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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **06/01/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

CLARITY TELECOM LIMITED

Petitioner

-and-

(1) JOHN BRITTON MEGAHEY; and
(2) BARCLAY TELECOM LIMITED

Respondents

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David Dunlop QC and Wayne Atchison (instructed by Millar McCall Wylie, Solicitors) for the Petitioner
Frank O'Donoghue QC and Alistair Fletcher (instructed by Tughans, Solicitors; and latterly, McKees, Solicitors) for the First Respondent

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SCOFFIELD J

Introduction

[1] This is an application on behalf of the first respondent in the above proceedings, Mr Megahey, seeking security for costs from the petitioner, Clarity Telecom Limited ("Clarity"). In these proceedings, Clarity has petitioned for the winding up of the second respondent, Barclay Telecom Limited ("Barclay"), in which Clarity and Mr Megahey each hold 50% of the shares. The winding-up order is sought pursuant to Article 102(g) of the Insolvency (Northern Ireland) Order 1989 (the 1989 Order) on the basis that it is just and equitable that the company should be wound up. The factual background to the petition is set out in further detail below.

[2] The first respondent, the moving party in this application, was represented by Mr O'Donoghue QC and Mr Fletcher; and the petitioner, opposing the application, was represented by Mr Dunlop QC and Mr Atchison. I am grateful to all counsel for their comprehensive written submissions and their focused oral submissions.

Factual Background

[3] Barclay – the company sought to be wound up – was a telecommunications business providing Voice over Internet Protocol (VoIP) services using technology supplied by Voxbit Limited, in which Clarity is the majority shareholder. Mr Megahey is a shareholder of Fonezone Telecommunications Limited ("Fonezone"), which trades under the Barclay brand as Barclay Communications. Barclay was established as a joint venture company, which was initially wholly owned by Clarity and Fonezone but Mr Megahey later elected to personally acquire the Fonezone shares in Barclay in 2012.

[4] Barclay was intended to work jointly between Clarity and Fonezone. Clarity's business was focused on landline telecommunications services, whereas Fonezone was based in mobile services. The new company, Barclay, was therefore able to provide a corporate vehicle with synergy to service both Clarity's and Fonezone's respective customer bases and it proved to be a successful and profitable business.

[5] Pursuant to a shareholders' agreement, Clarity was tasked with the day-to-day management of Barclay and would charge Barclay for the services it was providing in that regard. However, in or around the summer of 2018, Clarity and Mr Megahey had a dispute as to what was owed to Clarity by Barclay. The nature and details of this dispute are all highly contentious.

[6] In short, Mr Megahey believed that Barclay had been overcharged by Clarity and he therefore refused to authorise payments to Clarity unless the charges were fully vouched. For its part, Clarity contends that Mr Megahey saw an opportunity to use a different product to provide VoIP services (Gamma Horizon), rather than Voxbit's technology, and became involved in selling products in direct competition to Barclay. Clarity also contends that Fonezone – through a connected company (Barclay Digital Services Limited) – "poached" Barclay staff and sought to novate Barclay's customers to benefit itself. These claims are disputed by Mr Megahey but both sides contend that the other was in breach of the shareholders' agreement and was responsible for the breakdown in relations and, hence, the breakdown of Barclay's successful business model.

[7] Clarity is critical of the first respondent for failing to use the provisions of the shareholders' agreement to investigate any financial queries he had. Instead, it is said that he froze the bank accounts and effectively terminated Barclay's operations, denying Clarity any of its rights as a shareholder. This has led to a range of litigation. In autumn 2018 Clarity sought injunctive relief and there was an agreement, referred to at times as an *interim* agreement, reached between the parties in September 2018, which resulted in an agreed order of the court of 19 October 2018. The basic effect of the agreed position at that time was that Clarity would continue to service Barclay and would be paid for those services whilst the company was run down in a managed way. Clarity says that there is a sum of around £308,000 owed to it from invoices for services provided to Barclay which have not been discharged

and that some £160,000 of this sum has accrued since the date of the September 2018 agreement when the first respondent agreed that Clarity would continue to provide services. As a result, Clarity contends that Mr Megahey and Fonezone have taken the benefit of that agreement without paying any of the related costs (including costs incurred to third parties) which have been borne in their entirety by it.

[8] The ultimate result of all of this was that the Barclay business was wound down and Fonezone on the one hand and Clarity on the other simply competed for Barclay's customer base.

[9] The result of these events has been that Barclay is now left as a non-trading entity; but one which still retains significant assets in the form of cash resources. Given that it is deadlocked, these resources cannot be released as a consequence of the dispute. Clarity has petitioned for the winding up of Barclay in order to access what it contends it is owed and its share of the assets held by Barclay. Mr Megahey opposes the winding up petition on the basis that Clarity has not come to equity with clean hands and that it is responsible for the breakdown in trust and confidence between the shareholders. He wishes to pursue a derivative action against Clarity on behalf of Barclay if he succeeds in resisting the winding-up petition.

[10] Clarity has drawn attention to the fact that, at one point, Mr Megahey had in fact been keen that Barclay *should* be wound up and made a proposal in this regard; but that, as soon as Clarity indicated agreement to this proposal, Mr Megahey had a change of heart. I return to this issue below. For his part, Mr Megahey says that he would be prepared to release the payments due to Clarity if the charges were properly vouched to his satisfaction, but contends that Clarity has failed to produce this documentation. However, consideration of the exchanges between the parties suggest that Mr Megahey is unlikely to be satisfied unless there is a full and wide-ranging investigation into the running of Barclay and the services provided to it by Clarity.

[11] In submissions to the court, the dispute has been described as "intractable"; and it is clear that it has given rise to a range of litigation between the relevant individuals, namely Mr Megahey on the one hand and a director of the petitioner and its deponent, Mr Whelan, on the other. It is said that their current relationship "could hardly be worse" and, amongst other things, each has issued defamation claims against the other, which remain at an early stage of proceedings.

The relevant provisions of the Rules of Court

[12] The Rules of the Court of Judicature (NI) 1980 ("the 1980 Rules") Order 23, rule 1(1)(e) provides as follows:

> "Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –

…

(e) that the plaintiff is a company or other body (whether incorporated inside or outside Northern Ireland) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."

[13] Although the parties in this application do not strictly stand in the positions of plaintiff and defendant in the main proceedings, that does not matter, since Order 23, rule 1(3) of the 1980 Rules provides as follows:

> "The references in this rule to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim."

[14] Clarity is plainly a company. The key issues for the court on the present application, therefore, are:

(i) whether there is reason to believe that it will be unable to pay the first respondent's costs if ordered to do so (the 'inability to pay' issue);

(ii) if so, then, having regard to all the circumstances, whether it is just to order security for costs at all (the 'justice' issue); and

(iii) if so, then, what security should be ordered (the 'terms of the order' issue).

[15] The approach which the court will take when considering an application under Order 23, rule 1(1)(e) of the 1980 Rules was summarised by Weatherup J in *Tennyson v Devlin* [2013] NIQB 9, at paragraph [5], as follows:

> "Under Order 23 Rule 1(e), where there is reason to believe that a Plaintiff company will be unable to pay the Defendants' costs if unsuccessful in the action, the Court may order the Plaintiff company to give security for the Defendants' costs. The issue of security for costs was considered in *Brookview Developments Ltd v Ferguson* [2011] NIQB 37 and I adopt the approach there outlined. First of

> all there must be reason for the Court to believe that the Plaintiff company will be unable to pay the Defendants' costs. Secondly, the Court has a discretion whether to order security for costs. Thirdly, the Court has a discretion as to the amount of any security for costs."

[16] This confirms the analysis set out at paragraph [14] above, albeit it is couched in slightly different terms. The court's discretion at the third stage is also underscored by Order 23, rule 2 of the 1980 Rules, which states as follows:

> "Where an order is made requiring any party to give security for costs the security shall be given in such manner, at such times, and on such terms (if any), as the Court may direct."

The petitioner's ability to pay

The correct approach in law

[17] The first question for the court, therefore, is whether Clarity will be in a position to meet an adverse costs order against it if ordered to do so. The first respondent submits that the court must look to the future but does not have to be satisfied on the balance of probabilities that Clarity will be unable to meet a costs order. That is because the test in the rules is framed by reference to whether there is "reason to believe" that the petitioner will be able to do so.

[18] On the other hand, the petitioner submitted that the first respondent has to show that it *would not*, as opposed to *may not*, be able to meet its debts if an order for costs is made against it (relying on the *White Book*, 1999 edition, at paragraph 23/3/21). This is drawn from *Re Unisoft Group (No 2)* [1993] BCLC 532. In the course of his judgment in that case, Sir Donald Nicholls VC said as follows:

> "I start consideration of this subsection by noting that the phrase 'the company will be unable to pay the defendant's costs if successful in his defence', is clear and unequivocal. The phrase is 'will be unable', not 'may be unable.' 'Inability to pay' in this context I take to mean inability to pay the costs as and when they fall due for payment…
>
> The phrase 'the company will be unable to pay' is preceded by the words 'if it appears by credible testimony that there is reason to believe.' I do not think this latter phrase has the effect of watering down the words which follow. The court, on the basis of credible testimony, must have 'reason to believe, that is, to accept, 'that the company will be unable to pay.' If this were not so, and

> the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute… The matter on which, in the end, the court is required to reach a conclusion is whether the company will be unable to pay."

[19] However, this authority, and the *White Book* commentary on it which was cited, fails to taken into account later authority in the English Court of Appeal which returned to this issue. In *Jirehouse Capital v Beller* [2008] EWCA Civ 908, Arden LJ, giving the judgment of the court, addressed the matter. At paragraph [26], she said this:

> "In my judgment, there is a critical difference between a conclusion that there is "reason to believe" that the company will not be able to pay costs ordered against it and a conclusion that it has been proved that the company will not be able to pay costs ordered against it. In the former case, there is no need to reach a final conclusion as to what will probably happen. In the latter case, a conclusion has to be reached on the balanced of probabilities."

[20] Later in her judgment (at paragraph [29]), Arden LJ rejected the suggestion that the test of there being a 'reason to believe' should be elevated to a test on the balance of probabilities – since the matter to which the test relates is something which must be established and not simply identified as a possibility:

> "That which has to be established is something that will occur only after the order for security is made. It can therefore only be a matter of evaluation. A person can have a reason to believe that a future event will occur."

[21] Buxton LJ in *Phillips v Evershed* [2002] EWCA Civ 486 had not been intending to formulate a different test when he referred to the company being "in significant danger" of not being able to meet an order for costs; but was simply expressing the statutory test in his own words, albeit it is much safer to simply use the statutory words (see Arden LJ at paragraph [33]). At paragraph [34] of her judgment, Arden LJ went on to explain that, in assessing whether there is reason to believe that the plaintiff will not be able to pay, the court should look at the evidence put forward on the application *as a whole* and form an assessment as to whether there is reason to believe that the company will not be able to pay the costs ordered against it.

[22] I intend to follow the approach set out in the *Jirehouse Capital* case. Not only is it more recent and of greater persuasive authority than the *Unisoft Group* case (the former being a decision of the English Court of Appeal and the latter only at High Court level); but *Unisoft* was discussed at length in *Jirehouse Capital*. In light of Arden LJ's exposition of the Vice Chancellor's reasoning in *Unisoft*, any initial apparent incompatibility between the approaches in the two cases may be more illusory than real but, in any event, insofar as there may be a material difference, I adopt that set out in *Jirehouse Capital*. The question for me is whether there is *reason to believe* that Clarity *will* be unable to pay the first respondent's costs. The first respondent has to show more than that there is a mere *possibility* that Clarity will be unable to pay; but does not have to *prove* that it will be unable to pay on the balance of probabilities at this point. The proper application of the test lies somewhere in between.

The costs bill to be met

[23] What will the costs be which Clarity will have to meet if unsuccessful? In his affidavit grounding this application, the first respondent estimated that his costs would be £156,000 plus VAT at the conclusion of the action (comprised of £40,000 senior counsel's fees; £26,000 junior counsel's fees; £60,000 solicitors' fees; and £30,000 for expert evidence). This figure has been disputed by the petitioner in its affidavit evidence. It suggests that the costs claimed would tax out at a much lower level and that Mr Megahey's figure is disproportionate to the nature of the claim. That said, Clarity has not provided its own figure as to what it would consider to be reasonable; nor provided any indication of what it expects its own costs to be at the conclusion of the trial by way of comparison. In light of that, it is difficult to assess the credibility of the suggestion from the petitioner that the first respondent's predicted costs are overblown.

[24] The anticipated costs do seem high for a straightforward winding-up application. However, this is a dispute which plainly has a complicated history and appears to have been, and is likely to continue to be, extremely hard fought. Both sides have instructed reputable and experienced commercial solicitors, who have in turn engaged both senior and junior counsel. The court has already directed discovery and it is suggested that there will be detailed expert forensic accountancy evidence required in order for the first respondent's case to be both made and met. In the absence of any properly costed alternative figure from the petitioner, or any indication from it as to what it has agreed or expects to pay its own representatives, I proceed on the basis that Mr Megahey's estimate of his costs is reasonable or, at least, not too far wide of the mark (allowing for the possibility of some reduction on taxation).

The accountancy evidence

[25] Whether Clarity will be able to meet costs of such a magnitude – say, in the region of £125,000 to 150,000 plus VAT – has been the subject of expert evidence filed

in the course of this application. Mr Megahey relies on a report dated 9 April 2021 and an addendum report of 28 May 2021 from Ms Nicola Niblock of ASM Chartered Accountants, which have been compiled from information which is publicly available (noting that there is additional information she would have wished to have seen but which was not provided by Clarity) and which analyses the financial standing of Clarity and Voxbit, on which it is contended Clarity is ultimately dependent.

[26] Mr O'Donoghue criticised the petitioner for merely relying upon a letter from its own accountant, Mr John Hannaway. In his submission, it was not acceptable for Clarity to purport to rely on expert evidence from someone who was not independent. In making this assertion, he relied upon Horner J's comments in paragraph [43] of *Lagan Construction Limited v Northern Ireland Water* [2020] NIQB 61 reiterating the importance, save in exceptional circumstances, of compliance with the Practice Direction on Expert Evidence, including critically in respect of the submission of an Expert's Declaration in the appropriate form. Horner J concluded as follows:

> "Failure to include a Declaration undermines the report, devalues the expert's opinion, and makes it unwise for the court to attach any weight to the views expressed in that report… I cannot emphasise enough that if a party intends that the court should rely on the expert opinion of a suitably qualified witness, that Expert Evidence must comply with the Practice Direction if the court is to have any confidence in either its reliability or independence."

[27] Similar concerns were expressed by Horner J in *TES Group Limited v Northern Ireland Water* [2020] NIQB 62, at paragraph [10], where he was also critical of a failure by the plaintiff's expert to consider up-to-date draft or management accounts.

[28] In light of the above, the first respondent submits that Mr Hannaway's evidence is clearly inadequate. He has not provided a sworn expert declaration. Indeed, he could not do so because he is Clarity's accountant and therefore not independent of it. In addition, the first respondent asserts that there were draft accounts available but that Mr Hannaway had not commented on them, nor had they been disclosed to enable any scrutiny of them to be undertaken; nor had management accounts been produced. In these circumstances, it was submitted, the court had no proper visibility in relation to the current financial situation of Clarity. As discussed further below, that concern has been mitigated to some degree by the fact that, after the hearing, Clarity provided some further accounts for consideration which had just then recently been finalised.

[29] I am sympathetic to the petitioner's likely concern not to significantly increase the costs of this interlocutory application by instructing an independent accountant to review and take issue with Ms Niblock's reports. However, the first respondent

having instructed an expert, independent accountant, I consider that there is force in Mr O'Donoghue's submission that Mr Hannaway's evidence – certainly insofar as it purports to consist of opinion evidence – must be given considerably reduced weight. The petitioner has chosen not to meet the first respondent's expert evidence in kind and must live with the consequences of that. That is not to say that the evidence provided by Mr Hannaway is worthless. He is perfectly entitled to give evidence of fact in relation to matters relating to Clarity's financial position with which he will be familiar. Nonetheless, I do treat with significant caution any views which are opinion evidence not emanating from an independent expert who has been engaged on appropriate terms and who has completed the relevant declaration. This obviously gives the first respondent the upper hand on the first issue to be considered by the court, subject to how far Ms Niblock's evidence properly goes, which is discussed below.

Consideration in the circumstances of this case

[30] The first respondent relies upon a range of matters, highlighted in Ms Niblock's reports and in his skeleton argument, as indicating that the petitioner is in a precarious financial position, or will be if and when called upon to meet an adverse costs order.

[31] First, Mr Megahey relies on the fact that Clarity reported total retained losses of £225,520 as at 31 December 2019; and that it has never reported profit since its incorporation in July 2000.

[32] In its accounts for the year ending 31 December 2019, Clarity stated its main assets to be a £300,000 investment in its subsidiary Voxbit; £1.491m due from Voxbit; and £308,000 owed by Barclay. Mr Megahey submits that, if he succeeds at trial, it will be because he will have shown that Clarity overcharged Barclay, in which case recovery of the supposed debt of £308,000 from Barclay to Clarity must be doubtful. In addition, he submits that recoverability from Voxbit is also questionable given that it could be in a negative liability position of £125,000. If these assets are removed from Clarity's balance sheet, Mr Megahey suggests that Clarity has net liabilities of some £415,000. Ms Niblock supports his concerns about the recovery of debts owed to Clarity by related companies being questionable, in particular in relation to Voxbit which she considers looks healthier than it may be in fact by reason of the particular accounting treatment which has been used and of which she is heavily critical.

[33] The first respondent also submits that there are significant questions as to whether Clarity is able to continue to pay its liabilities as they fall due, given that there are increased trade and tax creditors over the two years to 31 December 2019. He also points to the fact that Clarity's long-term liabilities increased significantly from £353,000 at 31 December 2018 to £1,047,000 as at 31 December 2019.

[34] Clarity observes that its present cash position is not as bad as is being presented. It had £227,000 of cash at the year-end in December 2020, having increased creditor payments by £194,000 during the year (despite the impact of the Covid-19 pandemic on its cash reserves).

[35] At the time of the hearing of the application, the notes to Clarity's most recently filed accounts also stated that the directors secured government-backed loan finance in 2020 as a result of the difficulties caused by Covid-19. The first respondent takes from this that the company was in a difficult financial and liquidity position in 2020, necessitating additional loan finance. Those loans will have to be repaid at some point. Mr Megahey pointed out that his company, Fonezone, has not needed to take any government-backed loans and that it has maintained its revenue and increased its profits. Clarity's retort is that its service relates to fixed-line communications, so it will inevitably have been affected more severely by lockdowns and working from home requirements than mobile communications providers such as Fonezone. The mere fact that it has availed of government support (as have many other companies in the course of the pandemic) is not an indicator of future financial difficulties but merely a prudent step to assist with cash-flow and, indeed, the government itself will have made some assessment of its (Clarity's) future ability to repay the loans before making them. For my part, I did not consider this factor to be of any particular assistance in the assessment the court is required to make.

[36] Significantly, Mr O'Donoghue submitted, Clarity has lost the custom of Barclay (which was its "cash cow"). Although it has secured a proportion of Barclay's customers for itself, Mr Megahey contended that the majority of those customers had chosen to migrate to Fonezone instead of Clarity.

[37] Reference was also made to the independently audited accounts of Clarity Telecom Limited – a Republic of Ireland company ("Clarity ROI Ltd") owned by Clarity's majority shareholder, Beach Beech Ltd – for the year ended 31 December 2018 (these being the latest filed) which showed significant retained losses of €887,270 and overall net liabilities of €433,090 at 31 December 2018. The independent audit report contained a material uncertainty note in relation to the company's ability to continue as a going concern. The first respondent asserted that this Irish company engaged in similar trade, with similar products, to Clarity and Voxbit, so that its precarious financial position could and should be taken as an indicator of Clarity's financial (ill) health and, generally, the financial difficulties in which Clarity's wider group found itself.

[38] Although Mr Hannaway has said that the ability of a company to repay debts has little or nothing to do with book value but, rather, the generation of cash, the first respondent submits that Mr Hannaway has not provided evidence that the purported increase in Clarity's and Voxbit's profits and revenue respectively is sufficient to meet its obligations to repay loans, let alone make a costs payment to the first respondent. He relied on the fact that there was no positive averment to the

effect that there is *no* reason to believe Clarity will be unable to meet its costs obligations; although, as I observed in the course of the hearing, Mr Whelan has averred to that effect at paragraph 13 of his replying affidavit ("… the simple fact is that Clarity will be able to pay any reasonable costs incurred by the Respondents should the winding up Petition not be successful.")

[39] Clarity's central point is that, in the final analysis, it will be paid such moneys by Barclay as are properly found to be due to it but that, in any event, as a 50% shareholder in Barclay, it will always benefit from 50% of whatever available equity is left in Barclay once all disputed matters have been resolved. Accordingly, it will either receive moneys due to it from Barclay pursuant to its outstanding invoices or, at worst, receive 50% of those moneys which remain in Barclay if it is determined that Barclay is not liable to pay the invoices.

[40] Clarity further submits that the height of Ms Niblock's conclusions should not be overstated, for a number of reasons. First, her initial report looks at the ability of Clarity to meet not only the costs of the litigation with which this application is concerned but also the extant defamation proceedings and expresses the opinion that Clarity "would have difficulties in paying this amount" – that being an amount exceeding £500,000 for the costs of both parties in both sets of proceedings – "or the Defendants' legal costs." In assessing adverse costs from entirely separate proceedings, her report has not addressed the key issue before me. However, in a clarification arising shortly after the hearing, it was made clear by Ms Niblock that her opinion was that Clarity "would have difficulties in paying even the lesser amount (i.e. £157,200)".

[41] Second, Mr Dunlop pointed out that Ms Niblock merely opines that Clarity would be unable to meet the costs of any award against it "from the funds it currently holds." Clarity submits that this fails to take into account that it is owed an outstanding debt from Barclay (albeit this is in dispute), which far exceeds the amount of any adverse costs liability in these proceedings; and ignores the fact that Clarity's 50% shareholding in Barclay prima facie entitles it to 50% of Barclay's cash reserves which, at a minimum, stand at £522,000 (Mr O'Donoghue quoted the figure of some £550,000). Even assuming that Clarity is not owed any further monies from Barclay, its share of Barclay's assets amount to some £260,000 or more, which is more than enough to cover any adverse costs order it may have to meet. Those reserves are obviously going to be tied up until the litigation is resolved but cannot be ignored for the purposes of the present application, Clarity submits.

[42] Therefore, although Mr Dunlop accepted that the petitioner is under a degree of financial pressure, he submits that it will weather this storm (being a company of some 20 years standing) and have adequate resources to meet any adverse costs order in due course. The primary cause of the financial pressure, in his submission, was that Clarity was left bearing the cost of the run-down of Barclay's operations precisely because of the first respondent's actions.

The more recent accounts

[43] In his affidavit evidence, Mr Whelan on behalf of Clarity had averred that he expected its accounts for the year ending 31 December 2020 to demonstrate a healthy financial position, with earnings before interest, taxes, depreciation, and amortization (EBITDA) expected to be in the region of around £260,000 and net profit in the region of around £160,000. He had hoped that the relevant final accounts would be ready by the time he swore his affidavit but they were not, albeit they were expected to be provided shortly.

[44] The further accounts were provided after the hearing and were the subject of some further short submissions from the petitioner's counsel; and also a further addendum report from Ms Niblock. On the petitioner's side, it was noted that Clarity's net current assets had improved by almost £500,000 in the course of the last year. More importantly, the net cash held by Clarity had increased to around £228,000. It was submitted that other important markers of financial health included the reduction in trade creditors by almost £200,000 from 2019 until 2020; and that Mr Whelan's estimate of anticipated EBITDA and net profit had been confirmed. The net effect of the final 2020 accounts being available was said to be that they showed that the petitioner's liquidity (being the difference between short term assets and liabilities) had improved by approximately £230,000 in the year ended 31 December 2020.

[45] The first respondent has provided a further addendum report from Ms Niblock, dated 7 September 2021, in relation to this new material. Having reviewed the additional unaudited financial statements for Clarity and Voxbit (and audited financial statements for Clarity ROI Ltd), she states that she has seen nothing to change the opinions expressed in her earlier report and addendum report, namely that "based on the information available to us Clarity would have difficulty or be unable to meet the costs of any award made against it from the funds it currently holds." Mr Dunlop submits that 'having difficulty' meeting the costs is not the appropriate test: there must be reason to believe Clarity will be unable to meet an adverse costs order.

Conclusion on inability to pay

[46] On balance, and not without some reservations, I have come to the conclusion that there is reason to believe that Clarity will be unable to pay the first respondent's costs if ordered to do so. My reservations are based on the fact that there does appear to be an improving picture in Clarity's financial situation and I have little doubt that some of the financial pressure it has experienced has been exacerbated by the Covid-19 pandemic and the additional costs incurred in late 2018 and early 2019 as a result of dispute with the first respondent and it having to bear the lion's share of the costs of the run-down of Barclay's business. The points made by Mr Dunlop

and summarised at paragraphs [39] and [41] are powerful. However, I must consider the position as it would be if Clarity's petition is dismissed. At that point, the winding-up order would have been refused and the company (Barclay) would still be deadlocked, with the funds it held likely to be further depleted by a derivative claim (assuming that the winding up petition had been dismissed, at least in part, on the basis that such a claim should follow). The likelihood of this situation arising is another matter, addressed below. Nonetheless, if Clarity's petition is dismissed I consider that its financial position, at least in the short to medium term, is likely to be the same or worse than at present and, on the basis of Ms Niblock's evidence, I consider there is reason to believe that it will be unable to meet a significant costs order at that point.

Is it just to order security for costs?

[47] In exercising its discretion as to whether it is just to order security for costs in a particular case, even where the threshold test is satisfied, the court will consider all of the circumstances. In *Brookview Developments Ltd v Ferguson (t/a David Ferguson and Associates)* [2011] NIQB 37, Weatherup J drew upon the English Court of Appeal decision in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 and outlined what the relevant circumstances to be considered would include. The following non-exhaustive list may be offered, having regard to the dicta in each of those cases:

(a) Whether the plaintiff's claim is bona fide;

(b) What the plaintiff's prospects of success are (although the court should not enter into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of either success or failure);

(c) Whether there has been any admission;

(d) Whether the application for security for costs is being brought oppressively, so as to stifle a genuine claim (although the possibility or probability that the plaintiff will be deterred from pursuing its claim by an order for security for costs is not, without more, sufficient reason for not ordering security);

(e) Whether, conversely, the absence of an order for security for costs will permit the plaintiff to use its inability to pay costs if unsuccessful as a means of putting unfair pressure on the defendant;

(f) Whether the plaintiff's want of means has been brought about by any conduct on the part of the defendant;

(g) Whether the plaintiff has a financial backer; and

(h) Whether there has been delay in bringing the application.

[48] I consider a number of these factors in turn below. In reaching a view as to the just outcome on the application, the court retains a discretion even when it has determined that there is reason to believe that the plaintiff or petitioner will be unable to meet an adverse costs order. That arises from the use of the word "may" in the final part of Order 23, rule 1(1) of the 1980 Rules. There is authority in an equivalent field that this power should be carefully used; and also that there is no burden one way or the other: see Denning LJ in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, at 626. An instance of the courts in Northern Ireland declining to order security even where it was common case that the plaintiff could not pay the defendant's costs unless its claim succeeded is *Munchie Foods Ltd v Eagle Star Insurance Co Ltd* [1993] NI 155.

[49] The first respondent accepts that there is no evidence to suggest that the petition has not been brought in good faith. Accordingly, this factor is at best neutral for him or, at worst, a factor tending against the grant of security.

[50] In relation to the merits, it is extremely difficult for me, at this interlocutory stage, to make any reliable assessment of the ultimate rights and wrongs of the factual issues in dispute between the parties, in particular in relation to the claimed historic overcharging between the two companies concerned. It may well be correct, as set out by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, at 387, that a petitioner relying on the 'just and equitable' ground for the winding up of a company should come to court with clean hands, which may then require some enquiry (where the issue is raised) as to whether the breakdown in confidence between him and the other parties to the dispute is due to his own misconduct. The first respondent relies upon this but anticipated that Clarity would claim (as it did) that it will clearly be successful. The first respondent urged me to exercise caution in respect of any such claim, certainly in the absence of full discovery having been made and of the detailed forensic accountancy evidence which will be required to provide an analysis of the relationship between Barclay and Clarity.

[51] In my view, however, there is a distinction to be drawn between seeking to determine the merits of the factual disputes and taking a wider view on the first respondent's prospects of success in resisting the winding-up petition. The petitioner submits that it is notable that Mr Megahey accepts that there has been a complete breakdown of trust and confidence between the directors and shareholders in Barclay. The business is no longer trading and the only reason Barclay still exists is as a result of the significant cash assets it holds – which will be due course be released to the 50:50 shareholders, being Clarity and Mr Megahey. There is no dispute, therefore, that a classic ground exists for a just and equitable winding up. Mr Megahey's real objection now is that he wishes to pursue a derivative action in the name of Barclay against Clarity; but Clarity submits that this would be entirely self-serving, not only because Clarity is owed money by Barclay but also because it would be using Clarity's own share of Barclay resources to fund the action against Clarity.

[52] In Clarity's submission, a winding-up order would be the best way to address this position, since it would result in the appointment of an independent liquidator – a licensed insolvency practitioner who will inevitably have accountancy expertise - who would have every opportunity to take such action (if any) as he or she considered appropriate in relation to Barclay's earlier trading and dealing. The liquidator would have a duty and obligation to consider and investigate concerns about historic overcharging and, as appropriate, to seek recovery of monies. Mr Megahey is not content with this, nor with the appointment of an independent financial investigator to make a binding determination; nor will Mr Megahey agree to mediate at this point on conventional terms. In Clarity's submission, this is because Mr Megahey wishes to control any further investigation of the issues or litigation, rather than leaving it to be addressed by an independent and impartial third party; and/or in order to simply waste as many of Clarity's assets as possible. Mr O'Donoghue effectively accepted that Mr Megahey was interested in controlling this process (as well as being concerned about the costs of the liquidator which would deplete Barclay's assets) because of the lack of trust which has arisen.

[53] I consider there to be significant force in the petitioner's suggestion that it is unlikely that the court would ultimately decline to grant a winding up order in order to permit a deadlocked company to remain in existence to allow a derivative action by a 50% shareholder in the circumstances of this case – particularly when an independent assessment of the issue could be made, in a non-adversarial way, by an independent liquidator who has their own investigatory powers and is subject to fiduciary duties to Barclay and subject to the direction of the court. Accordingly, I consider that there is a strong prospect of the petitioner succeeding in its winding up petition – not necessarily because the court considers Clarity to be vindicated in relation to the overcharging allegations – but because it considers the best and most effective way of those being dealt with (or, in the language of the 1989 Order, the just and equitable way of dealing with them in the interests of the company) is for the petition to be granted. Insofar as the merits are relevant, therefore, I consider these to weigh in favour of the petitioner.

[54] Aside from any view the court may take on the petitioner's ultimate prospects of success however, it seems to me that, in addressing all of the relevant circumstances, a particular factor which I must consider in the circumstances of this case is the first respondent's initial willingness to have Barclay wound up, which was later retracted once Clarity agreed to same. In Clarity's submission, Mr Megahey's volte face in this regard shows that his sole aim and agenda is to apply as much financial and other pressure to Clarity as can possibly be achieved – now that his own company has moved beyond mobile telecommunications and into the VoIP landline market so as to be a direct competitor of Clarity – so as to secure a collateral and commercial advantage. In light of this, the petitioner submits that the present application is not moved in good faith; has nothing to do with preserving costs; and is an oppressive and bullying tactic moved very late in the day.

[55] Mr Megahey, in his replying affidavit evidence on the petition, candidly accepts that he previously said several times that Barclay should be wound up as a result of the dispute. (In fact, the evidence shows that this was suggested on a number of occasions in correspondence from his solicitors, which had obviously been considered and sent after taking advice, in terms which suggested that, in the absence of appointment of an independent expert, which was also proposed, "the obvious alternative is for the parties to agree a members' voluntary liquidation"). Mr Megahey's evidence explains that he has changed his mind and why he feels there is good reason for this. These consist of a mix of doubts about the independence or effectiveness of the investigation into his concerns which would follow winding up; and concern that the winding up of Barclay would reflect badly upon Fonezone, which trades under the same brand. I do not find these justifications convincing.

[56] Thus, although I cannot make an assessment of whether Mr Megahey will ultimately succeed in his contention that Clarity overcharged Barclay, I can, and must, make an assessment in the round of the purpose and effect of his present application for security for costs. I accept that my ability to do so is limited to some degree by the fact that I have not heard oral evidence at all at this stage, much less on the full gamut of issues in contention between the parties. Nonetheless, I have formed the view on the basis of the twists and turns in the litigation and of the open communications between the parties which have been put before me that this application has been brought in a tactical way as a means of increasing pressure on the petitioner and, in addition, in defiance of a number of pragmatic suggestions which would move matters forward in a much more efficient and cost-effective way in order to seek to resolve the issues between the parties without prejudice to Mr Megahey's claims.

[57] In particular, Mr Megahey has declined to agree to the appointment of an independent financial investigator to make a binding determination, notwithstanding that the identity of the suggested investigator had been agreed previously for other purposes. In addition, there appears to me to have been an unreasonable refusal to participate in mediation without the imposition of certain preconditions by the first respondent, in circumstances where the mediation process may have circumvented the issues of concern on Mr Megahey's part if a global agreement could be reached, or have resulted in an agreed means of dealing with them. It is now beyond dispute that a party's attitude to engagement in alternative dispute resolution mechanisms in commercial litigation is a factor which may be relevant to costs determinations and may even result in costs penalties. In my judgment, it is plainly also relevant to the exercise of the court's discretion in relation to an application for security for costs.

[58] As to whether this application is an attempt to stifle Clarity's claim, the first respondent points out that Clarity has not suggested that it would be prevented from progressing its claim if ordered to provide security. However, Clarity has asserted that the first respondent is *trying* to stifle (or to frustrate or impede) its claim

in a purely tactical way. It asserts that he is trying to do so by prolonging the litigation, increasing financial pressure on it and delaying its access to its share of the equity in Barclay.

[59] For my part, I do not consider that it has to be shown that a successful application for security for costs will result in the claim being discontinued for the court to conclude that it is being brought oppressively. There may well be cases where security for costs can be provided, and the plaintiff can struggle on with the claim, but where this can only be done with enormous difficulty or at enormous cost to the plaintiff and where, properly analysed, the application is being mounted in an oppressive way rather than through any genuine fear that a costs order will not ultimately be met. In the same way that the possibility of the plaintiff being deterred from pursuing its claim is not, without more, sufficient reason for not ordering security, the possibility that the plaintiff will nonetheless continue to pursue its claim if security is ordered is not, without more, a sufficient basis for concluding that the application is not brought oppressively. In each case, the court must exercise an element of judgment as to where on the spectrum the case falls and put that into the balance with the other considerations which require to be considered. I do not accept Mr O'Donoghue's submission that, if Clarity is right that it will not have a problem paying a costs order when it falls due, it follows that it would have no difficulty providing security for costs now. In my view, that does not follow. In any event, I have concluded that there is reason to believe that Clarity will be unable to pay costs if it loses (despite an improving financial picture). An application to compel Clarity to provide funds now could plainly be made with a view to seeking to stifle the claim.

[60] Mr O'Donoghue also made the proper point that the court's discretion as to the terms of the order for security can be calibrated, as necessary, to ensure that a claim is not unduly stifled, for instance by ordering less than full security where that sum would result in the petitioner's claim being stifled but a lesser sum would not. That is clearly correct; but before the court reaches that point it must consider the issue in principle, namely whether the purpose of the application is to seek to put undue pressure on the petitioner. In light of the discussion above, I consider it likely that this is a material, even if not the sole, motivation for the present application. Conversely, it is not asserted that the petitioner is seeking to put undue pressure on Mr Megahey by proceeding with the case in circumstances where it is clear it will never be able to meet an adverse costs order.

[61] Clarity also asserts that any want of means on its part has clearly been caused by the first respondent's actions. In turn, the first respondent contends that it is impossible for the court to reach any view on this since it is so bound up with the merits of his claim that Clarity had been overcharging Barclay (which is yet to be determined). I accept that this is a factor which is difficult to assess in the present case because it is so bound up with the merits of the overcharging dispute. In the event that Clarity is unsuccessful in its petition and is called upon to meet the first respondent's costs, it seems likely that there will have been found to be some force in

Mr Megahey's claims. However, looking at the matter as things stand today, any lack of means on the part of Clarity is plainly in some measure as a result of Mr Megahey's actions in bringing its business relationship with Barclay to an end and dead-locking the company; and in refusing to permit payment to Clarity, even on a partial or 'without prejudice' basis, for services provided to Barclay both before and after the agreement in September 2018. On balance, I consider this factor to be one which weighs against the grant of an order for security, although it ought to be given modest weight given that so much of the background to the reasons for the original fall-out is in dispute.

[62] There is also an element of dispute as to whether Clarity has financial support. Mr Hannaway has noted that the shareholders have contributed share capital at over £1.115m in excess of par value and that it has been advanced loans amounting to some £729,000. This information is provided in order to illustrate that Clarity has financial support (and so would be able to meet a costs order). The first respondent predictably interprets these cash injections as indicators of financial frailty rather than as giving reassurance. The need for such injections is concerning and does not point to a healthy company, he submits. There is also no evidence from any of the investors as to their own means or whether they will actually, as asserted, give further support in the worst case scenario of Clarity losing its petition; much less any clear guarantee of this. In light of the paucity of evidence in this regard, I consider the first respondent is correct to assert that this factor should be given no weight in Clarity's favour.

[63] Finally, on the issue of delay, the first respondent asserts that there has been no delay in bringing the application. I cannot accept that. The petition was issued on 25 September 2019. It was listed for hearing in June 2020. Although the first respondent says that – even leaving aside the disruption to court business which occurred as a result of the Covid-19 pandemic – it is unlikely that the case would have been able to proceed to hearing at that point, given that discovery was outstanding from both sides, this application was made only shortly before the petition was initially due to be heard. From March 2020 on, there was pandemic-related delay. However, little happened in the case since the substantive hearing was adjourned. This application was only made on 9 April 2021, notwithstanding that the filed accounts on behalf of Clarity and Voxbit on which the first respondent relies in this application came to his attention (on his evidence) in August 2020. In my view, there was nothing to stop the first respondent lodging this application much earlier, including during the lockdown period, or to stop it being heard during that period (remotely, as it was). Accordingly, I consider that there has been delay in bringing the application for security for costs. It is right that this is not in itself a bar to the grant of an order for security; but it is another factor to be weighed in the balance in determining the just outcome on the application.

[64] Weighing all of the above factors in the round, in my view I do not think it just to order security for costs in this case and exercise my discretion to decline to do so. I do so principally on the basis of my assessment of the first respondent's limited

prospects of success and/or his conduct in changing position on other more cost-effective ways of seeking to resolve the issues between the parties; my assessment of the motivation behind the application, which is more tactical than arising from a genuine concern about costs not being met; and on the basis of delay in bringing the application.

The terms of the order

[65] In *GWM Developments Ltd and Greenback Investments Ltd v Lambert Smith Hampton Group Ltd* [2010] NIQB 33, at paragraph [13], Weatherup J summarised how the discretion in relation to the nature and level of security for costs to be ordered should be exercised:

> "The amount of that security should be proportionate and should not be such as to destroy the essence of the right of access to the Court. The overall balance is to avoid injustice to the plaintiff if prevented from continuing with the action by an order for security and also avoiding injustice to the defendant if unable to recover the costs if successful… The 1999 *White Book* refers to security that should not be nominal and should not be oppressive. Paragraph 23.3.21 states that if the Court does order security it can order any amount up to full security and the amount need not be substantial provided it is more than nominal."

[66] In light of my conclusions on the second issue, I do not need to consider the terms of any order for security which would be appropriate in this case. Lest this decision is the subject of any appeal and it becomes relevant, however, I can also indicate that, had I otherwise been minded to make an order for security for costs, in all of the circumstances of the case I would not have been minded to order any more than around one-third of the anticipated costs to have been lodged, in the sum of £50,000.

Conclusion

[67] For the reasons given above, the first respondent's application for an order for security for costs is refused. I consider there is reason to believe that, if unsuccessful in its petition, Clarity will be unable to meet an order for costs but, in all of the circumstances, I nonetheless do not consider it just to require it to provide security in this case.

[68] I will hear the parties on the issue of the costs of this application.