assets for distribution amongst shareholders", which appeared in some United Kingdom authorities, were "to some extent an unnecessarily restrictive gloss" on what was stated by Jessel M.R. He emphasised that what was required for a fully paid-up shareholder to petition was "a sufficient interest to entitle him to ask for the winding-up of the company", and that he must show "a tangible interest". Oliver J. then expressed the view that it is not quite accurate to say that the tangible interest of the fully paid-up shareholder must necessarily and in all cases be restricted to the existence or prospective existence of a surplus, giving as an example a petition pursuant to the corresponding provision in the United Kingdom to paragraph (d) of s. 213 (if the number of members is reduced), as a situation in which the shareholder would have the strongest possible interest in seeing that the company's business is brought to an end, for otherwise he might find himself personally liable for the company's debts. Again, the logic of that observation would be obvious, if ground (d) stood alone, but, as will be demonstrated later, s. 213(d) does not stand alone in this jurisdiction.

32. Oliver J. continued (at p. 299), focusing on the general principle enunciated by Jessel M.R., as follows:

> "However, it is I think clear that in referring to a 'sufficient interest' Jessel M.R. meant an interest by virtue of the petitioner's membership. In order to establish his *locus standi* to petition a fully paid shareholder must, as it seems to me, show that he will, as a member of the company, achieve some advantage, or avoid or minimise some disadvantage, which would accrue to him by virtue of his membership of the company. For instance, a member of a company might have a strong interest in terminating its life because he was engaged in a competing business or because he was engaged in litigation with the company, but I do not think that that was the sort of interest that Jessel M.R. had in mind."

The outcome of those proceedings was that, although unopposed, the petition, which had been brought by the personal representatives of a 49% shareholder and sole director of the company, was dismissed.

33. The most recent English authority to which the Court has been referred is the decision of the Chancery Division of the High Court (Sir Andrew Morritt C.) in *Charit-Email Technology Partnership LLP v. Vermillion International Investments Limited* [2009] EWHC (Ch) 388). The passage from the judgment in that case on which the Company relied in this case, while clearly obiter on the status of a contributory to petition to wind up a company, does record the current position in the United Kingdom. It was stated (at para. 12):

> "It has been the established practice for many years under successive Companies and Insolvency Acts for the court in all matters relating to the winding up of companies to have regard to the wishes of the creditors and contributories . . .. In the case of a petition for winding up a company limited by shares, all of which are paid up, it is the established practice of the court to require a contributory to show that he has a tangible interest, in the sense that if wound up there would be surplus assets available for distribution to members (See In *Rica Gold Washing Company* . . . , and In Re *Chesterfield Catering Company Limited* . . .).

Approach adopted in this jurisdiction

34. The approach which has been adopted in this jurisdiction has been summarised as follows in MacCann & Courtney on *Companies Acts 1963 – 2012* where, in annotating s. 215 of the Act of 1963, the editors state (at p. 459):

> "Whilst English courts have been reluctant to allow the holder of a fully paid share to petition to wind up a company

> unless it can be shown that the member will have a tangible interest in the liquidation, as where there will be a substantial surplus of assets available for members, the Irish courts have been prepared to make a winding up order on a creditor's (sic) petition even where there is no prospect of a dividend in the liquidation."

The authority cited by the editors for that proposition is Re *Irish Tourist Promotions Limited* (1963 – 1993) ICLR 382, although it is recognised that this Court expressed some doubts, albeit obiter, as to whether a fully paid up shareholder has *locus standi* to present a petition for the winding up of the company on the ground of inability to pay debts in Re *La Plagne Limited* [2012] 1 ILRM 203.

35. The underlying facts and the background to the decision in the Irish Tourist Promotions case were outlined in some detail in the judgment in the *La Plagne* case. All of the issued shares in that case were fully paid. The petitioner was the owner of 43.6% thereof and he had an agreement to acquire another 12.6% thereof. The owner of the balance of 43.8% opposed the making of a winding up order. In making a winding up order, Kenny J. stated:

> "The company is insolvent: it cannot pay its debts. There is no prospect that it will ever trade profitably in the present circumstances and I think that it should be wound up by the Court.
>
> Before reaching this conclusion I have given consideration to the wishes of the creditors. They believe they have a better chance of being paid if the company is not wound up as the stock-in-trade will realise little if it is sold on the open market. Despite this, I think that the company should be wound up by the Court though the prospects of anyone being paid anything are remote."

As I stated in the *La Plagne* judgment, although this is not clear from the judgment of Kenny J., inspection of the original petition on the Court file revealed that the Petitioner asserted that it was just and equitable that the company be wound up, although s. 213(f) of the Act of 1963 was not expressly invoked. Indeed, as is clear from the judgment, there were s. 205 proceedings, which had been initiated by the other shareholder, in being, which had not been heard when the petition was heard.

36. There has been interesting academic commentary on the disparate approaches adopted in the United Kingdom and in this jurisdiction on the application of the Rica Gold Washing principle. In Lynch Fannon and Murphy on *Corporate Insolvency and Rescue* (Bloomsbury Professional), it is stated (at para. 2.43) that it is widely believed that in Ireland the "restrictive principle . . . has been ignored". That is a reference to the commentary in Ussher on *Company Law in Ireland* (Sweet & Maxwell, 1986). Ussher stated (at p. 273) that the principle has operated in an unnecessarily obstructive manner, referring to the *Othery Construction* case and the *Chesterfield Catering Co*. case and continued:

> "This restrictive principle has been ignored in Ireland. In *Re Irish Tourist Promotions Limited* a member succeeded in having a deadlocked company wound up on the just and equitable ground, despite the fact that it was insolvent, and that the majority of creditors were against a winding up. No authorities were cited but the case is consistent with s. 216(1) . . .. The English authorities have expressly held that this provision first introduced in 1908 was not intended to alter the tangible interest rule in the case of a member's petition."

The *Chesterfield Catering Co*. decision and also the Jenkins Committee are cited as authority for that last proposition. In the *Chesterfield Catering Co*. case a submission that the *Rica Gold Washing* principle was swept away when the analogue of s. 216(1), s. 225(1) of the Companies Act 1948, was introduced was rejected.

37. In annotating s. 208, which contains the definition of "contributory", the editors of MacCann & Courtney (*op. cit*.), having referred to the judgment of Kenny J., also refer to s. 216 in the following terms:

> "In the case of *Re Irish Tourist Promotion Board Ltd*. (22nd April, 1974, Unreported) H.C. (Kenny J.) a contributory succeeded in winding up a company on the just and equitable ground despite the fact that it was insolvent and that the majority of the creditors of the company were against the winding up. Kenny J. noted the insolvency of the company and the fact that in that case the petitioner accepted that he could not hope to get anything out of a liquidation. In coming to that conclusion no authority was cited but the decision is consistent with C.A., 1963, s.216(1)."

38. Section 216 is the section which deals with the powers of the Court on hearing a petition to wind up a company. Sub-section (1) provides:

> "On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but 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."

The rationale underlying the legislature's preclusion of the Court from refusing to make a winding up order on the ground only that all of the company assets are secured, a frequent phenomenon in the past five years, or that there are no assets, has been recognised for more than a century since the decision in Re *Crigglestone Coal Co. Ltd*. [1906] 2 Ch. 327. The passage from the judgment of Buckley J., at first instance, whose decision was upheld by the Court of Appeal, in that case most often cited is the following passage (at p. 332):

> "The company will often put forward, as if it were matter of defence, that there are no assets to wind up. It is not matter of defence at all. The Court has often refused an order upon that ground, but not because it lies in the debtor's mouth to say that he is not amenable to the jurisdiction because he has no property, but because the Court does not make an order when no benefit can result. If the order will be useful (not necessarily fruitful) there is jurisdiction to make it."

While in that case Buckley J. was considering the position of a creditor petitioner, it is logical that the commonsense approach adopted there should have general application in relation to winding up petitions irrespective of the capacity in which the petitioner presents the petition. Further, because of the increase in the number and type of remedies available to a liquidator or other stakeholders to pursue recovery of assets of a company which may have been wrongfully appropriated or dissipated in the past fifty years, s. 216 is of even more relevance today.

Conclusions on the criteria for determining whether a fully paid up contributory has *locus standi*

39. In identifying the criteria to be applied in determining whether, and in what circumstances, a fully paid up contributory may bring a petition to wind up a company, the first step, in my view, is to consider the statutory provisions governing by whom a petition may be brought. It is provided in s. 215 of the Act of 1963 that an application for the winding up of a company shall be by petition presented,

subject to the provisions of the section, either by the company, a creditor or a contributory. As to the scope of the entitlement of a contributory to bring a petition, the obvious starting point should be to read s. 215 in conjunction with s. 213, which sets out the circumstances in which a company may be wound up by the Court. In endeavouring to link a contributory to the grounds set out in s. 213, the following factors are relevant:

(a) In paragraphs (f), (g) and (h) of s. 215 it is provided that a specified public authority or a person nominated by such may initiate a winding up under paragraphs (ea), (fa), (h) and (i) of s. 213.

(b) There is a special provision in s. 215 as regards paragraph (g) of s. 213 which provides that a company may be wound up if –

> "the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case so, however, that the court may dismiss a petition to wind up under this paragraph if it is of opinion that proceedings under s. 205 would, in all the circumstances, be more appropriate."

Paragraph (e) of s. 215 provides that a petition for winding up on those grounds may be presented by a person entitled to bring proceedings for an order under s. 205, which would obviously include a fully paid up shareholder in appropriate circumstances.

(c) As is recorded earlier, paragraph (b) of s. 213 was repealed by the Act of 1983, as was paragraph (b) of s. 215. It is interesting to note that, prior to its repeal, paragraph (b) of s. 215 provided that a petition on the ground set out in paragraph (b) of s. 213 could not be presented "by any person except a shareholder", which obviously permitted a fully paid up shareholder to present a petition. Therefore, it would seem that the exception identified by Oliver J. in the *Chesterfield Catering Co.* case has been covered by legislation in this jurisdiction since at least 1963.

(d) That leaves paragraphs (a), (c), (d), (e), which is invoked in this case, and (f), which is also invoked in this case, of s. 213. While there is no specific provision in s. 215 as to who may present the petition invoking paragraph (a), that ground, on its terms, requires that the company has by special resolution resolved that the company be wound up. The paragraph (c) ground arises where the company does not commence business within a year or suspends business for a year. There is no restriction in either s. 213 or s. 215 as to who may invoke that ground. It is obviously a ground which could be appropriately invoked by a fully paid contributory. Paragraph (d) is specifically addressed in s. 215.

40. As to the three categories of petitioner generally provided for in s. 215, there are specific provisions in relation to two of them in s. 215, namely:

(a) Paragraph (a) provides that a contributory shall not be entitled to present a winding up petition unless one or other of two requirements are complied with. The first requirement corresponds to ground (d) in s. 213, that there has been a reduction in the number of members of a private company below two and, in the case of any other, company below seven. Once again, there has been legislative provision in this jurisdiction since 1963 which obviates the necessity of having to recognise an exception to the general principle enunciated in the Rica Gold Washing case, as suggested by Oliver J. in the *Chesterfield Catering Co.* case. As I have already recorded, the second requirement of paragraph (a) has been complied with by the Petitioner in this case, in that it has been demonstrated that the shares in respect of which it is a contributory, or some of them, either were originally allotted to it or have been held by it, and registered in its name, for at least six months during the eighteen months prior to the presentation of the petition.

(b) In paragraph (c) of s. 215 there is specific provision in relation to giving a hearing to winding up a petition presented by a contingent or prospective creditor, which is not relevant for present purposes.

41. In the light of the legislative framework which is clearly discernible on a comparison of s. 213 and s. 215, the question which arises is whether, as a matter of construction of the Act of 1963, there is any basis for the Court restricting the circumstances in which a fully paid up contributory may present a petition under paragraphs (e) or (f) of s. 213, or, indeed, on any other ground which may be invoked by a member, for example, on the basis of the general principle enunciated in the *Rica Gold Washing* case. I have come to the conclusion that there is not. In the case of paragraph (f), the just and equitable ground, which is frequently invoked in conjunction with paragraph (g) and s. 205 of the Act of 1963, the Oireachtas clearly intended that the Court should have a broad discretion. There is no logical reason why a fully paid up contributory should not be able to invoke that ground even if he cannot demonstrate that the company has tangible assets, bearing in mind the rationale underlying s. 316. Similarly, as regards the paragraph (e) ground, insolvency, a petition presented by a fully paid up contributory cannot be regarded as presented by a person merely having the status of an *amicus curiae*, because he has been conferred with the right to bring a petition by the Oireachtas in s. 215, subject to the express restrictions contained in paragraph (a) of s. 215. If the Oireachtas had intended that he should be precluded from invoking paragraph (e) of s. 216, it is reasonable to assume that it would have expressly so provided. As a matter of construction of s. 213 and s. 215 in the overall context of the Act of 1963 and, in particular, bearing in mind the rationale underlying s. 216, in my view, it is not open to the Court to imply such a preclusion.

42. Accordingly, the only criteria for determining whether a contributory has standing to bring a petition to wind up a company on any of the grounds set out in paragraphs (c), (e), (f) and (g) of s. 213 is whether compliance with paragraph (a) of s. 215 has been established. In the light of the provisions of the Act of 1963, the general principle enunciated in the *Rica Gold Washing* case has no application in this jurisdiction. A comparison of s. 213, s. 215 and s. 216(1) with the corresponding provisions of the UK Companies Act 1948 (s. 222, s. 224 and s. 225(1)), indicates that this Court is applying identical provisions differently to the manner in which the corresponding provisions were applied in the United Kingdom.

Criteria for determining whether the Company is unable to pay its debts

43. In aid of establishing the ground for making a winding up order provided for in paragraph (e), that the Company is unable to pay its debts, s. 214 identifies three circumstances in which a company shall be deemed to be unable to pay its debts, the only one of which, paragraph (c), can be invoked by the Petitioner in this case. Paragraph (c) requires that –

> ". . .it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

44. In this jurisdiction, there is no authority directly in point on the criteria to be applied in determining whether a company is "unable to pay its debts" for the purposes of s. 213(e). However, the meaning of "insolvency" in relation to a company was considered in a different context by the High Court (Barron J.) in *H. Albert de Bary and Co. NV v. O'Mullane* (High Court, Unreported, 2nd June, 1992) where Barron J. stated:

> "Insolvency is essentially a matter of assets and liabilities. If liabilities exceed assets, the position is one of insolvency. But the reverse is not necessarily true. A company is not solvent because its assets exceed its liabilities. It cannot for example take into account assets which it requires to remain in existence save insofar as they may be used as security to raise finance. The test is ultimately, can it pay its debts as they fall due . . .."

As authority for the last sentence in that passage, Barron J. cited the decision of the Supreme Court in *Crowley v. Northern Bank Finance* [1981] I.R. 353. That case concerned whether, for the purposes of s. 288(1) of the Act of 1963, the company was solvent when it created a floating charge within twelve months of the commencement of its winding up so as to avoid the floating charge being invalid. In his judgment, Kenny J. stated (at p. 358):

> "'Solvent' and 'insolvency' are ambiguous words. It has now been established by the decided cases that, for the purposes of s. 288 of the Act of 1963, the test to be applied in determining this question is whether immediately after the debenture was given, the company was able to pay its debts as they became due. The question is not whether its assets exceed in estimated value its liabilities, or whether a business man would have regarded it as solvent.
>
> . . . The question whether a company was solvent on a specified date is one of fact and it involves many difficult inferences. . . ."

On that basis, the test to be applied by the Court on this petition in determining whether the ground provided for in paragraph (e) of s. 213 has been satisfied is whether the Company was able to pay its debts as they became due when the petition was presented on 23rd January, 2013.

45. Although acknowledging that there has been a dearth of English case law on the topic, counsel for the Petitioner submitted that the Court should apply what has come to be known as the "cash flow test", not the "balance sheet test". Counsel did not point to any Irish authority which expressly considered the test. However, he did point out that it has come to prominence in Australian jurisprudence, where it is used for both bankruptcy and company liquidations. It was submitted on behalf of the Petitioner that the factors to be examined by the Court when considering the application of the cash flow test to the petition before the Court include the following:

> (a) the inability to pay debts includes 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.

The factor at (a) is certainly part of Irish law, having regard to the decision of the Supreme Court in *Crowley v. Northern Bank Finance* although, there is no specific authority in this jurisdiction as to how far into the future the Court must look to determine whether or not the Company can meet its debts as they fall due. In relation to the factor at (b), the Petitioner properly conceded that, in determining whether a company is able to pay its debts as they fall due, the Court is not limited to assessing whether cash in hand was adequate to cover the debts. Where other assets have to be resorted to, the factor at (b) certainly accords with common sense. If a company is relying on borrowings or raising capital by a share issue to meet current liabilities, the application of the factor at (c) also accords with common sense. Accordingly, while I do consider that in an appropriate case the factors at (b) and (c) may be relevant in determining whether a petitioner has proved that the company the subject of the petition was unable to pay its debts as they fell due at the relevant time, each petition must be considered on its own facts. It is unnecessary to express any view on the appropriateness of the cash flow test as distinct from the balance sheet test, having regard to the facts before the Court.

Company unable to pay its debts as they fall due ground established?

46. While the factual evidence as to the current financial state of the Company put before the Court by both the Petitioner and the Company has been outlined in considerable detail earlier, and I do not propose to repeat it, I think it is fundamentally contradictory that both in the petition and in the verifying affidavit the Petitioner should, on the one hand, seek to rely on the fact that the 2012 Interim Report shows a net current deficit of €80,000 to establish the inability of the Company to pay its debts while, on the other hand, the basis on which it asserts that the Court should intervene on a just and equitable ground is that the principal intangible asset of the Company, its shares in Limerick Zinc Limited, the value of which is stated to be €1,234,543, are at risk unless a liquidator is appointed to protect the assets. Although, as I have found, the Petitioner has standing to bring a petition to wind up the Company on a number of different grounds, including the grounds set out at (e) and (f) in s. 213, by adopting, from the outset, what can only be regarded as an inconsistent approach to the financial status of the Company as reflected in the 2012 Interim Report, questions about the Petitioner's credibility and concerns about his purpose in presenting the petition are certainly raised.

47. Aside from that, even without the evidence contained in Mr. Finn's affidavit, it would be impossible to conclude that the Petitioner has established that the Company is unable to pay its debts as they fall due, given the value of its intangible assets. What is striking is that Mr. Finn's affidavit has gone so far as to prove that, as he put it, bar directors' remuneration, the Company had sufficient funds to make all of the payments due by it as of 31st January, 2013, as they fell due.

48. It is difficult to give credence to the Petitioner's contention that the Company's intangible assets are not readily realisable, given that just six months before the petition was presented, the Petitioner made a proposal to the Company to purchase the Company's interest in Limerick Zinc Limited. Moreover, in support of the Petitioner's contention that the Court should be satisfied that it is just and equitable to wind up the Company, it was asserted in the petition that the financial interests of the creditors and contributories would be better protected by the making of a winding up order and the appointment of a liquidator "who will marshal the assets of the Company". The Petitioner elaborated on that point as follows:

> "In this regard, at the 20 November Meeting, Mr. Teeling personally confirmed to all attendees that the Company's beneficial interest in the shares of Limerick Zinc is freely transferable without any financial or other penalty or restriction. Therefore, the appointment of a liquidator will not prejudice the value of the Company's principal asset."

The contention that the intangible assets of the Company are not readily realisable contradicts that representation made to the Court in the petition. More significantly, there is no evidence before the Court that a situation has arisen, or will arise in the short to

medium term, in consequence of which, in order to meet its debts as they fall due, it will be necessary to realise the assets of the Company. On the contrary, the evidence shows that, with the exception of the remuneration of the directors, the Company has discharged its liability to its creditors. As regards the Company's liability for the directors' remuneration, what Mr. Finn, on behalf of the Company and its directors, has told the Court is that there has been, and there will continue to be, forbearance on the part of the directors in relation to requiring the Company to discharge its liability for their remuneration while the Company has insufficient cash to discharge the fees.

49. That leads to the Petitioner's contention that, while Mr. Finn averred that the Company "will in the future raise funds from shareholders as required", the Company has not put before the Court any credible evidence of likely funding and the Petitioner's assertion that in these "tough times" it is highly unlikely that the Company will be able to raise significant funds through a share issue in the near future. Apart from its speculative nature, that contention would seem to be at variance with the Petitioner's own activity after 28th June, 2012 in enlarging its shareholding. Aside from that, the true position is as outlined in the next preceding paragraph. At this point in time the Company does not need to raise funding to discharge its debts as they fall due.

50. In relation to the reliance of the Petitioner on the note in the 2011 Audited Accounts addressed earlier, it demonstrates the weakness of the Petitioner's case that it had to resort to it. The accounts were audited by Deloitte & Touche and they contained the required independent auditor's report to the members of the Company. It would be wholly inappropriate to draw any inference from the note as to the financial state of the Company when the petition was presented.

51. Similarly, the Petitioner's reliance on the "Exploration Update" document and the information disclosed at the meeting on 20th November, 2012 demonstrates the weakness of the Petitioner's case. As Mr. Finn explained, the Company's directors made a commercial decision as to how the joint venture agreement would operate for one year and they disclosed that to the members. The Court cannot draw any inference from the manner in which the directors run the business of the Company as to the solvency or insolvency of the Company.

52. Accordingly, the Petitioner has not discharged the onus it assumed of proving that the Company was not able to pay its debts as they fall due.

Just and equitable ground established?
53. It was submitted by counsel for the Company that the Petitioner had not suggested that the case falls within any of the established categories in which the Court will be satisfied that it is just and equitable that an order be made to wind up the Company, identifying those categories by reference to the six categories outlined in Courtney on *The Law of Companies* (3rd Ed.) at para. 23.092. What I propose in relation to this aspect of the Petitioner's case is to identify the case made in the petition and to determine whether it falls within any of the recognised categories by reference to which the Court will find that it is just and equitable to wind up the Company, without outlining those categories. The focus will be on the contents of the petition and not on the embellishment contained in Mr. Hardy's replying affidavit or the Petitioner's submissions.

54. The basis on which it was asserted in the petition that the Court should be satisfied that it would be just and equitable to wind up the Company can be stated concisely. As already recorded, the Petitioner asserted that the value of the intangible assets cannot be protected while the current management and directors of the Company remain in situ, because Mr. Finn and Mr. Teeling have been and continue to be the subject of legal proceedings in Dallas in the State of Texas, which involve allegations of breach of fiduciary duties and wrongdoing in the exercise of their functions as directors of a company, Endeavour Oil & Gas, Inc, which is chartered under the laws of the State of Delaware. The Petitioner would lose confidence in Mr. Finn's and Mr. Teeling's ability to continue as directors of the Company, if the allegations against them are found to be true. As I have recorded in the previous judgment, Mr. Finn's response in his affidavit is to characterise the assertions made in the petition and in Mr. Hardy's grounding affidavit as "bare and baseless grounds". The legal proceedings in Dallas have nothing to do with the Company. They have been widely reported. The case has been defended and the directors are confident of success. In his replying affidavit Mr. Hardy went further than in his grounding affidavit, averring that any faith he had in the directors' competence "had long evaporated" and that his confidence in them had been "further eroded". Mr. Hardy expressed particular concern that "the Company may have substantial tax obligations about which no provision has been made in the Company's accounts", which, as I understand the Petitioner's concern, relates to tax on the unpaid directors' fees which have been accruing. The basis of the concern expressed is wholly speculative and there is no evidence whatsoever in support of it.

55. Accordingly, the basis on which the Petitioner has sought to satisfy the Court that it would be just and equitable to wind up the Company is that it has lost confidence in the directors. It will be recalled that the Company is a public limited company and that the Petitioner is one member out of in excess of four hundred members of the Company. The Petitioner's claim that the Company should be wound up on the ground that it is just and equitable to do so because he no longer has confidence in the directors of the Company is utterly unstateable. If it were otherwise, a disgruntled shareholder could cause mayhem in the corporate sector. While breakdown of mutual trust and confidence is recognised as a factor which may satisfy the Court that it is just and equitable to wind up a particular type of company, that is to say, a company which is in essence a quasi-partnership, that principle does not apply to the Petitioner, as the owner of the 6.23% shareholding in a listed public limited company, even if there was substance in the Petitioner's allegations which, in my view, has not been established.

56. Accordingly, the Petitioner has not satisfied the Court that it would be just and equitable to wind up the Company.

Summary of conclusions
57. Although I have come to the conclusion that, under Irish law, a fully paid up contributory has *locus standi* to bring a petition to wind up the Company on the grounds relied on, in this case the Petitioner has not established either of those grounds for making a winding up order and, in particular, it has not been established that –

(a) the Company is not able to pay its debs as they fall due; or

(b) it would be just and equitable to wind up the Company.

The petition is dismissed and that is the end of the matter.

58. By way of general observation, I find it difficult to countenance circumstances in which the decision of the Court on a petition to wind up a company in this jurisdiction would be conditional on undertakings being given by interested parties not to pursue claims against the company. I would observe that in the Australian case cited by counsel for the Petitioner, *Brolrik Pty Limited v. Sambah Holdings Pty Limited* [2001] 1 NSWSC 1171, in this connection, the issue was whether a winding up order made at first instance should be terminated. In any event, in this jurisdiction it is not the practice of the High Court to exercise its jurisdiction under s. 216

by making what is sometimes referred to as an "unless" order, for instance, by making the type of order suggested by the Petitioner – an order that the Company will be wound up unless the directors undertake not to seek payment of the fees which have accrued and will accrue to them – for a variety of reasons, including the following:

(a) the effect of s. 220 of the Act of 1963, which provides that a compulsory winding up shall be deemed to commence at the time of the presentation of the petition for the winding up; and

(b) the effect of s. 218 of the Act of 1963, which provides that in a compulsory winding up, any disposition of property of the company, including things in action, and any transfer of shares or alterations in the status of members of the company, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void.