

# THE HIGH COURT

[Record No. 2023/221COS]

[2023] IEHC 773

IN THE MATTER

OF GREEN D PROJECT IRELAND LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2014

## **JUDGMENT of Mr Justice Mark Sanfey delivered on the 21<sup>st</sup> day of December 2023**

1. On Friday 24 November 2023, Green Biofuels Limited (In Administration) issued a petition to wind up Green D Project Ireland Limited (“**the company**”). On that date, the petitioner obtained an order ex parte for the appointment of provisional liquidators to the company. On Monday 27 November 2023, the company through counsel appeared in court to indicate its intention to apply to court to have the appointment of provisional liquidators rescinded.

2. Having heard on 30 November 2023 from counsel for the petitioner, the company and Eromettap Limited – a shareholder of the company – the court listed the petition for hearing on 14 December 2023 on the basis that the company could on that date oppose the granting of the petition on certain grounds which it had identified, and made orders for the exchange of affidavits from the parties in advance of the hearing of the petition. Certain further orders were made regarding the payment of legal costs in the matter and in relation to the performance by the provisional liquidators of their duties pending the hearing of the petition.

3. In the event, the petition – and the company’s opposition to it – was heard on 14 and 15 December 2023. What follows below is a verbatim record of the judgement of the court delivered ex tempore on 21 December 2023.

### **Introduction**

4. In his replying submissions, counsel for the petitioner categorised the submissions of counsel for the company as falling under three headings: -

- the standing of the petitioner;
- the evidence as to the company’s insolvency; and
- the alleged non-disclosure of material matters by the petitioner.

5. While many other points were raised and argued at the hearing, I agree that these points are the main issues between the parties. In fact, the issues as to the standing of the petitioner and the alleged non-disclosure of the matters in the petition are linked and may be taken together.

### **Standing/non-disclosure**

6. Although the petitioner invokes s.569(1)(a) and (d) as the statutory grounds on which a winding up order should be made, s.569(1)(a) did not in fact apply, as the company had not resolved by special resolution that it be wound up. The basis therefore on which the petitioner sought to windup the company was that contained in s.569(1)(d) – that “the company is unable to pay its debts”.

7. The petitioner did not however rely on the 21-day demand procedure set out at s.570(1)(a). Instead, it relied on s.570(1)(d), which provides as follows:

“For the purposes of this Act, a company shall be deemed to be unable to pay its debts

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...(d) if 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”.

**8.** Section 571(1) provides that a winding up petition shall be presented either by the company, any creditor or creditors (including any contingent or prospective creditors) of the company, or “any contributory or contributories of the company...”, subject to certain provisos set out in the section.

**9.** The petitioner – Green Biofuels Limited (in administration) (“**GBF**”)– is the holder of 65% of the issued share capital of the company. It is pointed out at para. 16 of the petition that the plaintiff “is also a significant creditor of the company”. That paragraph of the petition sets out four grounds for the application:

(a) “Your petitioner is a significant creditor of the company...”

(b) “The company is insolvent”...

(c) “There is requirement for an urgent appointment driven primarily by concerns over dissipation of assets...”; and

(d) “Your petitioner is also concerned that the company’s director’s pattern of behaviour is inconsistent with his obligation to act in the interests of the company’s creditors as a whole and/or all of the company’s shareholders...”.

**10.** It is not contested that the petitioner holds 65% of the shares in the company, and is thus, “a contributory” for the purpose of s.571 of the Act. Whether or not it is also a creditor of the company is contested by the company, although the petitioner contends that the company does not dispute the debt on *bona fide* grounds.

**11.** Eromettap Holdings Limited (“**Eromettap**”) is a 30% shareholder of the company, and is 100% owned by Karl Pattemore, who is the sole director of Green D. Eromettap contends that a shareholders’ agreement exists whereby, *inter alia*, a shareholder of the

company can buy out another shareholder if that shareholder becomes insolvent. Eromettap sought to avail of this provision by serving a notice on 01 November 2023 making an offer for GBF shares. The administrators however had by that stage commenced to market the assets of GBF. In order to put a stop to this process, Eromettap issued proceedings in this Court against GBF, Green D and the administrators, and an application was made to this Court (Dignam J) on 16 November 2023 at which certain directions were made.

**12.** However, it appears that, as of 22 November 2023 – according to an undated letter received from Certas Energy UK Limited (‘Certas UK’), Certas UK had “acquire[d] HVO Supplier Green Biofuels”. The letter stated that “...on Wednesday 22 November 2023, the business and certain assets of the company were acquired by Certas UK Limited (‘Certas Energy’)...going forward the business of the company will be operated by Certas Energy and will be known as GBF”. The letter contained details of bank accounts into which debtors could make payments, depending on whether invoices related to goods or services provided before or after 22 November 2023.

**13.** Mr Pattermore, in his affidavit of 28 November 2023 in response to the petition, referred to these circumstances, and averred as follows in relation to what he perceived to be the petitioner’s motivation:

“16. The company is concerned that the underlying purpose of this application is to seek to invalidate a commercial lease entered into between BLS Liquid Storage Cork Limited, as landlord, and the company, as tenant, relating to certain storage tanks at Tank Farm Site, Ringaskiddy, Cork dated 17 July 2023 (otherwise ‘the lease’)...

17. It is clear that the presentation of the petition to wind up the company and the appointment of the provisional liquidators is a direct attempt on the part of the administrators to obtain control of the company and to sell the assets of the company through the provisional liquidators in circumstances where the shareholders

agreement makes it clear that the non-insolvent shareholder can buy out GBF Shareholding, thus preventing Certa/Certas from getting the benefit of the business through the purchase of GBF on 22 November 2023. That is the context in which this application ought to be viewed, none of which was disclosed to the court on 24 November 2023. It is noted that the joint administrators and the provisional liquidators are from the same firm, EY.”

**14.** In her replying affidavit of 06 December 2023, Ms Winterborne averred as follows in relation to the failure to advert in the petition to the sale of the assets of the petitioner:

“56. The court was not informed that the UK assets of your petitioner had been sold to Certas Energy UK Limited (‘Certas’), but there is no basis on which the court ought to have been so informed. Assets under the control of the joint administrators have been sold to a related company of Certa, but that is all that has occurred. Your petitioner has not sold the shares in the company nor the shares in BLS (or its assets for that matter) to Certas nor – which might give rise to a material non-disclosure – is there any agreement or commitment to sell those assets to Certas”.

**15.** In these circumstances, the company adopts the following position at para. 13 of its written submissions: -

“13. The petitioner, on its own evidence, appears to have sold its UK assets to a third party prior to the bringing of the within petition. Given that GBF is a UK based company, it follows that its ‘UK assets’ must conceivably include its book debts, including any debts claimed as due by the company. The petitioner, it is respectfully submitted, has failed to demonstrate sufficient *locus standi* to bring the within petition. Moreover, no good reason has been offered as to why the sale agreement with Certa Energy [sic] has not been exhibited and put before the court”.

**16.** The petition issued on November 24, 2023 – two days after the sale of “the business and certain assets of the company” had taken place. It is suggested therefore that there is a strong possibility at least that, as of the date of issue of the petition, the petitioner was not in fact a creditor of the company, as the company’s debt had been transferred to Certas UK. It would follow, in those circumstances, that the petitioner did not have *locus standi qua* creditor to present the petition.

**17.** Moreover, it was submitted that the failure in the first instance to apprise the court – particularly when the appointment of provisional liquidators on an *ex parte* basis was being sought, of the sale of the “business and certain assets” of the petitioner prior to the presentation of the petition, and the subsequent failure by Ms Winterborne to clarify whether or not the debts of the company had indeed been sold to Certas UK were instances of material non-disclosure such as would justify dismissal of the petition.

**18.** This submission was rejected by counsel for the petitioner, who referred the court to certain averments and calculations of the affidavits of Mr Pattemore and Mr Bolger which appeared to acknowledge some indebtedness by the company to the petitioner, albeit disputing the amount.

**19.** Ms Winterborne has sworn that the petitioner has not disposed of its shares in the company. In those circumstances, it would appear that the petitioner is a “contributory” for the purpose of s.571 of the Act, and thus has standing to present the petition. The Act does not appear to require that the petitioner who argues that the company is unable to pay its debts be a creditor; a contributory may do so, even where the contributory is not a creditor.

**20.** However, I consider that the court should have been apprised in the petition and grounding affidavit of the sale of the petitioner’s business and assets, and particularly should have clarified, when it became an issue after Mr Pattemore’s affidavit of 28 November 2023, whether or not the debtors – including the company’s debts – had been part of the sale to

Certas UK. Even at this stage – that of delivering this judgment – that question has not been unequivocally addressed by the petitioner, so that the court remains uncertain as to whether the company is a debtor of the petitioner, or alternatively a debtor of Certas UK. In a case which was centrally concerned with whether or not the evidence tendered by the petitioner was sufficient to establish that it was a creditor of the company, the absence of evidence confirming that it was the legal owner of any such debt was surprising, to put it at its most benign.

### **The evidence as to insolvency**

**21.** The petitioner does not rely on the “deemed insolvency” procedure in s.570(a), and must prove to the satisfaction of the court that the company is unable to pay its debts. It seeks to do so in circumstances where Mr Pattemore and the company’s accountant Mr Bolger both aver that, when a claim in respect of renewable transport fuel certificates (“**RTF certs**”) is set off against monies owed to the petitioner, the company is in fact a net creditor as regards the petitioner.

**22.** Normally the court takes the view that such a conflict of evidence on affidavit cannot be resolved without oral evidence from the deponents. The petitioner submits however that the documentation generated by the company demonstrates that the assertions of the company that it is a net creditor have no credibility, and as such can be safely disregarded by the court.

**23.** Counsel for the plaintiff referred the court to management accounts prepared over the course of the last year for the company which show very significant ongoing losses, both in the profit and loss account and on the balance sheet. These include projections sent by Mr Bolger to Paul Mills of the petitioner on 09 August 2023 which show a negative asset balance as of October 2024 of €13.8m. Further projections for a two-year period from August 2023 to July 2025 show the company progressing from a net asset deficit of €14,765,737 in August 2023 to a positive net asset position of €167,348 in July 2025, but – as counsel for the

petitioner points out – an accumulated long-term debt to GBF by July 2025 of over €122m. A balance sheet compiled as of 31 August 2023 also showed a net asset deficit of €13,061,433.

**24.** However, by October 2023, Mr Bolger appeared to take a different view. In a letter of 12 October 2023 to Mr David Carty of Certa Ireland, Mr Bolger wrote “to confirm the financial standing of Green D Project Ireland Limited”. He stated that he could confirm “...that as at 31 August 2023 the company is currently solvent, with current assets exceeding current liabilities”. Current assets were valued in the letter at €30.45m with current liabilities valued at €25.91m. No calculations or corroborating documentation were included with the letter, which Mr Bolger acknowledged had “not undergone a formal audit process and are based on the company financial records and management accounts”. Mr Bolger did state however that “...these unaudited financial figures should be used for informational purposes and as a general indication of the company’s solvency”. A further letter of 16 October 2023 to Certa Ireland stated that GBF in fact owed the company €5.6m.

**25.** Ultimately, Mr Bolger prepared, at Mr Pattemore’s request, a letter setting out, as of 28 November 2023, management accounts to 31 August 2023. In the letter, he stated that “the company would now have a surplus of €39,858,216, thereby demonstrating that the company was solvent as at 31 August 2023”. The “revised intercompany balance” as of 27 November 2023 showed a sum of €31,173,202.80 owed by GBF to the company.

**26.** Counsel for the petitioner contrasts these figures with the previous figures for August 2023 showing very substantial losses. Counsel referred to Mr Bolger in his capacity as “the company accountant” – whose duty it was under the shareholders’ agreement to value the company – valuing the 65% shareholding at €537,000 as of 01 November 2023. Counsel also referred to various references by Mr Pattemore which, it was submitted, suggested an acknowledgement by him that the company was a net debtor of the petitioner.



**27.** While Mr Bolger does not address the issue of how his valuation of the company has changed so radically, it is clear that the difference is due mainly to the value attributed by him to the RTF certs. There is little reliable evidence before the court as to how these certificates are to be valued. Both Ms Winterborne and Mr Pattemore attempt to adduce hearsay evidence from “experts” who express views generally in relation to the valuation of RTF certs and the market for them. There is undoubtedly a dispute on the affidavits and documentation as to the value to be attributed to the RTF certs. It should be said that the certs are managed by the petitioner; Mr Pattemore is very critical, particularly in his supplemental affidavit, of the management and valuation by GBF of the certs. Both parties appear to accept that the certs are valuable, that they are the property of the company, and that they can be traded for value, although the liquidity of the market is an issue between the parties.

**28.** The court has no independent evidence of the value of the RTF certs. Ms Winterborne does not purport to be an expert in this regard. Mr Bolger states that the resolution of the inter-company balance – in which the value of the RTF certs is a major issue – “is complex, not straightforward, and not capable of easy resolution...” [affidavit 12 December 2023, para. 4]. He does set out his view as to the intercompany balance, and his workings in this regard. The petitioner does not express a definitive view as to what the balance is, other than to adopt the position that, on the company’s own records, it must be a net debtor of the petitioner and clearly will not be in a position to discharge its debts now that the financial support of the petitioner has been removed.

**29.** In this latter regard, Mr Pattemore has adduced some evidence of possible financial support from a prospective investor, although it is clear that negotiations in this regard are at a very early stage.

**30.** Counsel for the petitioner submits that I am entitled to take the view that the more recent figures presented by Mr Bolger which show the company as having a positive balance

sheet may be disregarded. He submits that those figures are mere assertions with no appropriate corroboration, and draws an analogy with the principles set out by Clarke J (as he then was) in *IBRC v McCaughey* [2014] 1 IR 749 when considering the court's approach to evidence proffered as a defence to an application for summary judgment:

“23. ...The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J in *Aer Rianta*. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant”.

**31.** Counsel submits that the court can conclude that the figures now produced by the company, and Mr Bolger's evidence generally, may be disregarded as not constituting a *bona fide* dispute as to the debt owing to the petitioner, such as was held in cases such as *Truck and Machinery Limited v Marubeni Komatsu Ltd.* [1996] 1 IR 12 and *Re WMG Toughening Limited (No. 2)* [2003] 1 IR 389 to be necessary to warrant restraining a winding up petition.

**32.** However, a similar issue was addressed by Butler J in *Re Bayview Hotel (Waterville) Limited* [2022] IEHC 516. That case involved a winding up petition where the petitioner relied on the 21-day letter procedure. The petition was opposed by a Mr O'Shea, who was involved in the running of the hotel which was the main asset of the company. Mr O'Shea claimed to be entitled to a 50% interest in the company. In the judgment, the court had to consider whether evidence on affidavit tendered by Mr O'Shea was undisputed and therefore required to be accepted by the court.

33. In her judgment, Butler J referred to the decision of the Supreme Court in *RAS Medical Limited vThe Royal College of Surgeons of Ireland* [2019] 1 IR 63, in which an issue arose as to whether, in judicial review proceedings, it would be appropriate that sworn affidavit evidence should be rejected by reference to other affidavits or documentation without giving the deponent concerned an opportunity to address issues as to the credibility or reliability of their sworn evidence. Butler J referred to two passages from the judgment of Clarke CJ as follows: -

“88. Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question....

92. But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts

in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact”.

**34.** In her judgment, Butler J comments on the foregoing as follows: -

“51. The implications of RAS Medical are far reaching. Whereas Hardiman J in *Tara Mines Pension Plan* regarded a failure to cross-examine a deponent as going to the weight to be afforded to the evidence and, by implication, to any objection to it, RAS Medical positively requires a deponent to be cross-examined whenever evidence is objected to on grounds of credibility or reliability and even where the affidavit evidence is contradicted by other documentary evidence. Indeed, at para. 90 of the same judgment, Clarke C.J. goes so far as to say that it is impermissible to ask a decider of fact to determine a contested fact on the basis of affidavit evidence or documentation alone. Therefore, in a case being tried on affidavit where the facts are disputed, the failure to cross-examine an opposing deponent can, and generally will, be fatal to the party bearing the onus of proof on the issue to which that deponent's evidence is relevant”.

**35.** Butler J accordingly found that an issue as to whether monies lent by the petitioner were only repayable after resale of the hotel “cannot be determined as question of fact in the absence of cross-examination of the deponent of the respective affidavits” [para. 59]. The court indicated that it formed this conclusion “with some reluctance”; Butler J stated that “in reaching this conclusion I do not necessarily accept the contention advanced by Mr O’Shea: indeed were I to be in a position to determine the matter, on the evidence available I would

probably reject it” [para. 60]. However, the court was nonetheless satisfied that the company was unable to prove its debt on consideration of other evidence, having regard to “the company’s accounts and the director’s reports attached thereto and to the total of the debt claimed by the creditors who have responded to this petition” [para. 70].

**36.** Counsel for the company expressed the view that the central issue between the parties was the value of the RTF certs. If the company’s present view of the value of the RTF certs is correct, the company has a healthy balance sheet and is owed a very considerable amount of money by the petitioner. On the other hand, the petitioner maintains that the figures now presented can have no credibility in light of the figures and calculations presented prior to the presentation of the petition, and in the absence of any corroboration of the value of the RTF certs.

**37.** However, this latter argument cuts both ways. The petitioner acknowledges that its employees “have been assisting the company to set up the requisite administrative accounts for the company to claim RTF certs from the authorities as well as to submit claims for RTF certs for fuel supplied to customers during the financial quarters noted above (as the company did not have the requisite experience to do so)” [para. 30 affidavit Lucy Winterborne, 23 November 2023]. The petitioner was, if anything, in a better position to adduce evidence as to the value of the RTF certs and the status of the claims for certificates made by the petitioner on the company’s behalf. Notwithstanding this, no definitive evidence was presented by the petitioner in this regard. Indeed, Ms Winterborne, at para. 45 of her supplemental affidavit, sought to adduce evidence from “three independent parties” – whom she did not name – “for their views on the RTF certs market and value”. Those “views” are set out in bullet point form in that paragraph, evidence which is hearsay and utterly inadmissible.

**38.** Mr Pattemore avers that the management accounts on which the petitioner relies as evidence of insolvency “were not prepared by the company or by the company’s accountant.

I believe that they were produced (at least in final draft) by Paul Mills of GBF UK who at the time may not have appreciated the various line items that ought to have been recorded in the company's accounts..." [affidavit 28 November 2023, para. 21]. Ms Winterborne in her supplemental affidavit – see para. 28 – denies that any such documents were prepared solely by agents of the petitioner, and avers that "the company's accountant was materially involved". It is not clear however to what extent the petitioner may have contributed to the figures, particularly the line items regarding RTF certs, UK duty reclaim amounts, recoverable carbon tax and customs and excise duties.

### **Other parties**

**39.** Certa Ireland Limited ('**Certa Ireland**'), a customer of the company, supported the petition. Certa Ireland discharged €26.7m on foot of an invoice raised by the company for the sale to Certa Ireland of over €18m litres of HVO fuel. Certa Ireland maintains that it has been supplied with 5.8 million litres of fuel, but that some 12.2 million litres allegedly worth €16m plus VAT have "gone missing". The circumstances of the claim are set out by Andrew Graham, Managing Director of Certa Ireland, in two affidavits sworn by him; Peter O'Brien, the secretary of the company, has sworn two replying affidavits strenuously refuting Mr Graham's allegations. Mr Pattemore also addresses the allegations extensively in his first replying affidavit in particular.

**40.** Eromettap was represented by counsel at the hearing. Counsel deprecated the lack of information proffered by the joint administrators as to the supposed insolvency of GBF, pointing out that administration is a "rescue process". It was submitted that the insolvency of GBF should not be asserted without evidence; this of course has particular relevance for Eromettap's proceedings in respect of the alleged shareholders' agreement.

**41.** Counsel for the company and Eromettap both referred to a letter dated 30 March 2023 – but sent in August 2023 – by Mr Mills on behalf of GBF. The letter was addressed to "the

directors of the company, and was headed “continuing financial support”. The letter simply stated “...I confirm that Green Biofuels Limited will continue to provide trade credit and finance to Green D Project Ireland Limited to support its trading operations through the coming twelve months”. Counsel for the company contended that it was improper of GBF to give such an assurance to the company in which it held 65% of the shares, and to then proceed to present a winding up petition a mere three months later. Counsel for Eromettap went so far as to suggest that this letter would provide the company with a defence if GBF had sought to take legal proceedings against it on foot of the intercompany balance.

### **Conclusions**

42. My conclusions in relation to these points are as follows: -

### **Standing/Non-Disclosure**

43. I consider that the failure to clarify whether or not the alleged debt of the company to the petitioner was transferred to Certas UK prior to the presentation of the petition was a material non-disclosure. The petitioner relied on its status as a creditor in order to establish its *locus standi* to present the petition. At para. 14 of his affidavit of 28 November 2023, Mr Pattermore drew attention to the announcement by Certas UK of the acquisition of GBF, and averred that “...it appears to me that Certas assumed that this sale included the business of the company...”.

44. It would have been easy for the petitioner to address this issue by exhibiting documentation which would show that Certas UK had not acquired the book debts of GBF, if that were the case. In circumstances where Certas UK has acquired “the business” of GBF, I consider that it was necessary for the petitioner to clarify whether the alleged debt remained the property of the petitioner after November 2022/23. That it has not done so has in my view created significant doubt as to whether GBF is in a position to argue that it is a creditor of the company at all. In a case in which the central issue is as to whether the company is “unable to

pay its debts”, that the party making that case has not taken care to establish definitively as a matter of evidence that it is a creditor of the company is in my view a significant omission, notwithstanding that the petitioner clearly has *locus standi*, being a contributory of the company.

### **Evidence**

**45.** I accept that there may be occasions where, even though there is a conflict on the evidence between two sets of deponents, the court considers nonetheless that there is sufficient documentary or other uncontested evidence which would establish definitively, in a winding up petition, that the company is unable to pay its debts. Indeed, *Bayview* is a very good example of a case in which this occurred. Butler J considered that she could not make findings of fact as between affidavits in the absence of cross-examination; nonetheless, there was sufficient material elsewhere before the court which enabled it to be satisfied that the company was unable to pay its debts.

**46.** In the present case, the evidence relevant to the issue of the company’s ability to pay its debts is as set out in the affidavits. The company’s accountant, Mr David Bolger – not an accountant employed by the company it should be said – has expressed a view that “ultimately the company will be owed a substantial sum of money more than €31m by the petitioner” [affidavit 12 December 2023, para. 14]. Mr Bolger expresses that view against a backdrop of figures produced some months earlier which show a very different position, albeit that it is not clear how much input Mr Bolger had into those figures. There is also the question of the relationship between Mr Bolger’s view of the solvency of the company and his valuation of its worth for the purpose of Eromettap’s invocation of the shareholders’ agreement.

**47.** It may well be that Mr Bolger and Mr Pattermore would have very difficult questions to answer regarding their view, as expressed in the affidavits and the accompanying



documentation, of the company's prospects and its ability to pay its debts as they fall due. However, it does not seem to me to be appropriate to disregard such evidence in circumstances where that evidence is not challenged by cross-examination. I am of the view that the resolution of the dispute on the affidavits in relation to the solvency of the company and whether it is unable to pay its debts is necessary to the proper disposition of the petition. The challenge to Mr Bolger's evidence is that it is not credible or reliable. In such circumstances, Mr Bolger must be given an opportunity to respond to the criticism made of his evidence. This follows clearly from the decision of the Supreme Court in *RAS Medical*, and the interpretation of that decision by Butler J in *Bayview*, with which I agree.

**48.** It is suggested that the court should infer from the documentation, and in particular the various iterations of the balance sheet, profit and loss account and projections exhibited to the affidavits, that it establishes the company's insolvency. However, for the reasons I have explained, the provenance and authorship of these documents are not entirely clear. The management of the RTF certs appears to have been within the control of the petitioner – not the company. The petitioner has not put before the court expert or otherwise compelling evidence as to the value of those certs.

**49.** The central issue of the company's ability to pay its debts is canvassed squarely in the affidavits. In the absence of cross-examination, it is not appropriate to draw conclusions about the solvency of the company. The petitioner did not avail of the 21-day procedure which would have forced the company to identify how it disputed the debt, "in good faith and on substantial grounds". The perceived desirability of appointing provisional liquidators may have militated against the use of this procedure. However, if a petitioner wishes to proceed by way of affidavit evidence, it may transpire that it cannot discharge its evidential burden without cross-examination where there are conflicting affidavits. This is what has happened in the present case.

**Certa Ireland**

**50.** I do not think that the Certa Ireland situation regarding the allegedly “missing oil” is on its own a basis for a finding that the company is unable to pay its debts. The facts of that issue are strongly contested, it being submitted that much of the oil may still be held in the UK. While the company’s inability to give a definitive account of what has happened to the oil bought by Certa is disquieting, the interaction on this issue with the petitioner that is evident from the affidavits – in particular, a misleading measurement of oil held at the company’s depot by an employee of the petitioner – has contributed to the confusion in roles between the company and the petitioner. While the unsatisfactory situation in which Certa finds itself would be taken into account in the exercise of the overall discretion which the court has if the petitioner establishes its evidential burden, in the circumstances it is not a factor which would cause the court to grant the reliefs sought by the petitioner.

**Orders**

**51.** While many further points were raised by the parties, in view of the findings above, it is not necessary to deal with those points. The petitioner has not discharged its onus of establishing that the company is unable to pay its debts. In addition, there has been a culpable and material non-disclosure by the petitioner in relation to whether or not it has in fact disposed of any debt owed by the company to it prior to the presentation of the petition. To the extent that the discretion of the court would have been engaged, this factor would have militated against granting the reliefs sought in the petition.

**52.** There will be an order dismissing the petition. I will hear the parties in relation to any further orders required, particularly in relation to the position of the joint provisional liquidators appointed in the matter.