Neutral Citation Number: [2010] IEHC 111

THE HIGH COURT

2010 6 COS

IN THE MATTER OF SILVERHOLD LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009

Judgment of Miss Justice Laffoy delivered on the 12th day of April, 2010.

Petition

1. This petition to wind up Silverhold Limited (the company) was presented by Gilroy Gannon (the petitioner), Chartered Accountants and Registered Auditors, on 6th January, 2010. It is based on non-compliance with a demand under s. 214(a) of the Companies Act 1963 (the Act of 1963), which was dated 9th November, 2009. In the s. 214 demand it was alleged that there is a lawful debt due by the company to the petitioner in the sum of €96,800 in respect of professional fees rendered to Leftbrook Limited (Leftbrook) and the company, for all of which debt the company acknowledged responsibility on 20th October, 2008, detailed particulars of which it was stated had already been furnished. The petition was verified by the affidavit of Eithne Friel sworn on 8th January, 2010. It was duly advertised. When the petition came on for hearing, all of the petitioner's formal proofs were in order. However, the debt was disputed by the company and the evidence before the Court comprised:

(a) an affidavit sworn by Kieran McKenna, a director and shareholder of the company, filed on 27th January, 2010;

(b) a supplemental affidavit sworn by Ms. Friel, who is a partner in the petitioner's firm, on 28th February, 2010;

(c) a further supplemental affidavit sworn by Ms. Friel on 12th March, 2010; and

(d) a further affidavit sworn by Mr. McKenna on 19th March, 2010.

Evidence of the petitioner's relationship with the company and the background to the debt

2. In 2006 the company and Leftbrook were associated companies, in the sense that they shared directors and had common shareholders. Leftbrook was the owner of a licensed premises known as An Sibin in the town of Cavan. The petitioner's involvement in Leftbrook and the company arose out of a proposed sale of An Sibin by Leftbrook to Canice Nicholas. Mr. McKenna, in his first affidavit, has described Leftbrook as a subsidiary of the company, and he has averred that the retainer of the petitioner by Leftbrook was suggested by the solicitor acting for Mr. Nicholas in the purchase of An Sibin for the purpose of advising on a re-organisation of the corporate structure of Leftbrook, which would enable Mr. Nicholas to acquire An Sibin through a share purchase rather than a purchase of the property itself.

3. Chronologically, the earliest document before the Court is a copy of Heads of Agreement dated 14th February, 2007 made between Leftbrook and Mr. Nicholas. In that document, Leftbrook agreed to take steps, which are outlined in general terms, whereby the trade, premises and licence of An Sibin would end up in a new company which would trade for a period of ten months. Then Mr. Nicholas would, by way of share purchase agreement, purchase the entire issued share capital in the new company for €3.5m, the purchase to be completed on 17th January, 2008. It was provided that the purchase price excluded the publican's licence but that Mr. Nicholas would have the option to purchase the licence and the fixtures and fittings at the price of €200,000 on completion, if planning permission was refused. It was provided that a deposit of €1m would be paid by Mr. Nicholas on the signing of the document, which would be released to Leftbrook. Finally, it was provided that Leftbrook would be "responsible for paying €40,000 towards fees of" the petitioner. The Heads of Agreement were signed by Mr. McKenna on behalf of Leftbrook and by Mr. Nicholas. It is pleaded in the statement of claim in the plenary proceedings between Leftbrook and Mr. Nicholas referred to later that the solicitors acting in the transaction for both parties were present at the meeting at which the Heads of Agreement were signed, although the signatures were not witnessed.

4. There is conflict as to whether the petitioner had any involvement with Leftbrook prior to the execution of the Heads of Agreement. Mr. McKenna has averred that he had a telephone call with a partner in the petitioner, Ken McMoreland, before the meeting and asked for assurances in relation to what Mr. McKenna has referred to as "the scheme". Mr. McKenna has averred that Mr. McMoreland's response was that "he could not put them in writing but that he could stand over the scheme 100%". In an affidavit sworn on 28th February, 2010 Ms. Friel averred that Mr. McMoreland was a former partner in the petitioner, who left the partnership in February 2008. Ms. Friel averred that, far from the petitioner ever being reluctant to put its tax advice in writing, it is the petitioner's policy never to provide tax advice other than in writing. There is also conflict as to when the petitioner became aware of the deposit of €1m paid under the Heads of Agreement. It is the petitioner's position, as averred to by Ms. Friel, that it did not become aware of that payment until after the petitioner was formally retained by Leftbrook on 31st October, 2007.

5. In support of his contention that Mr. McMoreland advised him that "he could stand over the scheme 100%" and gave him that advice in the knowledge that Mr. McKenna was about to sign the Heads of Agreement "the effect of which was that there was a binding agreement in relation to the transfer and that a non refundable deposit would be paid", Mr. McKenna exhibited and relied on a series of e-mails after the petitioner was formally retained. The first was an e-mail of 11th December, 2007 from Ms. Friel to Brian Dillon, the company's financial controller, in which Ms. Friel sought confirmation from the solicitors for Leftbrook that no legally binding contract for sale of An Sibin existed and that the deposit received was refundable and in which she added that she would "discuss with Ken the relevant conversation he had last February with Kieran & Canice re this matter". Mr. McKenna has also laid emphasis on a statement in an e-mail from Ms. Friel to Mr. Dillon dated 14th December, 2007, in which Ms. Friel stated that she had spoken with Mr. McMoreland regarding the deposit and that he had agreed with her comments that the petitioner required a letter in writing from the solicitor confirming that there was "no legally binding contract in place between Cara Pharmacies and the McKenna Brothers" and, in addition, the petitioner required confirmation "that any deposit received is a refundable deposit". The same issues were pursued in

a further e-mail dated 18th December, 2007 from Ms. Friel to Mr. Dillon. In fact, Mr. McKenna "for and behalf of the Silverhold Group", in a letter dated 9th January, 2008 to the petitioner, confirmed that he had received a deposit "on behalf of the Silverhold Group" in the sum of €1m from Mr. Nicholas on behalf of Cara Pharmacies Limited in February 2007 and that the deposit represented "a refundable deposit which will be refunded by the Silverhold Group should the purchase of An Sibin not proceed". Mr. McKenna also confirmed that there was "no signed contract in place between [himself], the Silverhold Group, Canice Nicholas or Cara Pharmacies Limited".

6. The process by which the petitioner was formally retained started in April 2007. A meeting took place in April 2007 between the Leftbrook's auditor, Frank Hanley, and Ms. Friel. Ms. Friel has averred that this was simply a "fact finding" exercise and, in support of this she exhibited an e-mail of 25th April, 2007 from the petitioner to Mr. Hanley seeking certain documentation. Apparently the next contact was a meeting which took place on 11th October, 2007 when Mr. McKenna attended at the petitioner's offices with Mr. Hanley and Mr. Dillon. Ms. Friel has averred that the purpose of this meeting was to discuss "the proposed restructure of the Leftbrook Group (sic)" and the requirement for consequent tax advice. Following that meeting the petitioner issued two letters dated 31st October, 2007 which were addressed to the Board of Directors of Leftbrook. The first was a letter setting out the petitioner's "terms of … engagement in relation to the group re-organisation". In relation to fees, the petitioner stated that it was estimated that their fee for the assignment would be €120,000 plus VAT, excluding outlay, of which €60,000 plus VAT would be payable immediately on the signing of the letter and the balance payable on completion. Mr. McKenna and Raymond McKenna, the other director of Leftbrook, signified their agreement to the terms of that letter at the foot thereof. There was also a provision that either side might terminate the engagement letter by written notice at any time but, in that event, Leftbrook would pay the petitioner's fees pro-rata to the date of termination. Neither the petitioner nor the company has alluded to that provision and I assume that there was no termination by written notice.

7. The other letter was a letter of advice setting out the tax implications of the proposed corporate re-organisation, which ran to thirteen pages and was accompanied by ten pages of schedules. The issue of fees was also dealt with in that letter (at p. 12). It envisaged the restructuring being implemented on a staged basis referred to as Step 1 and Step 2.

8. While I surmise that the documentation which both sides have put before the Court only reflects some of the dealings between the parties, it is clear that from December 2007 onwards the petitioner was heavily engaged on behalf of the Silverhold Group, not merely with the Revenue Commissioners, but also with Ulster Bank Limited, the company's bank.

9. There was "one-sided" correspondence between the petitioner and Leftbrook in relation to fees between April 2008 and September 2008. The first item exhibited is an e-mail of 22nd April, 2008 from Ms. Friel to Mr. Dillon in which it is disclosed that "in the light of cash flow difficulties experienced by Leftbrook", the petitioner had agreed to accept a reduced deposit of €30,000 plus VAT. In that e-mail Ms. Friel summarised what she called "the balance of time on the clock net of the deposit of €30,000 plus VAT paid to date", which aggregated €51,730 plus VAT, which it was proposed to invoice on the completion of "Step 1" in the re-organisation process. In fact, an invoice for €55,000 plus VAT making €66,550 in total dated 3rd June, 2008 was sent to Leftbrook with a letter of the same date which itemised the "current time charges". There were delays in getting to the completion of "Step 1". In a letter of 29th September, 2008 to Leftbrook, Ms. Friel indicated that she expected that "Step 1" would be completed within the next ten days.

The company's liability to the petitioner

10. The company came into the picture as having liability for the petitioner's fees in October 2008. In a letter dated 20th October, 2008 addressed to the petitioner, which was headed "Silverhold Restructuring" and was signed by Mr. McKenna, it was confirmed that the company would discharge the fees "on completion of Steps 1 & 2". In the final paragraph of that letter, Mr. McKenna referred to "the Professional Fees Financing options through your offices in association with IIB Bank", to which I will return later, and indicated that he had not received the loan application and would be obliged if it could be forwarded for completion. In his first affidavit Mr. McKenna has averred that the petitioner coerced him into signing the letter of 20th October, 2008 by stating that it would not carry out any further work unless he did so. He also averred that the letter was contrary to the original agreement which stipulated that all fees would be paid on completion. Ms. Friel in her first supplemental affidavit has asserted that Mr. McKenna's averment is untrue and that she had requested the company to confirm that the petitioner's fees would be discharged because it had previously "bounced" a cheque on the petitioner and it had paid no monies on account since January 2008. She further averred that the petitioner had completed "Step 1" and "Step 2" as referred to in the letter of 20th October, 2008. In his final affidavit, Mr. McKenna accused Ms. Friel of being "somewhat disingenuous", in that a cheque was "bounced" but it was paid in full within a few days. The cheque in question, which was for €15,000 plus VAT, was the second instalment of the €30,000 together with VAT, which was to be paid upfront, and it did "bounce" in January 2008 and was replaced by a bank draft. In any event, that letter of 20th October, 2008 is the letter referred to in the s. 214 demand. Further, Ms. Friel has pointed to the Business Transfer Agreement referred to later as giving the lie to the underlying rejection by the company of its liability for the petitioner's services.

11. Prior to 20th October, 2008 there had been executed what is described as a Business Transfer Agreement dated 7th October, 2008 and made between Leftbrook of the one part and the company of the other part, which was part of the corporate restructuring process, whereby, with effect from 7th October, 2008, Leftbrook transferred and the company acquired as a going concern all the undertaking and the assets of the business of Leftbrook, including An Sibin, "in consideration for an amount equal to the net assets taken over" which was to be represented by "an inter-company liability". The company also took over the liabilities of Leftbrook.

12. The putting in place of what was referred to by Mr. McKenna as "the Professional Fees Financing option", referred to in the letter of 20th October, 2008, commenced in November 2008. This was a Professional Fees Finance Loan Agreement between the company and IIB Bank whereby the company would borrow €66,550 from IIB Bank, which together with interest would be repayable by eleven monthly instalments, for the purpose of paying the professional fees due to the petitioner. The relevant application form was signed on behalf of Silverhold on 27th November, 2008 by Mr. McKenna and Raymond McKenna and on behalf of the petitioner on 3rd December, 2008. The application included an instruction to the company's bank to pay the monthly instalments to IIB Bank by direct debit. In her supplemental affidavit sworn on 12th March, 2010 Ms. Friel has averred that, by agreement with Mr. McKenna, following the completion of Step 2 on 16th December, 2008 the application form was submitted to IIB Bank. As I understand it, while the petitioner was advanced the sum of €66,550 by IIB Bank, as the first direct debit due by the company to IIB Bank on 9th February, 2009 was dishonoured, and according to Ms. Friel deliberately dishonoured by Mr. McKenna, the petitioner has had to repay the loan advanced by IIB Bank and has incurred further interest, costs and charges. That was the state of play when the fact that the company was disputing the petitioner's fees was first mentioned on the documentation before the Court, which is to be found in an e-mail of 6th March, 2009 from Ms. Friel to Mr. McKenna and, *inter alia*, the company's then solicitor.

The dispute
13. In the e-mail dated 6th March, 2009, Ms. Friel, having stated that she had been advised that the petitioner's fees were being disputed, outlined the sequence of events in relation to the fees payable to the petitioner starting with the letter of 31st October, 2007 setting out the terms of engagement through to the cancellation of the direct debit in favour of IIB Bank. The punch line in that letter was that the petitioner held the original documentation for Step 2 and would not file those documents with the Stamps Branch of the Revenue Commissioners until the matter of its fees was resolved. However, the petitioner later resiled from that position and the original documents were lodged in the Stamps Branch at the beginning of April 2009.

14. The e-mail of 6th March, 2009 and subsequent correspondence clarifies the build up of the claim for fees in the sum of €96,800 by the petitioner. The debt claimed comprises:

> (a) fees in the sum of €55,000 together with VAT at 21% amounting to €11,550, aggregating €66,550, as *per* the invoice dated 3rd June, 2008 referred to earlier in paragraph 9; and
>
> (b) fees in the sum of €25,000 together with VAT at the rate of 21%, aggregating €30,250.

It is stated in the e-mail of 6th March, 2009 that the fees at (b) above were claimed as interim fees in November 2008. In a letter of 9th April, 2009 to Mr. McKenna, the petitioner claimed that fees in the sum of €66,550 inclusive of VAT and €30,375 inclusive of VAT (this figure, I assume, reflecting the increase in the rate of VAT from 21% to 21.5% effective from 1st December, 2008) were outstanding and due. However, in his replying affidavit, Mr. McKenna averred that Leftbrook received only one invoice, in the sum of €66,500. While no copy of the invoice from November 2008 has been exhibited, there is ample evidence before the Court that the petitioner was claiming from the company fees inclusive of VAT amounting to €96,800 and that Mr. McKenna must have been aware of that fact.

15. The petitioner continued to press the company for the outstanding fees and its solicitors, RDJ Glynn, took up the cudgels on its behalf on 29th September, 2009 and ultimately issued the s. 214 demand on 9th November, 2009.

Legal proceedings by Leftbrook
16. It is clear from the affidavits and exhibits before the Court that a dispute has arisen between Leftbrook and Mr. Nicholas in relation to the sale of An Sibin. That dispute is not before the Court and caution has to be exercised in referring to it. However, it is necessary to record that on 4th September, 2009 plenary proceedings (Record No. 2009/8050P) were initiated between Leftbrook, as plaintiff, and Mr. Nicholas, as defendant, claiming specific performance of the Heads of Agreement dated 14th February, 2007. A statement of claim was delivered on 29th September, 2009. In his most recent affidavit Mr. McKenna has exhibited a defence which was delivered on behalf of the defendant in those proceedings as recently as 3rd February, 2010. The retainer of the petitioner to give taxation advice in connection with the sale of An Sibin is an integral element in Leftbrook's case, as pleaded. To avoid unintentionally putting a gloss on the respective positions of Leftbrook and Mr. Nicholas, I propose to quote from the pleadings.

17. In the statement of claim it is pleaded as follows by Leftbrook:

> "9. The Plaintiff and the Defendant employed Gilroy Gannon Chartered Accountants in order to advise the parties as to the implementation of the February 2007 agreement in the most tax efficient manner. As part of that advice Messrs. Gilroy Gannon informed the Plaintiff that in order to obtain Revenue Clearance as contemplated by the February 2007 agreement that confirmation was required that there was no legally binding contract in place between the Plaintiff and the Defendant and that the deposit paid of €1 million was a refundable deposit.
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> 10. On or about the 10th day of January, 2008 (sic) the Silverhold Group (of which the Plaintiff is a subsidiary) confirmed that the sum of €1,000,000.00 furnished in February 2007 was a refundable deposit and that there was no signed contract in place between the Silverhold Group and Cara Pharmacies Limited. The said letter was written on the instruction and on the advices of Gilroy Gannon and did not affect the enforceability of the February 2007 agreement which has at all material times remained binding both on the Plaintiff and the Defendant."

18. Paragraphs 9 and 10 of the statement of claim are addressed as follows in the defence delivered on behalf of Mr. Nicholas:

> "6. The Defendant awaits documentation and particulars relating to the advices referenced at paragraph 9 of the Statement of Claim. Pending receipt of those particulars and documents, the Defendant makes no admission in relation to that paragraph save as follows: it is admitted that the Revenue Clearance as contemplated by the February 2007 heads of Agreement required that there be no legally binding contract in place between the Plaintiff and the Defendant for the sale of the public house and that the deposit paid of €1,000,000.00 was a refundable deposit.
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> 7. The letter written on 10th January, 2008 is admitted and the Defendant will rely on the said letter together with the factual background against which it was written to demonstrate its true meaning and effect. The Plaintiff's characterisation of the letter in paragraph 10 of the Statement of Claim is denied, in particular the allegation that it did not affect the enforceability of the alleged February 2007 agreement.
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> …
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> 11. Further and/or in the alternative, any enforceable contract ever existing between the Plaintiff and the Defendant as alleged in the Statement of Claim, was discharged by mutual accord in letters exchanged on 9 and 10 January, 2008.
>
> 12. Further and/or in the alternative, if, as alleged by the Plaintiff (but denied by the Defendant), the said letters did not affect the enforceability of the heads of agreement of 14th February, 2007, the said agreement is illegal and/or tainted with [illegality] and/or the Plaintiff is not entitled in equity to specific performance thereof …"

Company insolvent?
19. The basis of the petitioner's petition is that by virtue of the provisions of s. 214 of the Act of 1963 the company is deemed to be unable to pay its debts because of non-compliance with the demand dated 9th November, 2009. In her most recent supplemental affidavit sworn on 10th March, 2010, Ms. Friel averred that, not only is the petition herein not an abuse of process as contended by

the company, but the company ought in all of the circumstances be wound up in any event. The basis of this assertion is that the company had not filed any annual returns with the Companies Registration Office (CRO) since 31st January, 2008 when it submitted returns for the financial year ended 30th April, 2007. Ms. Friel exhibited no less than fourteen recent searches in the CRO in relation to companies of which Mr. McKenna currently is a director (eleven) and of which (the remaining three) he was formerly a director. She further averred that there is no evidence of the company's solvency available to the Court.

20. In his final affidavit, Mr. McKenna has averred that the company's accounts have been finalised and filed and he has exhibited what appears to be the Signature Page of the relevant form B1 which was signed by the company's auditors, Francis Hanley & Co. Ltd., on 18th March, 2010.

21. As the petition is based on a s. 214 demand it is for the petitioner to establish that there exists a deemed insolvency by virtue of s. 214. The fact that the company may have been late in filing the most recent annual returns is irrelevant. If the company has put before the Court a basis on which the Court should not find that a deemed insolvency exists, for example, that the debt claimed is properly disputed in accordance with the test outlined later, and the core issue is whether the company has done that, in my view, there is no onus on the company to produce evidence of solvency.

The basis on which the company disputes the debt

22. The company, through Mr. McKenna, has put forward a number of reasons why the Court should find that the presentation of the petition was an abuse of process and that it should be dismissed. First, he alleges that the contract which the petitioner had was with Leftbrook, not with the company. Secondly, he alleges that, in any event, there are no fees due by Leftbrook because the transaction, which I understand to mean the sale of An Sibin, was never closed and the fees were due on completion. Thirdly, he alleges that the advice given by the petitioner and the structures put in place by the petitioner have caused difficulty for Leftbrook and resulted in the specific performance proceedings. In his most recent affidavit, Mr. McKenna has averred that, as a result of the defence received from the solicitors for Mr. Nicholas, a decision has been made that proceedings will be instituted against the petitioner but that, before the proceedings can be instituted, an expert must be retained by the company and the company is in the process of doing that. In his first affidavit Mr. McKenna alleged negligence and breach of contract on the part of the petitioner in advising Leftbrook. He also alleged that the petitioner acted improperly in advising both Leftbrook and Mr. Nicholas. In his first affidavit, Mr. McKenna surmised that Mr. Nicholas would respond to the specific performance proceedings on the basis that there was no binding agreement and averred that, in that event, the petitioner would be joined "as co-defendants to the proceedings for negligence and breach of contract and for damages for the clear conflict of interest in representing both sides to the transaction", on the basis that "the petitioner caused very significant loss to the company and to Leftbrook which as yet is not fully ascertained". That seems to differ from the position adopted in the later affidavit, which seems to envisage that separate proceedings will be instituted against the petitioner.

The law

23. The test to be applied by the Court when a company resists a petition to wind up on the basis that the debt is disputed or, alternatively, that it has a cross-claim against the petitioner was set out by the Supreme Court in *Re WMG (Toughening) Ltd. (No. 2)* [2003] 1 I.R. 389. In his judgment, with which the other judges of the Supreme Court concurred, McCracken J. stated (at p. 392):

> "The company is opposing the petition on the basis that the debt referred to therein is the subject matter of a *bona fide* dispute and that the company has a cross-claim against the petitioner for monies in excess of the amount claimed by him. …
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> There is no real dispute between the parties as to the proper test to be applied by the court in the circumstances. That test is set out in the judgment of Buckley L.J. in *Stonegate Securities v. Gregory* [1980] Ch. 576 at p. 579, and has already been approved by this court in *Re Pageboy Couriers Ltd.* [1983] ILRM 510. The passage reads at p. 512:-
>
> > 'If the Company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce a payment of a debt which is *bona fide* disputed'.
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> It is also accepted by the parties that the subject matter of the *bona fide* dispute may in fact not be the debt itself but rather a cross-claim by the company against the petitioner. The issue, therefore, is whether the company's claim in the present case is a claim made in good faith and on substantial grounds. It is clear that the issue is not whether the company will succeed in its claim, but whether it is a *bona fide* dispute which should be determined by the courts in the normal way without putting the company's existence at risk."

24. Although I think I am correct in stating that the company's position vis-à-vis the petitioner on this petition was not characterised on behalf of the company as a cross-claim, my understanding is that the company contends that it has a cross-claim for an unquantified amount against the petitioner. The status of a cross-claim as an answer to a winding up petition was considered more recently in *Re Emerald Portable Building Systems Limited* [2005] IEHC 301, in which the company both disputed the debt and contended that it had a cross-claim against the petitioner. Having referred to the decision of the Court of Appeal of England and Wales in *Re Bayoil S.A.* [1999] 1 All E.R. 374, which was a case in which the debt was not disputed but the company asserted that it had a *bona fide* cross-claim for a greater sum, Clarke J. stated:

> "It is clear, therefore, that a cross-claim can afford a company an answer to a winding up petition even in circumstances where that cross-claim would not amount to a set-off in equity so as to afford a defence to a claim for a liquidated sum. It follows that there may be cases where a plaintiff creditor might be entitled to obtain judgment against a company but where the same debt might, by virtue of a substantial cross-claim, be insufficient to lead to a winding up."

As to the nature of a cross-claim which would be an answer to a winding up petition, Clarke J. adopted the following passage from the judgment of Nourse L.J. in the *Bayoil* case (at p. 382):

> "I emphasise that the cross-claim must be genuine and serious or if you prefer one of substance, that it must be one

which the company has been unable to litigate and it must be in an amount exceeding the amount of the petitioner's debt."

On the facts before him, Clarke J. held that there was a *bona fide* cross-claim of sufficient substance to justify dismissing the petition, having found that there was an acceptable explanation for the absence of cross-claim proceedings due to a failure on the part of the company's solicitors.

Application of the law to the facts

25. In determining whether the company is "in good faith and on substantial grounds" disputing liability for the debt of €96,800 or has a genuine and serious cross-claim against the petitioner in an amount exceeding €96,800, which it has been unable to litigate, or both, it is necessary to identify the extent to which the evidence before the Court supports the *bona fides* of the company in disputing the petitioner's entitlement to the amount claimed or otherwise.

26. In my view, the following matters cannot be gainsaid by the company:

(a) Leftbrook accepted liability for fees estimated at €120,000 plus VAT and for the payment of €60,000 plus VAT upfront on the signing of the letter of engagement dated 31st October, 2007 by the directors of Leftbrook. The balance was payable "on completion".

(b) The petitioner accepted a payment upfront of €30,000 plus VAT, rather than €60,000 plus VAT, as had been agreed.

(c) By the letter dated 20th October, 2008 Mr. McKenna, a director of the company, confirmed that the company would discharge the fees due to the petitioner "upon completion of Steps 1 & 2". At that stage the invoice dated 3rd June, 2008 in the VAT inclusive sum of €66,550 had already issued. It would appear that, in any event, the liability of Leftbrook for the fees due to the petitioner had already passed to the company by virtue of the Business Transfer Agreement dated 7th October, 2008.

(d) A further invoice for a VAT inclusive fees of €30,250 issued in November 2008, although a copy of that invoice has not been exhibited. However, the petitioner did not request payment on foot of the November invoice until it issued the letter of 9th April, 2009.

(e) The petitioner sought payment of the June invoice in November 2008 and, on the evidence, I am satisfied that the company agreed to discharge the amount due (€66,550) by means of the loan from IIB Bank and agreed to the submission of the loan application form to IIB Bank at the end of December 2008 and to the processing and advancement of the loan to the petitioner in January 2009. Therefore, I am satisfied that the proper inference to be drawn is that the company accepted liability to the petitioner for €66,550 in January 2009. Because it had guaranteed payment of the instalments due by the company to IIB Bank, the petitioner had to repay to IIB Bank the sum of €66,550 which it had received, when the company, through Mr. McKenna, cancelled the direct debit. Mr. McKenna's explanation, in his final affidavit, that he cancelled the direct debit because the petitioner had "withheld our title deeds and did not conclude Step 2" does not stand up to scrutiny. In an e-mail of 17th December, 2008 to Mr. McKenna, Ms. Friel confirmed her understanding, on the basis of a call, which I take to mean a telephone call, with Mr. McKenna that morning that the petitioner could proceed to submit the loan application to IIB Bank and that it would be processed before Christmas. The first direct debit was presented for payment on 9th February, 2009 and dishonoured. Subsequently, on the basis of Mr. McKenna's assent, it was re-presented on 23rd February, 2009, but it was not paid because it was cancelled on the instructions of Mr. McKenna. Ms. Friel learned from an official of the company's bank, Ulster Bank on 4th March, 2009 that Mr. McKenna had cancelled the direct debit in person on the basis that he was disputing the petitioner's fees.

(f) Despite e-mails from Ms. Friel to Mr. McKenna on 6th March, 2009 and to the solicitors for the company on 11th March, 2009, formal letters dated 9th April, 2009 from the petitioner to both directors of the company and a reminder of 23rd April, 2009, a letter dated 9th September, 2009 from the petitioner to the company's current solicitors, and the correspondence of 29th September, 2009 from the petitioner's solicitors to both the company and Leftbrook and the s. 214 notice dated 9th November, 2009, neither Mr. McKenna nor anybody on behalf of the company intimated directly to the petitioner that the fees marked on the June 2008 invoice were being disputed or the basis of such dispute or the reason for cancelling the direct debit in favour of IIB Bank. In the letter of 6th March, 2009 from the company's then solicitors to the petitioner, which was obviously intended to be a response to Ms. Friel's e-mail of 6th March, 2009, the company's solicitors required the petitioner to lodge the Step 2 documentation with the Revenue Commissioners and merely commented that "perfection of security and settlement of any account are separate matters".

27. In summary, I am satisfied that there is cogent evidence before the Court that the company was liable to the petitioner for VAT-inclusive fees in the amount of €66,550 from the beginning of 2009 and that the company has not established that it is disputing that portion of the debt in good faith and on substantial grounds. In particular, I do not find Mr. McKenna's averment that he was coerced or pressurised by Ms. Friel into signing the letter of 20th October, 2008 on behalf of the company credible, because it is so patently inconsistent with his request in the last paragraph in relation to the loan application and with what transpired subsequently.

28. I take a different view in relation to the November 2008 invoice. As I have stated, the petitioner did not claim payment on foot of that invoice until 9th April, 2009. At that stage, the petitioner had lodged the Step 2 documentation with the Revenue Commissioners. It is not clear how the adjudication process turned out. It would appear from the letter of 9th September 2009 from the petitioner to the company's current solicitors that the petitioner resigned as agents for the company and notified the Revenue Commissioners of that fact on 6th May, 2009. Therefore, it is not clear whether the petitioner saw out the adjudication process of the Step 2 documentation. There is nothing before the Court to suggest that the company ever acknowledged liability for the sum claimed on foot of the November invoice. On the evidence, it is not possible to find that the company is not disputing this part of the debt in good faith and on substantial grounds.

29. However, in his judgment in *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd*. [1996] 1 I.R. 12, Keane J. emphasised that the company must dispute "any liability in respect of the alleged debt" in good faith and on substantial grounds to have the petition dismissed or, alternatively, to have the presentation of a petition restrained. He stated (at p. 24):

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

restrained from presenting a petition."

It seems to me that the same principle must apply where the Court is satisfied that the company has an undischarged liability to the petitioner in excess of €1,269.74 on foot of a s. 214 demand.

30. In the light of the findings in relation to the factual position of the company vis-à-vis the petitioner set out earlier, consideration of the issue whether the company has a genuine and serious cross-claim against the petitioner must be subject to reservations as to the manner in which Mr. McKenna has addressed the factual issues. His affidavits are replete with inaccuracies and incomplete statements. For instance, he has averred that the only invoice which Leftbrook received was the June 2008 invoice and has commented that it "is for a sum of €66,500.00 (sic) which is far less than the sum now claimed by the Petitioner". On the basis of the e-mail of 6th March, 2009 from Ms. Friel and the correspondence of 9th April, 2009, Mr. McKenna must have known the basis on which the sum of €96,800 was being claimed by the petitioner, even if he was disputing it and the Court has not found that he is not disputing the balance of the debt in good faith and on substantial grounds. I am also of the view that Mr. McKenna has made averments which are careless and he should not have made. For instance, in his first affidavit, having referred to the plenary proceedings between Leftbrook and Mr. Nicholas, he averred that it is "a distinct possibility that the Petitioner is seeking to avoid being joined as a defendant in what will be damaging litigation for them by the bringing of this Petition". On the evidence before the Court, it would appear that, until the petition was presented, the petitioner was not threatened with being joined in the proceedings. Apart from that, it is Leftbrook, not the company, which is the plaintiff in the proceedings.

31. Mr. McKenna, on behalf of the company, has made a bald assertion in his affidavits that the petitioner acted negligently, was in breach of contract, and acted improperly in a conflicted manner in advising Leftbrook and the company. In his final affidavit he has indicated that the company intends bringing proceedings against the petitioner. The allegations against the petitioner are general in nature and devoid of particulars. For instance, there is no evidence before the Court as to the level of damages which the company would be claiming, although I think it reasonable to infer that it would exceed the petitioner's debt. Two questions remain in determining whether the proposed proceedings involve a cross-claim which is an answer to the petition. The first is whether the cross-claim is serious and genuine. A claim for negligence and breach of contract in the context of a professional relationship must be regarded as serious. Notwithstanding the reservations I have expressed in relation to the manner in which Mr. McKenna has addressed factual issues, having regard to the overall context, including the existence of the plenary proceedings, I have come to the conclusion, albeit not easily, that the cross-claim is genuine. In arriving at the conclusion that the cross-claim is both serious and genuine, I have not formed any view on the merits of the proposed proceedings. The second question is whether the company has been unable to litigate the cross-claim. There is no evidential basis for a finding that such has been the case. However there is an additional factor, the existence of the specific performance proceedings which pre-date the petition, which is of relevance.

32. In relation to that factor, there is a conflict on the evidence which cannot be resolved by the Court, as to what the members of the petitioner's firm knew about the Heads of Agreement executed on 14th February, 2007 and the release of the deposit of €1m by Mr. Nicholas to Leftbrook on foot of that document prior to 31st October, 2007. That conflict goes to the core of the issue as to the retainer and advice of the petitioner as pleaded in the specific performance proceedings between Leftbrook and Mr. Nicholas. Its resolution may be of relevance in determining the outcome of those proceedings and may have implications for the outcome of the proposed proceedings against the petitioner. Therefore, given that the issue as to the retainer of, and advice given, by the petitioner raised in the specific performance proceedings is likely to be inextricably linked with the issues in the proposed proceedings against the petitioner, in the very unusual circumstances of this case, I consider that the petition must be dismissed by reason of the cross-claim in the proposed proceedings.

33. Aside from that, I think that this is a case in which the Court's residual discretion under s. 216 of the Act of 1963 may be relied on to dismiss the petition, because of the existence of the specific performance proceedings and the potential importance of what the petitioner's partners knew about the Heads of Agreement and the deposit paid by Mr. Nicholas to Leftbrook in the resolution of those proceedings as pleaded. In the absence of evidence of inability of the company to pay its debts as they fall due, as distinct from its unwillingness to discharge the petitioner's fees in the context of its subsidiary's dispute with Mr. Nicholas in relation to the sale of An Sibin, in my view, the proper exercise of the Court's discretion is to avoid making a decision which might unfairly impact on the prosecution of those proceedings.

Abuse of process

34. Mr. McKenna in his affidavits has asserted that the presentation of the petition was an abuse of process. Ms. Friel, understandably, has taken umbrage at that assertion and has described it as being "glib and unwarranted". The evidence establishes that Ms. Friel first heard from an official of the company's bank, Ulster Bank, that the fees were being disputed on 4th March, 2009. Despite the raft of correspondence, which I have itemised earlier, from the petitioner and its solicitors to the company and its solicitors, the nature and basis of the dispute was never raised by the company with the petitioner until Mr. McKenna swore his first affidavit three weeks after the petition issued. In taking an overview of the matter, I am satisfied that issuing the petition was not an abuse of process, even though I consider that it should be dismissed for the reasons stated earlier.

Order

35. There will be an order dismissing the petition.