THE HIGH COURT

[2021] IEHC 513

[Record No. 2021/21 COS]

IN THE MATTER OF LESTOWN PROPERTY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Ms. Nuala Butler delivered on the 22nd day of July, 2021.

Introduction

1. Under s.569(1)(d) of the Companies Act 2014, the High Court may make an order winding up a company if the company is unable to pay its debts. Under s.570 of the 2014 Act a company shall be deemed to be unable to pay its debts if a demand for a sum allegedly due has been served on the company (by leaving it at its registered office) and the company has failed to pay the amount or to secure it to the satisfaction of the creditor within 21 days. Special provision was made by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 increasing the minimum amount of the debt which may be subject to a demand under s.570 during what is termed an "interim period". The interim period reflects the time during which restrictive measures are in place on public health grounds. In its long title the 2020 Act states that it has been enacted *"in response to the economic difficulties caused by that disease"*. As the events giving rise to this application took place during the interim period the higher threshold of a €50,000 debt applied under s.570. Nothing turns on this as the amount claimed by the petitioner exceeds that figure.

2. The parties to this application are landlord and tenant. The petitioner is the company's landlord under a 25-year lease entered into on 25th November, 2015. The demised premises comprise a unit at Charlestown Shopping Centre used by the company, consistent with the planning permission governing the shopping centre, as a "Leisureplex", *i.e*. an indoor area at which paying patrons can use a bowling alley, a children's play area, pool tables, a laser games room and amusement machines. The public access to the Leisureplex at Charlestown Shopping Centre is through the lobby of an adjacent cinema premises which is leased to a different tenant. Although there are other access points, these are emergency fire exits and the court was informed and is satisfied that these would not be suitable for public access from either a fire safety or a planning perspective.

3. This petition has been brought because the company has not paid the rent *prima facie* due under the lease since the introduction of restrictions on public health grounds on 8th April, 2020. These restrictions have at various times required the closure of commercial premises and at other times have placed a maximum limit on the numbers that may be present at an indoor gathering. The first tranche of rent subsequent to that date fell due on 1st May 2020. By the time this application was heard at the end of April 2021, rent had not been paid by the company for a full year.

4. On 12th October, 2020 the petitioner served by registered post a formal demand on the company under s.570 of the 2014 Act. Because an issue was raised as to whether this method of service complied with s.570, a further letter demanding payment of the sum of €153,233.75 was delivered by hand to the company's registered office on 20th

November, 2020. In fact, the petitioner claims that by mid-November another quarter's rent and service charge had become due and that at the time the petition was brought on 8th February, 2021 the amount outstanding was €338,572.77 although the full of this amount had not been the subject of a formal statutory demand. The company acknowledges that these sums have not been paid although it claims that the amounts owed should take account of some monies due to it by way of repayment. However, as the petitioner points out, the taking account of any repayment would not reduce the amounts owed by the company below the statutory threshold of €50,000.

5. The petitioner does not deny that for significant periods of time since 8th April, 2020 the company was legally required to and did shut its business. There is a dispute as to the extent of any shorter period within that longer period during which the company could have legally opened its business, the extent to which it actually did so and, insofar as it did not, the extent to which it was precluded from doing so because the cinema premises through which the company's patrons normally access the Leisureplex remained shut or was required to remain shut. More significantly, the company disputes liability to pay rent at all during the current public health restrictions due to a rent suspension clause in the lease.

6. According to established case law relating to the precursor provisions to s.569 and s.570, namely ss. 213 and 214 of the Companies Act 1963, where there is a *bona fide* dispute regarding liability for the debt claimed, the court should not make an order winding up the company. Keane J in *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 IR 12 following the adoption of certain UK authority by O'Hanlon J in *Re Pageboy Couriers* [1983] ILRM 510 put it thus: -

> *"It is clear that, where 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 the court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed. That was the effect of the decision of Ungoed-Thomas J. in Mann v. Goldstein [1968] 1 WLR 1091 which was subsequently approved of by the Court of Appeal in Stonegate Securities Limited v. Gregory [1980] Ch 576, both of which decisions were expressly adopted by O'Hanlon J in Re Pageboy Couriers Limited [1983] ILRM 510.*
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> *The words "any liability" are, however, important: Where a company admits its indebtedness to the creditor in a sum exceeding £1,000 but disputes the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a petition."*

7. Thus the task of the court is firstly to ascertain whether on the basis of the materials before me there is a *bona fide* dispute as to the company's liability for rent and service charge since the first unpaid quarter's rent fell due on 1st May 2020 and, secondly, taking account of the extent of any amount in respect of which there is a *bona fide* dispute,

whether there is an undisputed liability or a liability in respect of which no *bona fide* grounds have been raised, for a residual amount of €50,000 or more. Given that the company does not claim to have made payments in respect of rent or service charge which are *prima facie* due, it is necessary to examine the terms of the lease in order to understand the nature of the issues between the parties and to assess whether the dispute raised by the company is a *bona fide* one.

Terms of 2015 Lease

8. I do not propose to set out in full those provisions of the lease under which rent is *prima facie* payable as these are not really in dispute. Under Clause 3.1 of the lease it was a condition of the demise of the premises that the company, as tenant, would pay the yearly rent in four quarterly instalments on Gale days fixed (by Clause 1.21) as being the first day of each of February, May, August and November each year. Further, Clause 3.1 states that payment of rent is to be made *"without any deduction, set off or counterclaim whatsoever"*. Clause 4.2 provides for payment of interest on arrears of rent. Liability to pay service charges arises under Clause 7 and under Clause 7.3 the service charge is to be paid quarterly, payment essentially coinciding with the Gale days on which rent is also due. The quarterly rent in respect of the premises is €69,187.50 and the quarterly service charge is €16,433.05 making a combined payment of €85,620.55 due each quarter.

9. Clause 3.2 of the lease provides for the payment of an insurance premium by the tenant to the landlord. That insurance premium is defined at Clause 1.26 as the proportion to be paid by the tenant of the total premia incurred or paid by the landlord in maintaining insurance cover against loss or damage by the insured risks. The insured risks are listed in Clause 1.27 which concludes by including "*such other risks as the landlord may at its discretion from time to time consider prudent or desirable*". The premium to be paid by the tenant and the insurance to be maintained by the landlord are addressed in more details in various of the sub-paragraphs of Clause 5.2. The insurance policy effected by the petitioner included insurance against the occurrence of "*notifiable disease*". Notifiable disease has a statutory meaning under the Infectious Diseases Regulations, 1981 and since 20th February, 2020 has included Covid-19. Separately, under Clause 5.4 the landlord covenanted to effect insurance against loss of rent in the following terms: -

> *"Subject to the landlord being able to effect insurance against the loss of rent referred to in this Clause 5.4 and subject to the tenant paying to the landlord within fourteen (14) days of demand the cost of such insurance, including but not limited to the premia payable in respect thereof, the landlord covenants with the tenant to insure against loss of rent following loss or damage to leisure centre building, the retained parts, the carpark and/or the adjoining buildings (or such part or parts thereof as the landlord shall in its sole discretion from time to time determine) by the insured risks, for four years or such longer period as the landlord may, from time to time, reasonably determine to be necessary, and such loss of rent insurance shall allow for and include provision for reasonable and proper anticipated increases in the rent."*

Under Clause 5.2.8 at the request of the tenant the landlord is obliged to produce copies of the relevant insurance premiums. On 3rd July, 2020 the company looked for copies of the relevant insurance policies from the petitioner which were not provided until 21st January, 2021.

10. The main clause on which the company relies is Clause 8.15 which provides for the suspension of rent and other payments. Insofar as material that clause provides as follows: -

> *"Provided the tenant has paid the insurance premium and service charge up to date, if the demised premises or any part thereof shall be destroyed or damaged by any of the insured risks so as to rendered the demised premises or premises or a reasonable means of access thereto unfit for use or occupation in accordance with the permitted user…..the rent and service charge, or a fair proportion thereof, according to the nature and extent of the damage sustained shall be suspended and cease to be payable from the date of the said destruction or damage. The suspension shall last until either the demised premises are again rendered fit for use and occupation or the expiration of four years (or such longer period as the landlord may have insured against) from the date of destruction or damage, whichever is the earlier. Any dispute regarding the suspension of the aforementioned sums shall be referred to a single arbitrator to be appointed in default of agreement, upon the application of either party, by or on behalf of the President or Acting President for the time being of the Society of Chartered Surveyor's in the Republic of Ireland in accordance with the provisions of the Arbitration Acts, 1954 to 1998."*

The Landlord's Insurance Policy

11. The petitioner provided the company with a copy of the relevant insurance policies on 21st January, 2021. The main document provided was an insurance policy entered into between the petitioner (and others) and RSA in respect of premises described as the Charlestown Centre and for a period between 1st November, 2019 and 31st October, 2020 (renewable on 1st November, 2020). That policy covered a wide range of risks primarily focussed on property damage. Thus, under the heading "*property damage insurance"* it is provided that if any buildings or contents suffer damage by any of the covers insured, the company (being RSA) will pay to the insured (being the petitioner, as landlord) the amount of loss in accordance with the provisions of the insurance. The clause goes on to provide that "*for the purpose of this insurance damage shall mean loss, destruction or damage"*. A slightly different definition appears on p.7 (which is apparently still part of the same section of the insurance contract) to the effect that *"damage means loss or destruction or damage to the property insured and any loss or destruction of or damage to data"*.

12. Under a section headed "*the insurance provided*" there is at p.10 an *"item on rent"* which provides that the insurer will pay the loss of rent in respect of buildings which have suffered damage. The loss of rent is defined as the actual amount of the reduction in the rent receivable by the insured during the indemnity period solely in consequence of the

damage. The special provisions in this section include at clause 6 on p.11 an item headed "*Prevention of Access*" which reads as follows: "*This item includes loss as insured caused by prevention or hindrance of access to the buildings or prevention of use of the buildings in consequence of damage by any cover insured to the property in the immediate vicinity of the buildings*". Finally, at para. 14 in the same section (at p.12) the heading "*Notifiable Disease*" appears. This item provides insofar as relevant as follows: -

> *"In respect of each item on Rent the term Damage is extended to include closure of the premises or part thereof on the order or advice of any local or governmental authority as a result of an outbreak or occurrence at the premises of*
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> *(1) any human contagious infectious disease other than Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition an outbreak of which is required by law or stipulated by the government authority to be notified…*

A special provision attached to that clause stipulates that "*premises"* shall mean *"only those locations stated in the Premises definition. In the event that the policy includes an extension which deems Damage at other locations to be Damage at the Premises such extension shall not apply to this Memorandum".*

13. The petitioner submitted a claim to its insurers under the business interruption clauses of its insurance policy seeking payment of the rent and service charges which its tenants had not paid to it. Presumably the company was not the only tenant in default in this regard. There was some delay on the part of the insurer in responding while the outcome of various test cases was awaited. Eventually on 5th January, 2021 the insurers refused cover on the basis that it had not been proven that an occurrence or outbreak of a notifiable disease (*i.e.* covid-19) had taken place at the insured premises. This refusal appears based in large part on the decision of the UK Supreme Court given on 15th January, 2021 in *Financial Conduct Authority v. Arch Insurance (UK) Limited* [2021] UKSC 1 being a test case involving a number of insurers and, presumably, a number of differently worded insurance policies. At para. 69 of the judgment of Lord Hamblen and Lord Leggatt, the court stated: -

> *"A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving differing symptoms of greater or less severity. Nor for that matter could an "outbreak" of disease be regarded as one occurrence, unless the individual cases of disease described as an "outbreak" have a sufficient degree of unity in relation to time, locality and cause…..The interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence. On this basis there is no difficulty in principle and unlikely in most instances to be difficulty in practice in determining whether a particular occurrence was within or outside the specified geographical area."*

Somewhat counterintuitively and notwithstanding that the Minister for Health declared the entire State "*being every area or region thereof"* to be an area *"where there is known or thought to be sustained human transmission of covid-19"* (see SI 120/2020-Health Act 1947 (Affected Areas) Order 2020) it would seem that the provisions of an insurance policy designed to provide protection in the event of loss being caused as a result of a notifiable disease, may not actually do so unless it is specifically shown that there was an outbreak or occurrence of the disease at the Charlestown Shopping Centre.

Consideration of Issues - Preliminary

14. The main area of dispute between the parties is the applicability or non-applicability of the rent suspension provisions of clause 8.15 of the lease. I will return to this issue in a moment but wish to make two observations at the outset. Firstly, for the purposes of this application I do not have to decide whether the company's contention that the rent suspension provisions apply is necessarily correct. The test is a lower one. I must be satisfied that the company has *bona fide* and substantial grounds for disputing liability for the amount of the debt claimed and that those grounds apply to the entire of the debt or at least to a sufficient proportion of it to bring the undisputed amount below the statutory threshold.

15. Secondly, establishing liability on the part of the company for an undisputed – or undisputable – debt of at least €50,000 is not the end of the matter. It merely brings the petitioner's claim within the scope of s.570 and deems the company unable to pay its debts. This in turn means that the petition then satisfies one of the grounds upon which a company may be wound up under s.569(1), in this case s.569(1)(d). Whilst in many instances establishing one of the grounds in s.569(1) will suffice to ensure that a petition is successful, it should nonetheless be borne in mind that a winding up order does not automatically follow. The court has an overriding discretion to refuse the petitioner's application. Some of the types of circumstances in which that discretion will be exercised so as to refuse an order which would otherwise normally be made are evident from the decided case law. However, given that the court is exercising an unfettered statutory discretion, previous case law cannot be read as placing any limit on the exercise of that discretion, save of course that once the qualifying statutory criteria under s.569 have been met, the reason for any decision refusing to wind up the company should be clear from the court's judgment.

Rent Suspension Clause

16. The company has disputed the petitioner's entitlement to payment of rent and service charge from an early stage. The company asserts that in circumstances where the outbreak of a notifiable disease is an insured risk, its premises have been damaged and rendered unfit for use or occupation as a result of government restrictions imposed because of the covid-19 pandemic and the inability of its patrons to access the premises. In December 2020, the company invoked the arbitration provisions of clause 8.15 but the petitioner's agreement to arbitration was subject to a pre-condition which does not fall within the scope of the arbitration clause and which the company did not accept. Further, in order to rebut the deemed insolvency, the company lodged the sum of €153,233.75, *i.e.* the amount of the statutory demand, with its solicitor. In essence, the company

makes the case that it is financially in a position to pay the sum demanded but has not actually paid it because it disputes its liability to do so.

17. In response the petitioner argues that the company has misconstrued clause 8.15. Firstly, the clause only applies where payment of insurance and service charge are up to date, which is not the case here. It is not entirely clear whether the petitioner is saying that payment of the company's insurance and service change was not up to date at the point when the company first declined to pay the rent prima facie due (1st May 2020) or that there is a continuing obligation to keep the insurance and service charge paid up in order to avail of the rent suspension clause. Given that the rent suspension clause also operates to suspend payment of the service charge, the latter can hardly be correct, although admittedly the drafting of the clause is infelicitous in this respect.

18. Secondly, the operation of the clause is dependent on the premises having been destroyed or damaged which the petitioner argues must mean physical destruction or damage caused by the materialisation of the insured risk which render the premises unfit for use. It is not sufficient that the premises cannot be used for reasons connected to the insured risk but unrelated to such physical damage.

19. Thirdly, the petitioner disputes the contention it regards as implicit in the company's position, that once you have insurance for a risk which materialises, then the insured property is automatically regarded as having been "damaged" as a result of the materialisation of that risk. Rather each of three steps must be shown to have occurred: the materialisation of the risk; that materialisation being the proximate cause of the destruction of or damage to the property and the destruction of or damage to the property – or of the means of access to the property - having rendered it unfit for use or occupation. In this case the petitioner argues that even if the issue of causation is put to one side, the enforced closure does not render the premises unfit for use, it merely prohibits their actual use for as long as the restrictions are in place. Further, the petitioner agrees with the views of RSA that, in light of the terms of the insurance policy, the insured risk (*i.e.* the outbreak or occurrence of a notifiable disease at the premises) has not in fact been established. Apart from evidence of the steps taken by the government at a national level in response to the covid-19 pandemic, there is no evidence of an outbreak or occurrence at the Charlestown Shopping Centre much less at the Leisureplex itself.

20. In response to the company's argument that the deemed inability to pay its debt should be disregarded because of the lodgement of the amount of the statutory demand with the company's solicitor, the petitioner points to three matters. Firstly, the actual debt has continued to increase by the accrual of additional rent and service charge payments each quarter. Secondly the company's filed accounts for 2018 show that it has no fixed assets and only €100 worth of debtors indicating that the entire contents of the Leisureplex must be owned by another, presumably related, company. The company also has no cash in its bank accounts which is regarded as highly unusual for a trading company. Finally, the petitioner points to a letter sent on 3rd July, 2020 by an entity called Entertainment

Enterprises Group on behalf of the company stating: *"We are aware that the current situation creates serious financial difficulties for both the landlord and the tenant".* As that letter was written in response to a letter dated 29th June, 2020 from the petitioner's solicitor seeking payment of the quarter's rent which had fallen due, the petitioner regards the letter as an admission that the company was in serious financial difficulties. In its written legal submissions the petitioner contends that this letter suggests that the insolvency of the company was not seriously in dispute.

21. I think this latter point can be dealt with quite simply. It is undoubtedly the case that the restrictions imposed as a result of the public health measures taken in response to the covid-19 pandemic have created serious financial difficulties for Irish businesses at all sorts of levels. I regard the statement to this effect in the letter of 3rd July, 2020 as a statement of the obvious position affecting any number of businesses constrained by those restrictions. I do not regard this statement as an admission of insolvency. I do not think that a pragmatic acknowledgement of the impact of the covid-lockdown on the parties to this litigation can be fairly construed as evidence of the company's insolvency for the purposes of either s.570 or s.569.

22. In my view there is a *bona fide* and substantial dispute raised by the company as to whether the arrears of rent and service charge claimed are actually due or, alternatively, whether the rent suspension provisions of clause 8.15 of the lease apply. At the heart of this dispute is the petitioner's contention, disputed by the company, that physical damage must have been caused to the property before the clause is applicable. I acknowledge the petitioner's argument that it is implicit in the meaning of the phrase of *"destroyed or damaged"* that physical injury to the property has occurred. A similar inference can be drawn from the terms of the insurance policy covering the risk in question which defines damage to buildings or contents as meaning *"loss destruction or damage"*. The petitioner links its argument back to the definition of insured risk in clause 1.27 of the lease. Most of the risks specifically listed contemplate physical damage to the property although I am not certain that this is necessarily the case as regards *"riot and civil commotion*", which are listed separately to *"malicious damage"* which might indeed be caused to property during a riot or a civil commotion. This argument loses some of its force because clause 1.27 also gives the landlord a discretion to insure other risks which then fall within the definition of *"insured risks"* for the purposes of the lease and no limit is placed on the type of risks the landlord may insure, in other words the risks the landlord may choose to insure are not limited to risks which are likely to result in physical damage to the insured property.

23. The company focuses on the requirement that the damage contemplated in clause 8.15 is damage which has rendered the premises or access to the premises unfit for use or occupation in accordance with the permitted user. Further, it relies on the special provisions in the insurance policy relating to notifiable disease which extend to the term *"damage*" to include closure of the premises on the order of or advice of any local or governmental authority. Consequently, it is argued that "*damage*" in the context of a notifiable disease does not necessarily require that there be physical damage caused. The

insured risk in issue is the outbreak or occurrence of a notifiable disease and the materialisation of that risk will not usually generate adverse physical effects on property but may well have adverse effects on the use or occupation of the property particularly if, as here, a formal order has rendered the property incapable of use. Thus, it is certainly arguable that the reference in clause 8.15 to damage caused by any of the insured risks is not limited to physical damage and must be construed in a manner that is sufficiently broad to encompass the type of damage that is likely to be caused by the materialisation of all or any of the risks which have been insured against by the landlord under the terms of the lease.

24. This is an argument which might or might not succeed. In parsing the terms of clause 8.15, the petitioner emphasises the concept of damage to the premises rather than of damage *simpliciter* and relies on the language used in terms of the premises being "*unfit"* or *"fit"* for use rather than being incapable or capable of being used. However, I do not have to decide whether in fact the type of loss or damage which has arisen (an inability to use the premises because of legal restrictions imposed by the government on public health grounds as a result of a pandemic involving a notifiable disease) is caught by the phrase "*destroyed or damaged by any of the insured risks*". It is sufficient that there be a *bona fide* dispute on substantial grounds on this issue and I am satisfied that the argument advanced by the company meets that threshold.

Additional Arguments:

25. In reaching this conclusion I am aware that there are additional arguments raised by the petitioner which, if ultimately borne out, may mean that in any event the damage in issue falls outside the scope of clause 8.15. In particular, the petitioner argues that the risk which is insured is the outbreak or occurrence of a notifiable disease at the premises and not the outbreak of covid-19 in the community generally or even in the community in which the premises is located. The only authority opened to the court on this point is the decision of the UK Supreme Court in the *Financial Conduct Authority v. Arch Insurance* (above) which is a certainly strong, persuasive authority in support of the petitioner's argument. Nonetheless in the absence of a definitive Irish authority on the point I would be reluctant to conclude that a restriction imposed by way of special condition on the circumstances in which cover will be provided for a particular risk has the effect of excluding that risk, which is otherwise insured, from the scope of the rent suspension provisions of clause 8.15.

26. The court was referred, in passing, to decisions of McDonald J on insurance disputes arising out of rejected claims in the context of the covid-19 pandemic in the hospitality sector. Having read two of these judgments, *Brushfield Limited T/A The Clarence Hotel v. Arachas Corporate Brokers Limited* [2021] IEHC 263 and *Aberken Limited T/A Sinnotts v. FBD Insurance* [2021] IEHC 78, I expect they were not opened to me because they consider terms of insurance policies which are materially different to those in issue here and also, despite circumstances which are obviously common to all these cases, the claims were of a somewhat different nature. I note McDonald J's approval in *Brushfield* of para. 114 of the decision *in Financial Conduct Authority v. Arch Insurance* (quoted above)

as regards the meaning of "*occurrence*" for the purposes of an insurance contract. I also note that the point was ultimately irrelevant to the issue he was deciding as covid-19 was not included in a list of diseases in respect of which the insurance contract expressly provided cover. Significantly, both of the cases decided by McDonald J concerned policies which related to the outbreak of an infectious disease either on the insured premises or within 25km of the insured premises, which is materially different to the terms of the contract here. It goes without saying that conclusions reached by a court in interpreting the provisions of a contract of insurance will not necessarily be of assistance when interpreting a different insurance contract where materially different language is used, even if both contracts cover the same risk.

27. The last issue to address is the petitioner's argument that because the restrictions which have been imposed were lifted, to varying degrees, from time to time there were periods covered by each of the quarters for which rent is due during which the company's premises either could have been or actually were open for business. The restrictions were imposed and lifted by a series of statutory instruments under s.31A of the Health Act 1947 which had been introduced by s.10 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act, 2020. All references to SIs in the following paragraphs are to statutory instruments made under s.31A of the 1947 Act.

28. It is unclear whether the company's business closed on 13th March when a lockdown was initially imposed by government or on 8th April when SIs 120 and 121 came into effect and imposed a mandatory requirement that all save essential businesses shut. Either way, rent had already been paid up to the end of April 2020. Under Article 1(2) of SI 234/2020 the premises could have legally reopened on 29th June, 2020 subject to a maximum of 50 persons being in attendance. This remained the position until a further lockdown was imposed on 17th September, 2020. There is some dispute between the parties as to the extent to which the premises could have reopened on 3rd December under SI 560/2020. The company's business is primarily a bowling alley, amusement arcade, soft play area or indoor children's play area all of which are listed at para. 10 of Schedule 1 and 2 to the SI. However, the business is accessed through a cinema and cinemas are not expressly mentioned in the SI although "*theatres and concert halls*" are listed at para. 1 of both Schedules. In any event it appears that the cinema did not reopen in December 2020 and, thus, the company contends that it did not have *"a reasonable means of access"* to its premises, using the language of clause 8.15 of the lease. The petitioner claims that to be the fault of the company in not negotiating and securing a stronger easement in its lease, presumably one which would have required the occupier of the cinema premises to open in order to provide access to the company's premises even if the cinema itself was prohibited by law from opening for business. All in all, it appears that the company opened its business for a period of four weeks from 20th August, 2020 before being required to close again on 17th September, 2020 and, at the date of the hearing of this application in April, 2021 had not opened since.

29. The petitioner points out that the company did not pay rent for the four-week period in August/September 2020 when it was in fact open for business. It also contends that as

the periods during which it could have opened for business fall within the quarters covered by each of the Gale days which have passed since May 2020 that rent is in fact due for each of those quarters. The petitioner contends that as rent is to be paid under the lease on a quarterly basis, once the premises could have been opened for any period during a quarter, then rent for the entire quarter must be paid.

30. That may be correct insofar as *prima facie* liability for payment of the rent under the lease is concerned but is not necessarily determinative of the extent to which liability to pay rent will be suspended pursuant to the rent suspension provisions of clause 8.15. This clause is not structured so as to provide for suspension of rent on a quarterly basis. Instead*, "the rent and service charge, or a fair proportion thereof according to the nature and extent of the damage sustained"* is suspended from the date of the damage until the premises are rendered fit for use and occupation in accordance with the permitted user. Thus, in my view simply establishing that the premises could have technically opened, even if only for a very brief period, during each relevant quarter does not necessarily establish liability for arrears of rent for all of those quarters in the manner contended. If the suspension clause operates to remove the liability to pay rent, it appears to do so in respect of any period in which the premises is rendered unfit for use or occupation and not solely in respect of entire quarters for which that is the case. If the quarterly rent is apportioned out on a weekly basis, then the rent due for the four-week period during which the premises was open would not exceed the statutory threshold of €50,000. In any event the company argues that liability for rent during that period should be set off against the rent paid in advance for April 2020 when the premises were unable to open because of the first lockdown.

31. Again, I do not have to determine which side of these various arguments should prevail. It is sufficient that I am satisfied that there is a *bona fide* dispute raised by the company on substantial grounds in response to the claim that it is liable for the monies claimed by the petitioner. I am satisfied that this is the case. When these matters are finally determined, whether that be in the course of an arbitration or by way of further litigation, the company may or may not succeed in establishing that it does not owe the sums claimed by the petitioner. However, there is sufficient merit in the arguments that have been raised by the company for the court to take the view that the requirements of s.570(ba) have not been satisfied. Consequently, I am not prepared to deem the company unable to pay its debts.

Discretionary Factors:

32. Lest I am incorrect in the conclusions which I have reached above as regards whether the company should be deemed unable to pay its debts under s.570, I make the following additional observations. Even if I were satisfied that the company should be deemed unable to pay its debts within the meaning of s.570, the court would nonetheless have had a discretion under s.569 as to whether a winding up order should be made. In the circumstances of this case I have given serious consideration to the exercise my discretion to decline to make such an order. There are a number of factors which would have made me reluctant to grant the order sought. Firstly, the company has lodged the

amount of the statutory demand with its solicitors. Although the petitioner claims that a greater amount is now owed because successive quarters of rent have fallen due, deemed insolvency under s.570 is by reference to an amount owing in respect of which a statutory demand has been made in a particular format. Lodging the amount in question with its solicitors, as the company has done in this case, indicates that that amount of money is available to the company to pay the debt. The debt remains unpaid not because the company does not have the resources but because it disputes its liability to pay.

33. Secondly and perhaps more importantly the events which have led to the non-payment of rent by the company and the dispute between the parties as to whether rent is due have arisen because of events outside of the control of both the petitioner and the company either generally or in their capacity as the landlord and tenant of this premises. The circumstances of the covid-19 pandemic are extraordinary not least because of the concerted official response which has led to the imposition, by law, of restrictions on movement, on public gatherings and on the operation of businesses of various types which are regarded as non-essential and where members of the public might otherwise congregate or come into contact with one another. These restrictions undoubtedly have had an economic impact on many businesses, including both of the parties to this litigation. The circumstances are unprecedented, and it is no straightforward matter to ascertain how the imposition of legal restrictions will interact with the terms of the day-to-day contractual relations between entities in many different areas of Irish business life. Winding a company up without affording it the opportunity to rely on the terms of its existing contracts, even where the meaning and impact of those terms in light of the legal restrictions is disputed, is a drastic solution.

34. The court is not attempting to predict how liability for the economic consequences of these restrictions might ultimately be resolved and certainly not as to how liability for the rent claimed should be determined as between the petitioner and the company in this case. Nonetheless I would be very reluctant to make an order winding up the company in consequence of the non-payment of a debt where the circumstances of that debt are entirely attributable to ongoing restrictions of this nature and are arguably the subject of a specific clause in the lease which would suspend the disputed liability. This is not a case in which if the company were to be wound up the lease would revert to the landlord and the premises could be straightforwardly and profitably be re-let to another tenant. Any other tenant taking possession of these premises for the purposes of using them for their permitted user would face exactly the same restrictions faced by the company over the last sixteen months. There is no suggestion that prior to the pandemic this company had ever been in arrears of any of the sums due under the lease nor that it was in any other way an undesirable tenant. The default, if it be such, is specific to the particular circumstances.

35. For all of these reasons I refuse the reliefs sought by the petitioner in this application.