Neutral Citation No: [2019] NICh 10	*Ref:* **McB11002**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **28/06/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (COMPANY INSOLVENCY)

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IN RESPECT OF PROCEEDINGS IN THE WINDING UP OF COMPANIES

AND

IN THE MATTER OF LAGAN HOLDINGS LIMITED

AND

IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

BETWEEN:

LAGAN HOLDINGS LIMITED

Plaintiff;

-and-

LAGAN CONSTRUCTION LIMITED

Defendant.

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McBRIDE J

Application

[1] By summons dated 3 December 2018 the plaintiff, Lagan Holdings Limited, seeks an injunction restraining the defendant, Lagan Construction Limited from issuing a winding up petition in respect of the plaintiff, pursuant to a statutory demand dated 9 November 2018.

[2] The defendant issued a statutory demand on the plaintiff on 9 November 2018. Under "Particulars of Debt" it stated:

> "**These particulars must include (a) when the debt was incurred, (b) the consideration for the debt, (or**

if there is no consideration the way in which it arose), and (c) the amount due as at the date of this demand.

The creditor claims the amount of £1M being an agreed sum due immediately by the debtor to the creditor in respect of monies which were being held on trust for the creditor by the debtor since on or about April 2010 and February 2011, being the respective dates of settlement agreements reached in respect of claims made against numerous insurance policies in relation to pyrite litigation incepted in Dublin (which sets some of its demands as being immediately due without prejudice to the creditor's entitlement to claim such further sums which are due and owing to the creditor from the debtor pursuant to the aforesaid insurance monies).

The said sum was payable on demand and has been duly demanded by the creditor by letters dated 02 and 23 August 2018 and thereafter by the creditor's solicitors by letters dated 14 and 28 September 2018, and it is thereby due by virtue of an account stated.

The agreed sum of £1M is further recorded as liability due by the debtor to the creditor in the last set of accounts filed by the debtor at Companies House for the year ended 30 June 2017 which it is recorded as an amount falling due within one year."

[3] The plaintiff's application was grounded on the affidavit evidence of: Christopher Ross, solicitor, sworn on 3 December 2018; Edward Jones, director of the plaintiff company sworn on 13 December 2018; and Declan Canavan, accountant, sworn on 13 December 2018. In reply the defendant filed affidavits by: Kevin Anthony Lagan, accountant, sworn on 11 December 2018; Michael McCord, solicitor sworn 11 December 2018 which exhibited a report by Mr James Neill, chartered accountant, dated December 2018; and an affidavit by Jill Harrower-Steele sworn on 17 December 2018.

[4] As appears from the affidavit evidence of the defendant, the defendant alleges that the plaintiff agreed to pay £1M to the defendant on foot of an agreement ("the agreement") entered into between Kevin Anthony Lagan acting on behalf of the defendant and Declan Canavan, acting on behalf of the plaintiff, on or about early 2011.

Background

[5] There are three relevant periods to be considered namely:

(a) Events pre-agreement,

(b) Events surrounding the agreement, and

(c) Events post-agreement.

[6] The plaintiff was represented by Mr Stephen Shaw QC with Mr David Dunlop of counsel. The defendant was represented by Mr David Scoffield QC with Mr Atchison of counsel. I am grateful to all counsel for their detailed written and skilfully presented oral submissions.

Events Pre-Agreement

[7] The events prior to the agreement are uncontentious and can be summarised as follows:

(a) Michael and Kevin Lagan, who are brothers, operated a group of businesses known as the Lagan Group of Companies. ("The Lagan Group"). The Lagan Group included, *inter alia*, Irish Asphalt Limited, Linstock Limited, (both of whom are registered in the Republic of Ireland), Lagan Cement Group Limited, Lagan Holdings Limited and Lagan Construction Limited.

(b) The Lagan Group conducted a range of commercial activities. For the most part they focused on the construction industry and related activities including the supply of aggregate in-fill material for use in the construction industry.

(c) Prior to 2010 Kevin Lagan held 55% of the shares in the Lagan Group and Michael Lagan held 45% of the shares.

(d) On 9 July 2010 the two brothers and a number of the Lagan Group of Companies entered into an agreement ("the Separation Agreement") which provided for the corporate re-organisation of the Lagan Group. Pursuant to the Separation Agreement the Lagan Group was effectively split between the ultimate ownership of the two brothers. Kevin Lagan owned the entirety of the shares in some Lagan Group companies and Michael Lagan owned the entirety of the shares in other Lagan Group companies. The two brothers in addition retained joint shareholdings in other Lagan Group companies including Irish Asphalt Limited and Linstock Limited.

(e) The plaintiff is a limited liability company. It was incorporated on 18 February 2009. It has four directors, one of whom is Kevin Anthony Lagan. The entire shareholding is held by Runlin Limited. Kevin Lagan

holds 55% of the shareholding in Runlin Limited. Michael Lagan owns 45% of the shareholding in Runlin Limited.

(f) The defendant is a limited liability company. It has four directors one of whom is Jill Harrower-Steele.

(g) Prior to the Separation Agreement a number of claims had been issued against a number of companies in the Lagan Group. These included claims against the plaintiff, the defendant, Irish Asphalt Limited and Linstock Limited. The claims arose out of the supply of in-fill materials sourced from a quarry in County Dublin known as Bay Lane Quarry. The in-fill allegedly was contaminated with pyrite and allegedly caused extensive and serious building defects. ("the pyrite litigation", also known as "Bay Lane claims").

(h) In 2009 the two insurance companies who had insured the Lagan Group entered into agreements dated 13 April 2010 and 24 February 2011 with the Lagan Group whereby the insurers agreed to pay a total sum of £54.5M ("the Insurance Fund") in consideration of the Lagan Group releasing them from their liability to indemnify them.

Deed of Contribution and Conduct

(i) On 1 September 2010 the plaintiff, the defendant, Lagan Cement, Irish Asphalt and Linstock, all of whom had been named as defendants in the existing pyrite litigation, entered into a Deed of Contribution and Conduct ("the Deed") to "regulate the conduct of the existing Bay Lane claims and any future Bay Lane claims".

(j) Clause 4 of the Deed provided for the treatment of the Insurance Fund as follows:-

> "4.1 The parties shall procure that all monies paid by liability insurers to any of the defendants or any member of the KL Group, the ML Group or the Irish division in connection with any existing Bay Lane claims and future Bay Lane claims shall (subject to any conditions agreed with the relevant insurance companies) be paid into an escrow account in the joint names of the defendants or as shall otherwise to be agreed by ML and KL and shall be retained on that account unless determined by the Committee.
>
> 4.2 It is the intention of the parties that any such insurance recoveries referred to in Clause 4.1 shall be applied towards the conduct of the existing Bay Lane claims and future Bay Lane claims. The manner in

which they are to be applied shall be agreed by the Committee."

(k) Clause 3 provided for the conduct of claims. It provided as follows:

> "3.1 The parties agree that, subject to the remaining provisions of this Clause 3, a Committee comprising the following persons shall be empowered and authorised by each of the defendants that the sole management of the conduct of the existing Bay Lane claims and any future Bay Lane claims on behalf of (and insofar as they relate to) each of the defendants;
>
> 3.1.1 KL (and his nominated legal representative from time to time); and
>
> 3.1.2 ML (and his nominated legal representative from time to time): ("the Committee") **PROVIDED THAT** the Committee may delegate the management of the conduct of those claims in accordance with the provisions of Clause 3.11.
>
> 3.2 Each of the defendants shall carry out, execute and be bound by any decisions made by the Committee in relation to the conduct of the existing Bay Lane claims and any relevant future Bay Lane claims by each of the defendants and hereby irrevocably delegates the management of the conduct of the existing Bay Lane claims and any future Bay Lane claims to the Committee exclusively **PROVIDED THAT** the Committee may delegate the management of the conduct of those claims in accordance with the provisions of Clause 3.11.
>
> 3.3 For the avoidance of doubt each of KL and ML (or their respective alternates) shall (subject to Clause 3.5) be required to form the quorum required for a meeting of the Committee and each of KL and ML (or their respective alternates) shall have one vote in any decisions to be made by the Committee but none of the other attendees referred to in Clause 3.1 above shall have a right to vote. In the event of a deadlock in relation to any manner to be determined by the

Committee the provisions of Clause 3.9 (sic) shall apply.

3.4 Each of KL and ML shall be entitled to appoint an alternate to attend and vote at meetings of the Committee by notice in writing to the other and to Lagan Holdings. Each of KL and ML shall attend or procure that his alternate attends at all meetings of the Committee of which he has been given notice in writing. Such notice shall be reasonable in the circumstances, having the regard to the nature and urgency of the matters to be discussed thereat.

….

3.9 Meetings of the Committee may consist of a conference between members (or their respective alternates) who are not all in one place, but each of which is able (directly or by telephonic communication) to speak to each of the others, and to be heard by each of the others simultaneously. …

3.10 In the event of a deadlock …

3.11 The Committee shall be authorised and empowered to delegate any non-strategic aspects of the conduct of the existing Bay Lane claims and future Bay Lane claims on such terms as may be agreed by the Committee but subject always to the provisions of Clauses 3.1 and 3.2."

(l) The Insurance Fund was initially paid to Maples and Calder, solicitors who acted for the parties named as defendants in the pyrite litigation. The Insurance Fund was then later transferred to the plaintiff.

Events relating to the agreement

[8] Although a number of deponents refer to the terms of the agreement entered into between the plaintiff and the defendant, these deponents do so on the basis of "information and belief". Consequently little weight can be attached to this evidence. The only two deponents who can directly comment on the terms of the agreement entered into are Mr Kevin Anthony Lagan and Mr Declan Canavan as they were the actual parties engaged in the negotiations which ultimately led to the agreement.

[9] Kevin Anthony Lagan is a chartered accountant and was formerly a director of the plaintiff. He avers that he, on behalf of Michael Lagan, had discussions with

Declan Canavan, who acted on behalf of the Kevin Lagan, in 2011 in relation to the distribution of the Insurance Fund. It was agreed between them that £1M would be allocated to the defendant and £1M would be allocated to Lagan Cement. At the time of this allocation the plaintiff did not have funds to immediately pay the amounts due to either the defendant or Lagan Cement. It was therefore agreed that the amounts due to both the defendant and Lagan Cement would be treated as loans from these companies to the plaintiff and the amounts would be repayable on demand. It was further agreed that the loans would be recorded in the accounts of the plaintiff, the defendant and Lagan Cement. Kevin Anthony Lagan denies that the loans were conditional on either liquidity or finalisation of the pyrite litigation.

[10] Declan Canavan, chartered accountant and former director of the plaintiff avers that when the Insurance Fund became available discussions had to be taken "as to what to do with the monies and who owned the monies" and "a question also arose as to how best to allocate the insurance monies". He states that he reached an agreement with Kevin Anthony Lagan. It was agreed that £12M was to be allocated to the plaintiff. Of this £12M, £10M was allocated to the plaintiff to hold for all the Non-Republic of Ireland defendants and 2 x £1M sums were allocated to the plaintiff and Lagan Cement, "to cover tail-end mop up and miscellaneous costs after the pyrite litigation had concluded". Declan Canavan further refers to an e-mail sent by Mr Murphy dated 18 May 2011 enclosing a note dated February 2011 which documented the agreed allocation of the Insurance Fund. The notes states:

> "5. From insurance proceeds – allocated £1M to Lagan Construction
>
> 6. From insurance proceeds – allocated £1M to Lagan Cement."

[11] Declan Canavan further avers that it was his understanding that the allocation of £1M to each of the defendants and Lagan Cement was only to become payable "assuming that there was available liquidity within the plaintiff and that all litigation relating to the pyrite litigation had concluded". He denies that the sum claimed by the defendant is immediately due as the conditions have not been met.

Events post-agreement

[12] After the agreement was entered into the plaintiff, the defendant and Lagan Cement in the usual way filed their statutory accounts. The plaintiff also prepared cash flow projections.

[13] The accounts for the plaintiff, the defendant and Lagan Cement have been considered by Mr Neill, chartered accountant. In his report dated December 2018 he opines as follows:

> "It would be my opinion that within each of the financial statements of Lagan Construction Limited for the years ended 31 March 2012 to 31 March 2017, it has been the opinion the directors of Lagan Construction Limited, that the date of approving and the signing the accounts, that a debt of £1m is owing to Lagan Construction Limited by Lagan Holdings Limited and payable within one year. I further note that the accounts were independently audited by BDO Northern Ireland for each period. …
>
> As outlined in detail in Section 4.3 it would be my opinion that within the financial statements of Lagan Holdings for the year ended 30 June 2017, it has been the opinion of the directors of Lagan Holdings Limited as of 26 July 2018 … that a debt of £1m is owing to Lagan Construction Limited by Lagan Holdings Limited and is payable within one year.
>
> It would be my opinion that the debt has not been treated as a contingent liability in the accounts of Lagan Holdings Limited nor a contingent asset in the accounts of Lagan Construction Limited or Lagan Cement Group Limited. As outlined in further detail in Section 4.3, the treatment of the debt within each of the accounts at each of the three entities appears to be the same and … in contradiction to the position outlined by BMK Accountants (accountants for Lagan Holdings Limited) in correspondence dated 22 November 2018. I would again note that the accounts of Lagan Construction Limited and Lagan Cement Group Limited were audited by BDO Northern Ireland and Price Waterhouse Coopers LLP respectively."

[14] Correspondence was received from BMK, chartered accountants and registered auditors, on 22 November 2018 in response to a letter sent by the plaintiff's solicitors. It stated:

> "It is our understanding that a £1m allocation was created in or around mid-2011 and disclosed within the relevant financial statements of Lagan Holdings Limited at 31 December 2011 and year ended 31 March 2012 within the financial statements of Lagan Construction Limited. A similar allocation was made

in that year in favour of Lagan Cement Group Limited.

Both allocations were presented by the Lagan Holding Limited directors as being dependent on:

- Having available liquidity within Lagan Holdings Limited, and
- The finalisation of all litigation relating to pyrite.

As such the allocated amount would only be payable if sufficient funds were available and litigation had successfully concluded.

We note from the review of the year ended 31 March 2012 financial statements of Lagan Construction Limited reference is made within note 21:

'During the year the company agreed a loan of £1M to Lagan Holdings.' …"

[15] Declan Canavan in his affidavit states that as director of the plaintiff he prepared management and statutory accounts. He further avers that he prepared cash flow projections. He accepts that 2 x £1M allocations from the Insurance Fund were treated as liabilities in the management and statutory accounts but avers that during the period 2011 - October 2017 these allocations were not shown in the cash flow projections as projected payments. He further avers that following a Board meeting in October 2017 the 2 x £1M allocations were included in the cash flow document produced in November 2018 but in or around February 2018 the 2 x £1M allocations to each of the defendant and Lagan Cement were removed out of the cash flows due to unexpected liquidity issues.

[16] On 2 August 2018, 23 August and 14 September 2018 the defendant sought payment from the plaintiff of the £1M.

[17] On 21 September 2018 the plaintiff's solicitors wrote to the defendant's solicitors asking them to set out the basis upon which the defendant claims there is an actual liability and further asked them to produce the evidence of that liability and an explanation of the circumstances and the creation of the liability if it so existed. The letter further set out that without prejudice to the position in respect of determining the existence of liability or otherwise, any payments due by the plaintiff to the defendant "would be subject to the liquidity constraints of Lagan Holdings Limited".

[18] In their response dated 28 September 2018 the defendant's solicitors stated that their client did not accept that the payment was subject to the liquidity constraints of the plaintiff. It further stated:

> "The debt due is £1,020,400 and we are surprised your client has asked for evidence of liability and circumstances where the liability is recorded in the last set of accounts filed by your own client at Companies House. It had seriously been suggested by your client that it needs an explanation from our client about a liability which your client has itself recorded in your client's own accounts?"

[19] On 9 November 2018 the defendant sent a Pre-Action Protocol Letter under the Pre-Action Protocol for Commercial Actions to the plaintiff claiming the £1M as an "agreed indisputable sum due" and indicated a statutory demand would be served in respect of this debt. The Pre-Action Protocol Letter further sought an account as to how the Insurance Fund had been spent and set out a number of concerns that the Insurance Fund had been spent in breach of the Deed.

[20] On 9 November 2018 a statutory demand was issued by the defendant upon the plaintiff which claimed that the plaintiff owed it the sum of £1M which was payable immediately.

Relevant law

[21] In accordance with Article 104 of the Insolvency (Northern Ireland) Order 1989 a petition for the winding up of a company must be presented:

> "…either by the company, or the directors or by any creditor …"

[22] Under Article 102 the company may be wound up, inter alia, if it is unable to pay its debts.

[23] Article 103 defines inability to pay debt as follows:

> "(1) A company is deemed unable to pay its debts—
>
> (a) If a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a demand (known as 'the statutory demand') in the prescribed form requiring the company to pay the sum due and the company has for 3 weeks thereafter neglected to

> pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor …"

[24] Under Rule 6.005 of the Insolvency Rules (Northern Ireland) 1991 a debtor can apply to set aside a statutory demand against him personally and the court may grant such an application if, inter alia, "the debt is disputed on grounds which appear to be substantial".

[25] Rule 6.005 does not however apply to a statutory demand served on a company. Accordingly the only way in which a company can restrain the presentation of a petition is to seek an injunction.

[26] The principles upon which the court acts in such applications, when a debt claimed is disputed, have been considered in a number of cases in this jurisdiction. In *Spanboard Products Limited v Elias and Others* [2003] CHNI 3 Girvan J held at paragraph [4] as follows:

> "In an application to restrain the presentation of a winding up petition such as the present the applicant must demonstrate that it would be an abuse of process for the defendants to proceed with the petition. It is thus necessary for the company to establish that if the defendants presented a winding up petition it would be bound to fail. It is clear from the authorities such as *Mann v Goldstein* [1968] 2 All ER 769 that <u>if the debt claimed by a petitioner is disputed on grounds showing a substantial defence requiring investigation the petitioner will be unable to establish that he is a creditor and accordingly does not have locus standi to present the petition</u>." (emphasis added).

In that case, Girvan J granted the application as he was satisfied there were "triable issues".

[27] In *Ward v Anglo Irish Bank Corporation Limited* [2011] NICH 7 at paragraph [5], Deeny J accepted that an applicant for an injunction only has to show "that there is a triable issue i.e. one that is neither spurious nor bound to fail but on which it may succeed at trial".

[28] In *Allen v Burke Construction Limited* [2010] NICH 9 a case involving an application to set aside a statutory demand, Deeny J held that the applicable test was the same whether the application was either to set aside a judgment; or to seek leave to defend a case and avoid summary judgment; or to set aside a statutory demand;

or to obtain an injunction staying a winding up petition. In all these applications he held:

> "The court is not holding a full trial of the matter; it must only decide if the grounds appear to be substantial. They must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble."

[29] I agree with all these dicta and consider that perhaps the most useful summary of the relevant principles upon which the court will act in an application for an injunction retraining the presentation of a winding up petition, was that given by Norris J at paragraph [22] in *Angel Group v British Gas* [2012] EWHC 2702, when he stated as follows:

> "The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:-
>
> (a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: *Mann v Goldstein* [1968] 1 WLR 1091.
>
> (b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).
>
> (c) A dispute will not be 'substantial' if it has really no rational prospect of success: in *Re A Company No.0012209* [1992] 1WLR 351 at 354B.
>
> (d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract.
>
> (e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for

> the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in *Re A Company No.006685* [1997] BCC 830 at 832F.
>
> (f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination.
>
> (g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment."

[30] In applying these principles it is important to take into account the comments made by Daniel Alexander QC at paragraphs [47] and [48] in *Breyer Group Plc v R V K Engineering Limited* [2017] EWHC 1206, when he stated as follows:-

> "The courts have recognized on numerous occasions that such proceedings are not the place for resolving genuinely disputed debt claims which the court cannot properly determine, either as to merits or as to quantum … While the court must be astute to avoid having the wool pulled over its eyes by a debtor trying to escape its obligations, it must be equally astute to avoiding injustice being caused by a potential creditor using insolvency proceedings to make it less likely that a justified defence or counterclaim will be pursued because the alleged debtor will be pressurized into paying the claim in full before that can be done."

[31] In determining whether to grant an interlocutory injunction the court will take into account the factors set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396. There is however a long line of authority to the effect that an attempt by a creditor to pressurise a company into paying a debt which is disputed, by petitioning to wind the company up, is an abuse of the process of the court – *Re A Company (No. 0012209 of 1991)* [1992] 2 All ER 797. An injunction always lies against an attempt to abuse the process of court. Therefore, if the petitioner establishes that

a bona fide dispute exists as to the debt, an injunction restraining the presentation of a petition winding up the company on this basis, will almost invariably be granted.

Submissions of the parties

[32] Mr Shaw on behalf of the plaintiff submitted that there was a substantial dispute in respect of the debt. He accepted that Kevin Anthony Lagan and Declan Canavan entered into an agreement in or around February 2011 (the date which appears on the note by Mr Murphy) in respect of the Insurance Fund. He submitted however that when Kevin Anthony Lagan and Declan Canavan entered into the agreement they were not acting as the alternates of Kevin and Michael Lagan and consequently they were not acting as the Pyrite Committee when they made the agreement. As a result they were not in a position to agree how the Insurance Fund was to be applied, because Clause 4.2 of the Deed provided:- "The manner in which [the Insurance Fund is] to be applied shall be agreed by the Committee". In support of his argument that they did not act as alternates he relied upon an affidavit sworn by Michael Lagan on 22 March 2018 which was filed in the Chancery proceedings in which he averred at paragraph [33] as follows:

> "That 'Pyrite Committee' has not formally been convened since 2010 and I understand the insurance settlement proceeds have at all material times been under the control of Lagan Holdings Limited as trustee, and that at no time did any Pyrite Committee discuss any allocation of, or manage any of, the insurance proceeds with Lagan Holdings Limited as held."

[33] Secondly, he submitted that even if Kevin Anthony Lagan and Declan Canavan acted as alternates there was a substantial dispute as to the terms of the agreement. In particular Declan Canavan asserted that the allocation of £1M was contingent on the liquidity of the plaintiff and the finality of the pyrite litigation. In contrast Kevin Anthony Lagan averred that there were no conditions attaching to the loan. In such circumstances Mr Shaw submitted that there was a triable issue which this court could not resolve as it required detailed investigation which could only take place at a trial. In particular, as neither party to the agreement had contemporaneous notes of the terms of the meeting, and as each gave diametrically opposed versions of the terms of the agreement reached it was necessary to call these persons and for them to be subjected to cross examination so the court could form a view as to the facts relating to the actual terms of agreement reached and to determine, in particular, whether any conditions attached to repayment.

[34] Mr Shaw further submitted that the available documentary evidence did not render investigation by trial unnecessary as the available documentary evidence did not conclusively resolve the dispute. Although he accepted the accounts indicated that the £1M allocation was a loan which was due immediately, he submitted that

there was an argument that the accounts were "not properly labelled" and the court therefore needed to investigate this matter. In addition, he submitted that there were other documents before the court which indicated that the debt was not immediately repayable, namely a letter dated 22 November 2018 from the plaintiff's auditors, BMK and in addition the plaintiff's cash projections which indicated that the loan was only repayable when the plaintiff met certain liquidity conditions. These documents indicated that the debt was contingent on the liquidity of the plaintiff and the finality of the pyrite litigation.

[35] Finally, Mr Shaw submitted that the £1M claimed was substantially disputed as it formed part of a much wider commercial dispute which was presently the subject of proceedings before the Chancery Court.

[36] In contrast Mr Scoffield, on behalf of the defendant submitted that there was clear and indisputable evidence that the debt was due and owing. Firstly, he submitted that Kevin Anthony Lagan and Declan Canavan acted as the alternates of Kevin and Michael Lagan. He referred to Mr Jones' affidavit lodged in the Chancery proceedings in which he accepted that Kevin Anthony Lagan was an agent or nominee of the defendant. He further submitted that Declan Canavan did not dispute in his replying affidavit the evidence of Kevin Anthony Lagan that he and Declan Canavan were acting as alternates of Kevin and Michael Lagan and therefore acting as the Pyrite Committee when they entered into the agreement.

[37] Secondly, Mr Scoffield submitted the court should dismiss the evidence of Declan Canavan as it contained mere bare assertions which were completely inconsistent with the available objective documentation and should accept the evidence of Kevin Anthony Lagan which was corroborated by: a note by Mr Murphy; the statutory accounts of the plaintiff, the defendant and Lagan Concrete Limited; the plaintiff's Board minutes, and e-mails.

[38] Mr Scoffield placed particular emphasis on the statutory accounts filed by the plaintiff, the defendant and Lagan Cement. He submitted that all these accounts recorded the £1M as a loan due and owing to the defendant by the plaintiff. In addition the minutes of the plaintiff's Board indicated that a loan of £1M was due by the plaintiff to the defendant. Further he referred to an email dated 20 October 2017 from Declan Canavan which said, "Kevin Lagan on behalf of Lagan Homes Limited agrees to accelerate the remaining Lagan Homes Limited capital repayment … This undertaking will immediately cease in the event that Lagan Construction Limited demands repayment of the existing £1M sum due to it from Lagan Holdings Limited." He submitted that this e-mail confirmed unambiguously that the plaintiff accepted it owed a debt of £1M to the defendant. In light of all the written objective documentary evidence he submitted that there was no real dispute that a debt was due and owing and consequently the court did not need to investigate the matter further. He submitted that all the evidence produced by the plaintiff was a mere smoke screen and the alleged dispute was a mere pretext.

[39] In relation to the submission that the debt was contingent he submitted that the accounts referred to the debt as being due and owing within 1 year and although there was a section in the accounts where the plaintiff could have recorded the debt as a contingent liability it did not do so. Accordingly, he submitted the objective evidence unambiguously pointed to a debt which was due and owing without being contingent on liquidity or finality of pyrite litigation. He further submitted that it made no sense for the debt to be contingent on finality of pyrite litigation as the purpose of the allocation from the Insurance Fund was to enable the defendant to defend the pyrite litigation. The averment by Declan Canavan that the allocation was designed to be available for "tail end mop up costs after litigation had finished", accordingly made no sense considering the Insurance Fund was to be used in defence of pyrite litigation.

[40] He further submitted that although there were related proceedings in the Chancery Division in relation to the Insurance Fund, the dispute before this court in relation to the £1M was a discrete dispute which arose out of an agreement entered into between Kevin Anthony Lagan and Declan Canavan.

[41] Accordingly, he submitted that the court should conclude that there was no genuine or substantial defence to the debt and the evidence of the plaintiff was simply an attempt by it to "pull the wool over the eyes of the court".

Consideration

[42] The burden is on the plaintiff to establish that there is a "substantial dispute". In determining whether such a dispute exists the court must evaluate the strength of the evidence before it to ascertain if there are "triable" issues as opposed to "mere quibbles". The court must also be astute to ensure that the plaintiff is not seeking to pull "the wool over its eyes" by a multiplicity of objections raised in voluminous affidavit evidence.

[43] The plaintiff submitted that the claim for £1M formed part of the wider dispute between the parties in respect of the Insurance Fund, which is presently the subject of a dispute in the Chancery Division. In contrast the defendant submitted that the claim for £1M was a discrete claim arising from the agreement entered into between the representatives of the plaintiff and defendant.

[44] The statutory demand sets out the particulars of the debt. It states that the creditor's claim for £1M is "an agreed sum due immediately by the debtor to the creditor in respect of monies which were held in trust for the creditor by the debtor since on or about April 2001 and February 2011, being the respective dates of settlement of agreements reached in respect of claims made against insurance policies in relation to pyrite litigation …..". The particulars of debt then go on to record that the sum was demanded and that it was recorded as a liability due by the debtor to the creditor in the last set of accounts filed by the debtor for the year 30 June 2017 in which it was recorded that the amount fell due within one year.

Nowhere in the particulars of debt does it state that the debt arose as a result of an agreement entered into in 2011 between representatives of the plaintiff and the defendant acting as alternates for Kevin and Michael Lagan or otherwise acting as the Pyrite Committee under the Deed. In addition, in response to the plaintiff's letter to the defendant's solicitors, dated 21 September 2018 asking them to set out the basis upon which the defendant claims there was a liability and to produce the evidence of that liability and an explanation of the circumstances and the creation of the liability if it so existed, the defendant's solicitors failed to set out details of the agreement and simply referred to the accounts. Notwithstanding the failure of the statutory demand and the subsequent correspondence to set out clearly that the £1M claimed arose out of a discrete agreement reached by the Pyrite Committee in respect of part of the Insurance Fund, I am nonetheless satisfied that there is no arguable case that the £1M debt forms part of the wider dispute between the parties which is presently the subject of proceedings in the Chancery Division. This is because the parties all agreed that an agreement had been reached between the parties in respect of £1M being allocated from the Insurance Fund to the defendant by the plaintiff. Accordingly the only dispute between the parties related to whether it was an enforceable loan and whether conditionality was attached to repayment.

[45] I have carefully evaluated all the evidence before the court in detail, and notwithstanding the very cogent arguments made by Mr Scoffield I am satisfied that the plaintiff has raised a genuine and substantial dispute in respect of a number of significant issues, which if established, would defeat the defendant's claim.

[46] First, I consider that there is a triable issue whether Kevin Anthony Lagan and Declan Canavan were acting as alternates of Michael and Kevin Lagan and therefore acting as the Pyrite Committee when they entered into the agreement in early 2011. Under the Deed the only body which can determine the manner in which the Insurance Fund is to be applied is the Pyrite Committee. Under Clause 3.4 of the Deed "each of Kevin Lagan and Michael Lagan shall be entitled to appoint an alternate to attend and vote at meetings of the Committee by notice in writing to the other and to Lagan Holdings. …". There was no evidence before this court that such a notice in writing had been given. In addition such evidence as there was, indicated that the Pyrite Committee had not met until a substantial period of time after Kevin Anthony Lagan and Declan Canavan met. Mr Jones in his evidence averred that the Pyrite Committee did not meet until 3 May 2018. This was corroborated by the evidence of Mr Michael Lagan in an affidavit sworn on 22 March 2018 in connection with the Chancery proceedings in which he averred as follows at paragraph [33]:

> "That the 'Pyrite Committee' has not formally been convened since 2010, and I understand the insurance settlement proceedings have at all times been under the control of Lagan Holdings Limited as trustee and that at no time did any Pyrite Committee discuss any allocation of, or manage any of the insurance

> proceeds with (sic) Lagan Holdings Limited has held."

[47] Whilst I acknowledge Mr Jones in his affidavit sworn on 15 June 2018, in the Chancery proceedings accepted that Kevin Anthony Lagan was an agent or nominee of Michael Lagan, he does not confirm that Kevin Anthony Lagan acted as Michael Lagan's alternate in accordance with the terms of the Deed.

[48] I therefore consider there is a need for a full investigation into the question whether Michael Anthony Lagan and Declan Canavan acted as alternates. This court cannot resolve that factual dispute on the basis of the evidence before it. Such a factual dispute can only be resolved after a full trial when the court has had the opportunity to hear and see all the relevant witnesses and examine all the relevant documents.

[49] As I am satisfied that there is a triable issue whether Kevin Anthony Lagan and Declan Canavan acted as the Pyrite Committee when they entered into the agreement, a substantial dispute arises about whether their agreement is enforceable in light of the provisions of the Deed.

[50] Secondly, I consider that there is a triable issue whether repayment of the debt was subject to conditionality. Kevin Anthony Lagan and Declan Canavan gave diametrically opposed evidence in respect of the terms of the actual agreement reached between them. Whilst I accept the submissions of Mr Scoffield that there is no real dispute that the plaintiff agreed to pay £1M to the defendant from the Insurance Fund, I do consider, however that there is a triable issue whether repayment of the debt was subject to conditionality. I have come to this conclusion for the following reasons.

[51] Kevin Anthony Lagan and Declan Canavan were the only parties present when the agreement was entered into. Neither party kept a contemporaneous note of their discussions. Neither prepared a contemporaneous note of the terms of the agreement. Given their diametrically opposed evidence in respect of the terms of the agreement and given that this goes to the heart of the dispute, I am satisfied that the only way a court can resolve this fundamental dispute is by hearing their evidence. It is only after a trial a court can assess the credibility of the witnesses and can determine what the actual terms of the agreement were and in particular can determine whether any conditions applied to repayment.

[52] I accept that in all the statutory accounts of the plaintiff, the defendant and Lagan Cement the £1M is referred to as a loan. Even though the accounts have a section dealing with contingent liabilities this loan was never included in that section or otherwise stated to be contingent. Further, I note the e-mail correspondence in which it was acknowledged on the plaintiff's behalf that it owed a debt of £1M to the defendant. In addition I have read the various minutes of the plaintiff's Board,

which Mr Scoffield referred to me in detail, and note that all of these point to the plaintiff accepting that it owed a debt to the defendant of £1M.

[53] Notwithstanding the weight which I attach to the statutory accounts, the Board minutes and the e-mails, I nonetheless find that these documents alone are not determinative of the issues in dispute and do not alone establish that there is no substantial dispute as to the debt. This is because this documentary evidence, which was created after the agreement was entered into, does not purport to be and is not a record of the terms of the agreement. It must therefore give way to the primary evidence of the parties who entered into the agreement. Whilst the accounts may tend to show the agreement was not subject to conditionality, the only evidence relating to the actual terms of the agreement the parties entered into, is the evidence of Kevin Anthony Lagan and Declan Canavan. The only way the dispute between them, relating to the terms of the agreement can be resolved is by hearing their evidence and subjecting it to challenge in the usual way in a trial.

[54] In addition the documentary evidence is not dispositive of the dispute as there are some documents which indicate the repayment of the loan was subject to conditionality. For example, the cash flow projections prepared on behalf of the plaintiff only included a payment to the defendant when the plaintiff met certain liquidity conditions. This raises, at least, an arguable defence that the debt was only repayable when the plaintiff met certain liquidity conditions. Further, BMK, the plaintiff's auditors in a letter dated 22 November 2018, stated that the allocation of £1M was dependent on liquidity within the plaintiff and the finalisation of all litigation relating to pyrite. This letter, at least, calls for some further investigation. I am therefore satisfied the documentary evidence before the court points both ways and consequently does not unambiguously demonstrate that there is no triable issue.

[55] Further the evidence of Kevin Anthony Lagan points to there being a triable issue whether the loan was conditional on the liquidity of the plaintiff. He avers at paragraph [17] of his affidavit that the plaintiff "did not have the funds to immediately pay the amounts due. It was therefore agreed … that the amounts due … would be treated as loans …". Then at paragraph [10] of his affidavit he states "since the monies could not be paid by Lagan Holdings Limited at that time, this became a debt from the plaintiff to the defendant payable on demand". I consider that his affidavit is inherently contradictory on the issue whether the repayment of the debt was subject to the plaintiff having liquidity and therefore a triable issue arises.

[56] For all these reasons I am satisfied that there is a real and substantial dispute whether the £1M is immediately due and owing.

[57] Given that the plaintiff has raised a number of triable issues I consider it would be an abuse of process for the defendant to proceed with the presentation of the petition and accordingly I grant the injunction sought.

[58] I will hear counsel in respect of costs.