

**THE HIGH COURT**

[2021] IEHC 701  
[2020 No. 377 COS.]

**IN THE MATTER OF KILCARRANE BUSINESS CENTRE LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, 2014, AS AMENDED**

**JUDGMENT of Ms. Justice Butler delivered on the 10th day of November, 2021**

**Introduction**

1. On 24th November, 2020, Henk Offereins (the petitioner) presented a petition to wind up Kilcarrane Business Centre Ltd (the company) under s. 569 of the Companies Act, 2014. The basis for the petition is twofold, namely that the company is unable to pay its debts (s. 569(1)(d)) and that it is just and equitable that the company should be wound up (s. 569(1)(e)). As regards the former, on 14th February, 2020, a formal statutory demand under s. 570(a) of the 2014 Act was made of the company by the petitioner's solicitor seeking payment of the sum of €195,490 allegedly due by the company to the petitioner. As the amount in question was not paid nor secured to the satisfaction of the petitioner within 21 days (nor since), under s. 570, the company is deemed to be unable to pay its debts.
2. On affidavit, the company disputes liability for the alleged indebtedness on two grounds. Firstly, it asserts that the amount claimed was a personal liability accepted by the petitioner rather than a loan by him to the company. Secondly, it appears that the company purported to transfer its liability to the petitioner to its parent company in the Netherlands where it was set off against a larger amount allegedly owed by the petitioner to that Dutch company. The legal argument made on behalf of the company is different again. It is contended that it is not sufficient for the petitioner to simply allege that money was owed to him by the company. He must establish that the money allegedly owed was due at the time of the claim and the company contends that the petitioner has failed to do this.
3. There is an obvious tension between the two arguments made on affidavit on behalf of the company. The first is premised on there never having been any indebtedness on the company's part to the petitioner. The second implicitly accepts that indebtedness but is premised on it no longer existing due to the transfer and set-off involving the Dutch parent company. I say "implicitly" because, notwithstanding that acceptance of the fact that some amount is owed is inherent in the notion of a set-off, the company's deponent, Ms. Loes Klaassen-Don, strenuously maintains that no such debt ever arose. Either way, the petitioner states that he never consented to the transfer of the debt owing to him from the company to its parent and notes that this transfer only occurred after he had made a formal statutory demand under s. 570. The petitioner also takes serious issue with the representation in the company's account of the loan by him to the company and to claims now made on the company's behalf by Ms. Klaassen-Don which are inconsistent with the declarations made and documents filed by the company in the Companies Registration Office in compliance with its statutory obligations.

4. This is the context in which the court must decide whether to exercise the discretion conferred upon it by s. 569(1) of the 2014 Act and whether or not to accede to the petitioner's request to have the company wound up on the basis that it is unable to pay its debts or, alternatively, on the basis that it is just and equitable to do so or on both grounds. No issue is taken with the suitability of the persons proposed by the petitioner to be appointed as official liquidators in the event that an order is made winding up the company. Equally no issue has been taken with the formal proofs required for an application of this nature, save of course the issue as to whether the petitioner has established that the sum claimed was actually due to him at the time of the statutory demand.

#### **Factual Background**

5. As is often the case, this petition reflects the breakdown of a far more complex business relationship between the parties involving three companies, a partnership, a lease, a bank loan and a veterinary practice. The complexity is added to by the fact that the three principals are Dutch nationals and one of the companies is registered in the Netherlands. Many of the documents before the court are presented in translation from their original Dutch. Others are written in English by persons whose first language is not English. Given the overlapping strands to the relationship between the parties, this has had the potential to create additional confusion.
6. The parties first became involved in 2004 when Ms. Klaassen-Don, placed an advertisement in a Dutch veterinary medical journal on behalf of herself and her husband looking for a young vet with entrepreneurial spirit who was interested in setting up a practice for companion animals in southwest Ireland. The Klaassens had bought a farm in Kenmare some years earlier and were keen to promote animal welfare in the area. The advertisement expressly stated "*(practice) accommodation and facilities will be provided*". The petitioner responded to the advertisement and the parties entered into discussions concerning the proposal which envisaged that the veterinary practice to be run by the petitioner would, as well as providing commercial services, also provide certain vaccinations, neuterings and emergency surgery for free or at a discount on a charitable basis. The petitioner and his wife moved to Ireland in 2005 and it seems that they were assisted in doing so by loans from the Dutch parent company which the petitioner states have now been repaid in full. Whilst the broad parameters of the agreement between the parties was understood, the legal expression given to that agreement has been, at best, unclear and the agreement itself has changed over time.
7. The Klaassens are the sole shareholders and directors of a Dutch company, Bibesco Beheer BV (Bibesco or the Dutch parent company), through which funding for the project was to be provided. A second company, Kilcurrane Business Centre Ltd, which is the subject of this petition, was registered in Ireland on 30th December, 2005. The company is a wholly owned subsidiary of the Dutch parent company. The petitioner was originally a director of the company along with the Klaassens but was removed from that position at an EGM of the company on 9th September, 2019. The company purchased a site at

Gortamullen Business Park on Mart Road in Kenmare on which a purpose-built veterinary clinic was constructed (the property).

8. Inevitably, the construction and fit out of the premises cost more than had been budgeted for. Ms. Klaassen-Don attributes this to the petitioner insisting on the highest specification for the fit out but no detail has been provided to the court as to the actual costs involved nor the breakdown between the construction costs and the fit-out costs. In order to complete the premises, a bank loan of €150,000 repayable over fifteen years was obtained by the company in May, 2006. The purpose of the loan is stated to be "*to complete construction and fit out medical centre*". The loan was secured by a charge on the property and by a personal guarantee was provided by the petitioner.
9. The underlying purpose of this loan is the subject of much dispute between the parties. Ms. Klaassen-Don states that the loan was taken out in the company's name because the petitioner was unable to secure personal financing but that it was understood at all times that the petitioner was personally liable for its repayment. She points to the fact that the repayments were made exclusively by the petitioner. The petitioner disagrees saying that by 2006 it had become clear that the initial investment provided by Bibesco would not be sufficient to complete the project, hence the need for the loan. The loan repayments which he made were properly treated as a director's loan by him to the company. He points out that as the clinic was owned by the company, there was no reason for him to personally provide finance for its completion unless he were investing in the company and obtaining shares in exchange, a proposal which was made but never implemented. Both sides rely on the content of emails exchanged at the time in support of their respective positions. The emails, originally written in Dutch and at times referring to other entities of which the court has no knowledge, do not enable the court to reach a specific conclusion that all parties were agreed that liability for repayment of the loan was intended to be something different than that which is evident from the terms of the loan offer and from the company's accounts. However, one email in the sequence, from the petitioner, dated 24th July, 2006 casts some light on what the parties may have intended. The petitioner notes that due to legal difficulties, a loan could only be drawn down in the name of the company "*a structure of which I am not part at the moment*". He goes on to underline "*that the distribution of the shares*" of the company "*should be arranged as soon as possible*" before concluding that he is not happy with the current situation.
10. The reference to the distribution of the shares in the company may be understood by reference in turn to an outline partnership agreement between the petitioner and Bibesco executed on 7th July, 2010. The agreement is unusual in that, although executed in 2010, it refers to the parties intending to make an agreement to start in June, 2005 and includes a number of key dates which, by the time the agreement was executed, had passed without the scheduled events taking place and without the agreement being amended to reflect this. This undoubtedly gives rise to certain interpretive difficulties. The partnership agreement envisages two additional entities, the Kenmare Veterinary Centre, called the practice, and a company called the Kenmare Veterinary Centre Ltd which is referred to in the agreement as the company but which, for reasons of clarity, I will call

KVCL. The petitioner was to have complete responsibility and liability in respect of both entities. The agreement provided that KVCL would be owned 80% by the petitioner and 20% by Bibesco and that KVCL would run a shop at the clinic with the inventory of products being owned by the petitioner and Bibesco in the same ratio. Ms. Klaassen-Don indicates that it was intended that Bibesco's share of the profits from the shop would be used to fund some of the charitable operations on the site. The court was informed that KVCL has never traded although it would appear that products were sold by the practise, which would not be unusual for a veterinary practise.

11. Key to understanding the intention behind the partnership agreement are clauses 4, 6, 12 and 16. Clause 4 states that the company is the owner of the property and that "*at the moment*" the only shareholder in the company is Bibesco. Clause 6 is worth quoting in full. It provides:-

*"It is the intention of the Parties that 50% of the property at Gortamullen will be transferred to Henk Offereins or the legal successor of Henk and this will be achieved by transferring 50% of the shares of Kilcurrane Business Centre Limited (hereinafter referred to as "Kilcurrane" from Bibesco to Henk or the legal successor of Henk."*

Clause 12 goes on to provide that the petitioner will pay 50% of the initial investment that Bibesco would incur in the purchase and completion of the building. Although the building was completed and operational by the time the agreement was signed, this clause was not amended to reflect that nor to identify the amount of the investment that had by then been incurred. Clause 16 then provides:-

*"Offereins will get loans from Bibesco for his purchase of half of the shares in Kilcurrane and half of all related costs to complete the building as veterinary centre, to complete the shop and to develop the site and to operate the veterinary centre."*

The following clauses make provision for repayment of these loans on the basis that no repayments were required in the first three years and the accumulated interest on the loans would be added to the debt. The first payment was due on 30th June, 2008 and every three months thereafter. There is reference in the partnership agreement to loan agreements which have not been placed before the court. Finally, other clauses in the agreement provide for the entry into a lease of the property and payment of market rent by the petitioner subject to renegotiation if the shares in the company were transferred between 1st July, 2008 and 1st July, 2010, both of which dates had passed before the outlined partnership agreement was signed. The company and the petitioner entered into a one-year lease of the premises in July 2012, although the petitioner had been in occupation of the property since its completion. The lease was not formally renewed on its expiration but the petitioner remained in occupation on a year to year basis.

12. The company places particular reliance on clause 13 of the partnership agreement which provides as follows:-

*"The maximum financial investment of Bibesco in the practice and support in costs of living for Offereins will be €420,000 (ex VAT). This investment is for the property (purchase building) and loans for Offereins. Offereins hereby acknowledges receipt of such loans of €245,091.37 and agrees that they are interest bearing loans repayable in full on demand by Bibesco according to the arrangements in the attached loan agreements between Offereins and Bibesco."*

13. The company's position is not only that these loans were made to the petitioner by Bibesco but that by signing the partnership agreement the petitioner acknowledged the loans and his liability to pay Bibesco. The petitioner takes a different view. Firstly, he makes the point that the company is not a party to the partnership agreement and, secondly, that the agreement was executed some five years after the commencement of the project and has never actually been operated in accordance with its terms. More significantly, he claims that the amount set out in clause 13 includes the amount which would have been advanced to him to purchase a 50% interest in the company in exchange for half the costs incurred by Bibesco in the purchase of the site and the completion of the clinic. As no transfer of shares took place, no liability arises for the repayment of loans which would have been advanced for that purpose. Crucially, the petitioner avers that this was confirmed to him orally by Ms. Klaassen-Don at a meeting on 9th November, 2017. This is disputed by Ms. Klaassen-Don.
14. As previously noted, loan repayments were made to the bank by the petitioner in respect of the loan taken out in the name of the company. Initially, these loan repayments were recorded in the company's annual accounts as submitted to the CRO as a director's loan from the petitioner and as being repayable by the company to him. However, accounts for the year ending 2017 show a sum of €164,336 due to Mr. Ger Klaassen rather than to the petitioner. When this came to the attention of the petitioner in 2019, his solicitor wrote to the company asking it to ensure that the 2018 accounts accurately reflected the correct balance due to the petitioner. The 2018 accounts as originally filed did not make the correction and again attributed the loan balance owed to the petitioner, by now some €195,490, to Mr. Ger Klaassen. Again, solicitors' correspondence ensued and the accounts were revised on the 26th September, 2019 to show that amount as repayable by the company to the petitioner.
15. During this period, relations between the parties had taken a turn for the worse. Ms. Klaassen-Don claims that the petitioner ran into financial difficulty as a result of which, at some time in 2017, he unlawfully sublet the premises without the consent of the Company to another vet practicing as "All Creatures Vet Centre". Ms. Klaassen-Don claims that this vet was unwilling to undertake the charitable work previously done at the clinic for a body called KLAWS (Kenmare Local Animal Welfare Society) which had been founded by the in 2006. The petitioner disputes this on a number of levels. A letter is exhibited from KLAWS dated February, 2021 in which that body confirms it continues to have a good working relationship with both vets and the team at All Creatures and that all are still working together to care for unwanted animals on a daily basis. The petitioner states that no sublease has been created, he remains the sole tenant and the other vet

operates from the property with his permission, presumably on the basis of some sort of licence. Finally, he indicates that the reason for the change was his desire to focus on veterinary sports medicine whilst All Creatures focuses on the local equine, small animal and farm animal side of the practice. Whatever the rights and wrongs of the situation, the Klaassens relied on the petitioner's alleged breach of the partnership agreement and of the lease to justify his removal as a director of the company in September, 2019.

16. In addition, Ms. Klaassen-Don avers that the petitioner had never repaid the loans he had from Bibesco and exhibits two statements of account, one from January, 2009 in respect of €300,823 which is signed by the petitioner and one from February, 2019 in respect of €269,619 which is not signed by the petitioner. The latter statement rather oddly states that the total amount is comprised of a principal sum of €172,367 and €97,251 in interest, the latter of which is owed to the company. No explanation is offered in the statement or elsewhere as to why the interest on a principal sum allegedly owed to Bibesco is owed to the company. In any event, the petitioner disputes the alleged debt saying that he repaid the amounts which were owed in 2009 and has not countersigned the statement from 2019 nor acknowledged that those amounts are outstanding. He states that Bibesco has not made any demand for repayment since 2010 when the amounts indicted on the 2009 statement were repaid in full. No details of the amounts due has been provided to him notwithstanding his solicitor's requests in that regard. Finally, of course, he relies on the fact that Ms. Klaassen-Don had orally acknowledged that no amounts were outstanding by the petitioner to Bibesco. Correspondence between Dutch lawyers on behalf of the parties in respect of this alleged debt is exhibited.
17. However, Ms. Klaassen-Don sets out at para. 20 of her affidavit steps taken because of the existence of this alleged debt. She states:-

*"On or about 2 September 2020, Bibesco held a General Meeting at which it was resolved that the debt of the Petitioner to Bibesco, then standing at €405,228 would be set off against the director's balance of the Petitioner, then standing at €209,680.*

*By this measure, lest there be any doubt as to the true nature of the Bank of Ireland arrangement, the Company discharged the Petitioner's director's balance with it in full. The Petitioner remained indebted to Bibesco in the sum of €195,548. Since the Company has discharged €209,680 of the Petitioner's liability to Bibesco, he is, in fact, significantly indebted to it and not vice versa. Indeed, the full story is that the Petitioner is further indebted to the Company arising out of other considerations, set out below."*

The minutes of the general meeting of shareholders of the Bibesco are exhibited, translated from the Dutch original. These minutes include a record of a resolution adopted to the effect that the alleged debt of the petitioner of some €405,228 "has... by means of setoff against the debt of €209,680 to Kilcurrane Business Centre Limited been reduced by that amount". This resolution is in fact set out twice in slightly different versions as it seems that there was an English translation provided in the Dutch original which is not

exactly comparable to the translated Dutch text. This also refers to the debt of the company being "offset" against the Petitioner's debt to Bibesco. The company's accounts for the year end December, 2019 under the heading "Director's Transactions" which showed €195,490 due to the petitioner at the year end 2018, now show nothing due. Under the heading "Related Party Transactions", an amount of €209,680 is now shown as being due by the company to Bibesco. This is the amount by which the petitioner's director's loan would have increased over the course of the year due to additional repayments made by him to the bank.

18. The other considerations referred to in the affidavit apparently include a debt of €37,321 allegedly owing by the petitioner to the company and shown in the company's 2019 accounts. The single page extract which has been exhibited to explain this amount covers a period from 2017 to 2019 and shows that a significant proportion of the figure claimed consists of increases in rent over those three years. A further amount of €15,675 is identified as "interest charged to Henk last year moved to debtors". Ms. Klaassen-Don states that €34,021 of the total was subject to a bad debt provision against the petitioner. The 2019 accounts include a note as follows:-

*"The trade debtors closing balance is made up of amounts due to the company, net of a bad debt provision from Hendrik Willem Offereins who was a director at 31 December 2018 but ceased as director on 09 September 2019. There is a provision of €34,021 (2018: €21,948) at year end against this debtor. Without provision the balance owing would be €37,321 (2018: €24,269)."*

19. The petitioner makes the obvious point that this alleged debt is not in fact referred to in the 2018 or 2017 accounts and appears for the first time, apparently as having been largely written off, in the 2019 accounts. He also points to the fact that no increase in rent under the lease was ever agreed. Negotiations were entered into in 2018 but did not result in agreement. A letter from the company's solicitor dated 13th February, 2018 suggests that the company sought to put in place a lease at a monthly rent of €1,400 plus VAT and raised the issue of whether a sublease had been granted to another vet. The letter goes on to point out that "neither of the documents have been executed and matters are very much up in the air". Further, although the petitioner requested copies of rental invoices from the company from 2017 to 2020 inclusive, invoices were only furnished for the period from January to July, 2020. Those invoices suggest the monthly rental payment remained at €1,191. Consequently, as the petitioner puts it, it seems the company has created a bad debt against the petitioner based on increased rents to which he never agreed and which were never invoiced to him nor demanded from him before being purportedly written off by the company.

#### **Applicable Law**

20. The law applicable in these circumstances is relatively straightforward. The High Court has jurisdiction under s. 569(1) of the 2014 Act to windup a company if any of the circumstances outlined in sub-paras. (a) to (h) are shown to exist. The jurisdiction is a discretionary one and it does not follow merely because the existence of any of the circumstances has been established that an order will necessarily be made by the court.

Section 571(2) provides, *inter alia*, that the court should not give a hearing to a winding up petition until a *prima facie* case for winding up has been established to the satisfaction of the court. Further, in relation to s. 569(1)(d), a creditor may have recourse to the deeming provision of s. 570 to establish that a company is unable to pay its debts where a statutory demand has been formally served on the company and the debt has not been paid nor secured or compounded to the satisfaction of the creditor within 21 days.

21. In this case, a statutory demand was served on the 14th February, 2020 to which no response was received from the company. In fact, this demand was preceded by a stream of correspondence from the petitioner and his solicitor to the company, it's then solicitor and it's accountants to which very little was received by way of response. The first letter from the company's solicitor was received in October, 2020 in response to the threat of a petition and did not raise any of the issues which are now relied on by the company. Instead, it asserted that the bringing of the petition would invalidate the legal title to the folio. On the basis of these exchanges and the lack of any meaningful response to the statutory demand, the petitioner is entitled to rely on the deeming provisions of s.570 and thus has established that the company is unable to pay its debts. Consequently, the petitioner is *prima facie* entitled to an order under s. 169(1)(d).
22. However, before proceeding to grant the petition, it is necessary to look closely at the defence raised by the company. Keane J. in *Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd* [1996] 1 IR 12 provided useful guidance on the circumstances in which a petition which otherwise meets the criteria of s. 569(1)(d) might not be granted. He stated, starting at p. 24:-

*"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..."*

*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..."*

*It is also clear that, even where the company appears to be insolvent, the Court may nonetheless, in the exercise of its equitable discretion, restrain the presentation of the petition where it is satisfied that the petition is being presented for an ulterior or collateral purpose and not in good faith by a creditor forming part of a class of creditors which seeks the administration of the assets of the company for the benefit of that class in an orderly manner under the supervision of the Court: see *In re a Company* [1983] BCLC 492.*

*I am also satisfied, however, that the jurisdiction to restrain the presentation of the petition is one to be exercised only with great caution.”*

23. In the context of this case, the court must consider whether the defences raised by the company constitute the disputing of liability for the debt in good faith and on substantial grounds. As the amount of the debt well exceeds the statutory thresholds and no admission has been made in respect of any of it, it is unnecessary to consider what the position might be if only part of the debt was admitted.

**Has the Petitioner established there was a Loan?**

24. The arguments made on behalf of the company at the hearing of this petition were technical, legal ones which, with limited exceptions, did not really engage with the affidavit evidence including the evidence which had been submitted on behalf of the company. The main exception to this was the reliance placed on the fact that the petitioner had signed a partnership agreement which, the Company claims, acknowledged the debt due to Bibesco at clause 13. The legal arguments made on behalf of the company are fourfold and I will address them each in turn.
25. Firstly, it is pointed out, and correctly so, that the onus is on the petitioner to establish that there was a loan by him to the company. Secondly, the evidential value of the company accounts as filed in the CRO is questioned. Thirdly, the petitioner must establish not only that there was a loan, but that repayment of the loan was due at the time the statutory notice was served. It may be useful to acknowledge that in seeking to ascertain whether the company is disputing a debt on substantial grounds, the court does not have to decide that a defence on those grounds will necessarily succeed. The standard is a lower one and is closer to asking whether the defence raised is one which should be determined substantively by a court before the existence of the company is put at risk. Finally, in light of the *Truck and Machinery Sales Ltd* test, the company addresses the issues raised by the petitioner in relation to the *bona fides* of its actions in connection with the issues giving rise to the petition. There is obviously a overlap between the just and equitable heading under s. 569(1)(e) and the requirement that any defence to the specific debt claimed must be *bond fide* - although the just and equitable ground may also be available in circumstances where there is no allegation of a lack of *bona fides*.
26. In relation to the question of whether the petitioner has established that there was a loan by him to the company, the company points to s. 237(2) of the 2014 Act. Section 237 applies to what are termed “relevant proceedings” which, under s. 237(1)(a), means civil proceedings in which it is claimed that a transaction entered into by a director of a company constitutes a loan or a quasi-loan by the director to the company. Section 237(2) then provides:-

“(2) *In relevant proceedings, if the terms of the transaction or arrangement concerned either—*

*(a) are not in writing, or*

*(b) are in writing, or partially in writing, but are ambiguous as to whether the transaction or arrangement constitutes a loan or quasi-loan or not (or as to whether it constitutes a quasi-loan as distinct from a loan),*

*then it shall be presumed, until the contrary is proved, that the transaction or arrangement constitutes neither a loan nor a quasi-loan to the company or its holding company, as the case may be."*

27. Although the partnership agreement executed in 2010 refers to "*attached loan agreements*", no such agreements are in evidence before the court. Therefore, for practical purposes, the agreement between the company and the petitioner as regards repayment of the bank loan drawn down in the name of the company is one which is not in writing. Consequently, a presumption arises that the transaction is not a loan by the petitioner to the company. However, like all presumptions, it is not a rule of law and can be displaced by sufficient contrary evidence, a fact which is expressly recognised in the terms of s. 237(2).
28. On the basis of the evidence before me, I am satisfied that the presumption which would otherwise arise under s. 237(2) has been displaced. The evidence on which I rely to reach this conclusion is (1) the loan documentation from the bank from which it is clear that the loan was not made personally to the petitioner but was a business loan to the company for the purposes of completing a development on property which was owned by the company and the loan was secured, primarily, by a charge on that property; (2) the treatment of the repayments made by the petitioner to the bank as a director's loan in the company's accounts over an extended period of time; (3) the correction, at the request of the petitioner, of the accounts for year-end December, 2018 when the amount due to the petitioner was erroneously shown as being due to Ger Klaassen; (4) the purported transfer of the debt due by the company to the petitioner to Bibesco in September, 2019; and (5) the set-off by Bibesco of amounts due to the petitioner by the company against amounts allegedly due by the petitioner to Bibesco. In my view, the last two actions in particular make no sense at all if the company and its parent, Bibesco, did not accept that the amount in question which had previously been shown as a director's loan in the company's accounts was in fact a sum due by the company to the petitioner.
29. The company makes a related argument to the effect that the treatment of the sum as a director's loan in the company's account is not evidence of the fact that it was a loan by the petitioner to the company. It argues that although the statutory obligations on directors in making statutory returns to the CRO imposes a responsibility on directors, it does not operate as a guarantee to persons who might read documents filed pursuant to those obligations that the content of the documents is true or accurate. Whilst technically this is correct and certainly there would be no basis for holding directors personally liable in the case of inadvertent errors, it is a singularly unattractive argument in a context such as this. What the company is saying is that having treated certain payments as a loan over many years, once the loan is called in, it can ignore its previous treatment of it and dispute the characterisation of the payments made by the petitioner.

30. In making this argument, the company relies on the judgment of Laffoy J. in *In Re Kasam Investments Ireland Ltd* [2012] IEHC 553. That was a case in which the petitioner had invested in a company and had received shares which did not have voting rights. The abridged financial statements of the company acknowledged the company's indebtedness to its investors and described the debt due to the petitioner as an amount falling due within one year. Notwithstanding this, Laffoy J. held that there was a *bona fide* dispute on substantial grounds as to whether the acknowledged loan by the petitioner to the company was due at the time the statutory demand was issued or whether it was repayable by the company at some future time and that this dispute could not be determined on the evidence before the court. However, it is clear from the judgment that the company had exhibited a letter from the accountant who had prepared the company's financial statements indicating that the accounting treatment of the debt as falling due within one year was consistent with the fact that there was no pre-defined term attributable to the loan save that it was due and repayable on the maturity of the investment which did not have a predetermined maturity date. Thus, Laffoy J did not decide that entries in a company's accounts are of no evidential value *simpliciter*; rather on the basis of the evidence before her there was a *bona fide* dispute as to whether the amount recorded in the accounts as being due was actually due.
31. I think there are two material distinctions between this case and *In Re Kasam Investments*. Firstly, in *Kasam Investments Ltd*, the fact of the loan was not in issue and the dispute between the parties was a narrower one as to when the loan became repayable. The directors of the company were not seeking to abandon the treatment of the loan as a loan in the company accounts altogether. Secondly, there was additional expert evidence before the court as to how the company accounts should be interpreted. There is no such evidence available to the court in this case. Instead, the company relies on the fact that company accounts were not treated as being definitive in *In Re Kasam Investments Ltd* to say they should not be treated as having any evidential value in this case. I do not agree. In the absence of a clearly articulated and evidenced basis for not treating as a director's loan something which is recorded over many years in the company's accounts as such, I am not prepared to accept that there are substantial grounds for disputing the existence of the loan merely because the company's financial statements, in other circumstances, might not be regarded as definitive. In any event the petitioner's case is not dependent solely on the company's accounts. The position as reflected in the company accounts is consistent with the terms of the loan to the company by the bank and with the purported set off of the amount due by the company to the petitioner against the petitioner's alleged debt to Bibesco.

**Was the Loan due when the Statutory Notice was served?**

32. The company argues that it is not enough simply to call in the loan, it must be actually due at the time when the statutory demand is made. It is also argued that if the petitioner cannot establish the terms of the alleged loan then, equally, he cannot establish that it was due and owing at the material time. In particular, the bank loan which had been taken out in May, 2006 was for a fifteen-year term and, thus, its term had not expired when the statutory notice was served in February, 2020. As it happens, the bank

loan was subsequently paid off in full by the petitioner when, as a result of his discontinuing repayments following his removal as a director of the company, the bank refused further credit to the petitioner personally due to the fact that he had guaranteed the company's loan which was now in arrears. The company claims that the fact the petitioner was removed as director is not a trigger which made the loan repayable nor was the company's balance sheet insolvency which had existed for some considerable time.

33. In disputing this, the petitioner points to two factual matters and a number of legal ones. Firstly, loan agreements between the company as borrower and each of the petitioner and Ger Klaassen were drawn up in 2016. Mr. Klaassen executed his agreement but for reasons which are not explained, the petitioner did not execute his. The draft loan agreement makes the loan amount, which at €164,531 is the same as the amount recorded in the company's accounts for the year ending December, 2016 as being repayable to the petitioner, repayable on demand. Secondly, the amount is consistently recorded in the company's accounts (save for the period during which the Petitioner's loan was incorrectly attributed to Mr. Klaassen) as an "*amounts are repayable to the directors*" and as being repayable within one year. The company, relying on *In Re Kasam Investments Inc* says that this is a boilerplate accountancy term and does not mean that the amount recorded in the company's account was actually due within that year.
34. On his removal as a director, the petitioner initially sought from the company proposals for repayment of the loan. When no response was received, a formal demand for payment within seven days was sent on 24th January, 2020 and when no response was received to that demand, a statutory demand for the sum of €195,490 was sent on 14th February, 2020. In passing, I might observe that I do not accept the company's arguments that the demand is insufficiently particularised. When the chain of correspondence is read as a whole, it is quite clear that repayment is being sought of the director's loan account balance recorded in the company's accounts as being due to the petitioner which in turn is linked to repayment by the petitioner of the company's bank loan.
35. Legally, the petitioner argues that as loan was advanced to the company by the petitioner without any specific terms having been agreed as to its repayment, the petitioner is entitled to demand repayment on request. He relies on the statement of Gibson J. in *Williams & Glyn's Bank v. Barnes* [1981] Com. L.R. 205 in a case concerning whether money lent by way of an overdraft was repayable on demand that there is a "*rule of law which results from the nature of lending money: money lent is repayable without demand, or at latest on demand, unless the lender expressly or impliedly agrees otherwise*". That decision was followed in this jurisdiction in *IBRC Ltd v. Cambourne Investments Inc* [2014] 4 IR 54 in which for various reasons, a contract of loan was held not to have come into operation such that its express terms could not be relied on. Charleton J. held that a contract of loan nonetheless remained in place of these terms, and that unless "*the behaviour of the parties shows that they intended a different bargain, monies lent on overdraft are repayable on demand*".

36. The company here is not arguing that the debt is not yet repayable by reference to some different repayment terms allegedly agreed between the parties either expressly or by implication. The company's position is of course ambiguous because despite the manner in which these amounts were treated in its accounts over many years, it is primarily arguing that there is no debt owed by it to the petitioner at all. However, unlike the position in *In Re Kasam Investments*, its fall-back position is not to suggest that the debt would become repayable on some other date by reference to some other understanding. If taken to its logical extension, the company's argument would mean that in the absence of proof of the repayment terms, the debt would, in effect, never become repayable. This cannot be the law particularly in light of Charleton J.'s very clear statement in *Cambourne Investments Inc* that "*Once lent, money is repayable*". Once that basic principle is accepted, then in the absence of evidence of agreed terms in relation to repayment, the loan is repayable on demand provided a reasonable period is allowed after the demand has been made (per Lewison L.J. in *Chapman v. Jaume* [2012] EWCA Civ. 476, followed by Ryan J. in *ACC Bank Plc v. Deacon* [2013] IEHC 427).
37. In this case, I am satisfied that in the absence of any evidence that different terms were agreed, the director's loan recorded in the company's accounts as being repayable by the company to the petitioner is repayable on demand by him provided a reasonable opportunity has been afforded to the company to repay. As the issue of repayment was first raised by the petitioner in October, 2019 and a formal demand made in January, 2020 before the statutory notice was served in February, 2020, I am also satisfied that the time afforded to the company to arrange for repayment was reasonable. Thus, the monies became due following the formal demand in January, 2020 and were, therefore, due at the time the statutory demand was sent in February, 2020.
38. The finding in the preceding paragraph disposes of the issue of whether the loan was due at the time the statutory demand was served. Had it not done so, it would be necessary to decide whether, in circumstances where a director is removed from his office in respect of a company, any outstanding director's loan would crystallise at that point and become repayable, absent any express terms agreed to the contrary. In my view there is certainly a logical basis for holding that a director's loan will fall due when the lender ceases to hold the office of director (unless otherwise agreed). Loans from a director to a company fall into a special category and not just for accounting purposes. A director is centrally involved in the management of a company and hence in the use to which any sums received by way of loan are put. When a person ceases to be a director they no longer have any oversight or role in the finances of the company and lose the protection that might afford them as regards the monies that they have lent. However, these observations are necessarily obiter since, if I am correct in holding that the loan was in principle repayable on demand, then the petitioner's removal as a director was not a necessary precondition for repayment becoming due.

#### **Is the Company Insolvent?**

39. In the circumstances of this case the company is deemed to be unable to pay its debts under s.570. However, the court should still look to the actual financial position of the

company, particularly where liability to pay the debt is disputed. The winding up of a company is a drastic step and, if it is not actually warranted in light of the company's true financial position, then the court may exercise its discretion not to make an order under s.569. As many of the authorities point out, the presentation of a petition should not be used as a method of debt recovery and if it appears that the company is in a position to pay the debt (despite not having done so) then normal debt recovery procedures should be invoked by the petitioner.

40. The company's accounts for the year end 2018 show that the company owed some €487,957 to its creditors including the €195,490 owed to the petitioner. The other significant creditors were Ms. Klaassen-Don and Bibesco, each of whom were owed amounts in excess of €100,000 and, combined, an amount about €50,000 in excess of that owed to the petitioner. The accounts for year end 2019 do not show anything owing to the petitioner due to the purported transfer of his loan to Bibesco. The company's total indebtedness reduced slightly from the 2018 position to €456,517, the bulk of which (some €312,990) is now owing to Bibesco. The company describes this position as a "*book debt insolvency*".
41. The company also states, correctly, that in exercising its discretion under s. 569(1), the court can take into account the wishes of the other creditors under s.566 and in doing so must have regard to the value of each creditor's debt (s.566(3)). In this case, those creditors are principally Bibesco and Mr. Ger Klaassen (the debt previously owing to Ms. Klaassen-Don 2018 now showing up as owed to Mr. Klaassen in the 2019 accounts). These creditors categorically do not want the company wound up. However, the fact that the other creditors do not want the company wound up is not determinative, especially in circumstances where the debt the subject of the petition, is roughly comparable albeit somewhat lower than the combined value of the debts owed to these creditors (on the basis of the 2018 accounts).
42. I think that the court must also have regard to the relationship of Mr. Klaassen and Bibesco with the company on the one hand and, the fact that since his removal as a director, the petitioner has no connection with the company. The creditors who do not wish to see the company wound up are its parent company and one of two share-holders in its parent company. Thus, while both are undoubtedly creditors, they are not routine trading creditors nor for example financial institutions which might have extended credit to the company in the normal course of business. Their interest in the company goes beyond the ability of the company to repay the amounts due to them.
43. The company is not and never has been a trading company. Its sole asset is the lands and premises at Gortamullen Business Park from which the Kenmare Veterinary Centre operates. The petitioner has obtained a valuation of this property from a local valuer as being worth approximately €220,000 with an expected annual rent of €16,500. The company's deponent, Ms. Klaassen-Don disputes this valuation, suggesting that the valuation has been reduced by what she alleges to be the unlawful occupation of the premises by the vet whom the petitioner has permitted to enter into occupation. No

alternative valuation is offered by the company. Having looked at the valuation report exhibited by the petitioner, it does not seem that the alleged breach of the lease referred to by Ms. Klaassen-Don is a fact which was taken into account in reaching the value attributed to the premises. The valuation is based on the results for comparable property in the area over the preceding two years and the only factor identified having a negative effect on the value of the property is that it is a unique property built for a customised use and it would be difficult to find a tenant for its current use. In the circumstances, I am satisfied that the property has a value of circa €220,000. This means that the debts of the company significantly exceed the only asset available to it out of which those debts might be discharged. In these circumstances, I am satisfied that the company is in fact insolvent and, even though the other creditors are opposed to the winding up, the level of the debt owed to the petitioner in light of the company's overall indebtedness and of the value of the only asset available to discharge those debts point towards the granting of this petition.

**Dispute in Good Faith and on Substantial Grounds?**

44. There is certainly a dispute between the parties as to the circumstances in which the debt owed by the company to the petitioner arose, whether there are other arrangements or agreements between the parties (not currently evidenced before the court) that would mean that something ostensibly recorded and treated as a debt is not in fact a debt and whether the debt was validly set-off. The court was advised that separate proceedings have been issued in respect of the lease, the partnership agreement and the arrangements between the parties concerning KVCL. However, those proceedings are at a very early stage and, apart from the fact of their issue, the court was not provided with any further details as to their contents. Looked at entirely dispassionately, the dispute between the parties reaches the thresholds of providing the company with a defence to the petition on substantial grounds. The real issue is whether the defence now relied on by the company is being advanced in good faith.

45. I do not think that it is. Firstly, the company did not dispute the debt until after the petition was presented despite the fact that the petition was preceded by extensive correspondence on behalf of the petitioner either expressly reserving his entitlement to demand repayment or actually demanding repayment of the loan. Secondly, apart from the period during which the debt owed to the petitioner was incorrectly attributed to Mr. Klaassen, the debt was at all times characterised in the company's accounts as being an amount repayable to the petitioner as a director. The company did not dispute that characterisation either when the petitioner's solicitor sought rectification of the attribution error in the 2017 and 2018 accounts, nor when proposals were sought for the repayment of the loan. It could be argued that as the company did not respond to any of the petitioner's correspondence, it equally did not accept the petitioner's characterisation of the debt. However, in circumstances where the petitioner had just been removed as a director, thereby ending his formal link with the company, I think it was incumbent on the company to clarify that the petitioner's claim to be owed money by the company (as reflected in the company accounts) was incorrect, if in fact that was the case.

46. Thirdly, the defence advanced by the company is based on two mutually inconsistent stances. The first is that no debt was ever owed since the bank loan was personal to the petitioner and, hence, repayable by him personally and the second is that the debt which was owed to the petitioner was transferred to Bibesco and set off against the petitioner's debts to that company. Whilst it is acceptable in principle for mutually inconsistent pleas to be made in a defence, issues can arise as to the *bona fides* of such pleas particularly when they go beyond merely denying the contrary case pleaded and thereby putting the plaintiff on full proof. In circumstances where the onus on the company is to show that it has a *bona fide* defence to the debt underlying the petition on substantial grounds, I think that there is a consequent obligation on the company to unambiguously identify to the court what the real defence is.
47. Finally, the court views very seriously the purported transfer of the debt recorded in the company accounts as being owed to the petitioner to Bibesco without notice to the petitioner and without the petitioner's consent, particularly since this step was taken after the statutory notice had been served by the petitioner on the company. Not only did this involve a purported transfer of the company's liability to repay the petitioner to another legal entity, but it involved an entity which is not based in this jurisdiction. No real explanation for this action has been offered to the court save for Ms. Klaassen-Don's assertion that the commercial loan from the bank and the arrangement surrounding it "*arose in the same nexus, joint venture and/ or partnership*" such that an entitlement to set-off arose and was duly exercised. In oral argument, it was suggested that this may have been done on the basis of advice from Dutch lawyers but no evidence of this was put before the court nor was there any evidence that such a transfer would have been permissible under Dutch law and indeed the petitioner's Dutch lawyers state in correspondence that it is not in fact permissible. It is clearly not permissible as a matter of Irish law. The petitioner relied on the statement of Collins MR in *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at p. 668 to the following effect:-

*"A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor;"*

This authority was not disputed by the company.

48. It is very difficult for the court to view this purported transfer as anything other than a device on the part of the company to avoid its potential liability to the petitioner. The absence of any meaningful explanation on behalf of the company or indeed of any offer to revoke the purported transfer so as to allow liability for the alleged debt to be determined as between the petitioner and the company is telling. The fact that the purported transfer took place after the petitioner had made a formal statutory demand for repayment of the monies claimed (to which no response was provided) and at a time when the monies were still shown as being owed to the petitioner in the company's accounts heighten the court's concern as to the *bona fides* of the transaction. In all of the circumstances, I am unable

to conclude that the defences now being advanced by the company are made in good faith.

### **Just and Equitable Grounds**

49. On the basis of the preceding analysis, I have found that the petitioner has established that there is a debt owing to him by the company which, despite a formal statutory demand, the company has not repaid. Under s. 570, the company is deemed to be insolvent in these circumstances. I acknowledge that the company is in possession of an asset which exceeds the value of the debt owed to the petitioner and, in other circumstances, that might be sufficient to refuse the petition on the grounds that the petitioner should simply seek to recover the debt in normal course. However, in the circumstances of this case, I do not think that such an approach is warranted, partly because the company is not a trading company and its total indebtedness significantly exceeds the value of its only asset and partly because I have found the defence put forward by the company has not been advanced on a *bona fide* basis. Therefore, it follows that the petitioner has established a basis for the grant of an order winding up the company under s. 569(1)(d) and I will make such an order.
50. Lest I am incorrect in any of the findings that have led me to this conclusion, I have also considered whether the company should be wound up on the alternate basis advanced, namely that it is just and equitable to do so under s. 569(1)(e). The jurisdiction exercisable under s. 569(1) is always discretionary but this is particularly so in the case of s. 569(1)(e) where the phrase "*just and equitable*" necessarily connotes that equitable principle should be applied. In addition, the standard is a subjective one in that the court must be of the opinion that it is just and equitable that the company be wound up. Needless to say, this opinion must be one which is reasonably based on the evidence before the court.
51. The company suggests that the decided case law in respect of the just and equitable ground is confined to a number of categories, none of which arise here. I note that Courtney in *The Law of Companies* (2016 ed.) groups the decided case law into six categories for the purposes of his treatment of it, but the author is careful to acknowledge in doing so "*the danger of fettering the perceived latitude of this ground*". I do not think the court's task is to attempt to pigeonhole the facts of the case into one or more of these categories which simply reflect the author's analysis of the range of cases decided to date. In any event, I am not as confident as the company that none of these categories arise. The first category is titled "*quasi-partnership cases*" and although the text focuses on a case where a private company was tantamount to a partnership between the shareholders (*Re Murph's Restaurant* [1979] ILRM 141), the situation here where a partnership agreement with the parent company envisaged that a 50% shareholding in the subsidiary company would be transferred to the petitioner, a transfer which never materialised, is not that different. Other headings include a deadlock in corporate management which is also potentially relevant in circumstances where the calling in of the director's loan by the petitioner was precipitated by his removal as a director by the company.

52. Looking at the situation overall, although the original advertisement sought a vet to establish a practice in accommodation and facilities to be provided by the Klaassens, it is clear that fairly quickly the parties envisaged that the petitioner would acquire an interest in the company and thus in the premises from which the practice was operating. That clearly had an impact on the manner in which the financial relations between the parties were structured and operated. Although Ms. Klaassen-Don suggests in her affidavit that the petitioner may have made repayments of the company's bank loan as a gift, this was not seriously pursued in oral argument save to illustrate circumstances in which a director might make repayments on a loan on behalf of the company without himself intending that the company would repay him. It is questionable whether a director would do this in circumstances where he or she did not also have a shareholding in the company.
53. It is evident that relations between the parties deteriorated over time and the petitioner never received the shareholding in the company which he anticipated receiving at the time he personally guaranteed the company's bank loan. The outline partnership agreement between the petitioner and Bibesco, which is partly predicated on the petitioner acquiring a 50% stake in the company, appears never to have been operated either in full or as intended. Although there is not an exact identity of personnel as between the partnership agreement and the parties to this petition there clearly has been a breakdown of the relationship between the principals, namely the petitioner and the Klaassens. Consequently, even without considering the purported transfer by the company of the debt owing to the petitioner out of the jurisdiction to its parent company, there is a basis upon which that just and equitable ground can be invoked. As pointed out at the beginning of this judgment, the background to the petition concerns three companies, a partnership, a lease and a veterinary practice which serve as the legal superstructure to what was in effect a quasi-partnership between the petitioner and the Klaassens. Indeed Ms. Klaassen-Don on behalf of the company asserts that the commercial loan to the company arose in the context of the same "*nexus, joint venture and/ or partnership*". That quasi-partnership and any relationship of trust and confidence between the parties has clearly broken down. The authorities suggest that it may be just and equitable to wind up a company in this type of circumstance.
54. Finally, and crucially in the context of my conclusion that it is also appropriate to make an order winding up the company under section 569(1)(e), the breakdown in relations between the parties was accompanied by the illegal transfer of the company's debt to the petitioner out of the jurisdiction to its parent company without notice to or the consent of the petitioner. This, in my view, definitively tips the balance such that I am of the opinion that it would be just and equitable to wind up the company. I will therefore allow the petition and make an order winding up the company on both grounds advanced by the petitioner.