APPROVED **[2024] IEHC 686**

THE HIGH COURT

Record No: 2024/117 COS

IN THE MATTER OF CITY QUARTER CAPITAL II PLC

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr Justice Rory Mulcahy delivered on 2 December 2024

Introduction

1. In this application, the joint liquidators of Blackbee Investments Limited ("**Blackbee**") seek an order winding up City Quarter Capital II plc ("**the Company**") pursuant to section 569(1) of the Companies Act 2014, as amended ("**the Act**"). Blackbee seeks to have the Company wound up on the grounds that it is unable to pay its debts and, or in the alternative, that it is just and equitable to do so.

2. Strikingly, the Company resists the application without disputing Blackbee's central contention that it is unable to pay its debts. Nor does it argue that Blackbee is incorrect when it contends that, for a variety of reasons, it is just and equitable that the Company be wound up. Rather, it opposes this application on the sole ground that Blackbee has not established to the requisite standard of proof that it is a creditor of the Company.

3. Accordingly, the sole question which needs to be addressed for the purpose of determining this application is whether Blackbee has established that it is a creditor of the Company.

Factual background

4. The factual background to this application is set out in my earlier judgment ([2024] IEHC 530), in which I acceded to Blackbee's application to be substituted as petitioner in place of the individual who had originally presented the Petition, Mr Tom Finneran. As explained in that judgment, on 19 May 2023, Colin Farquharson and Luke Charleton were appointed as joint liquidators (the "**Joint Liquidators**") of Blackbee by order of the High Court on foot of a petition presented by the Central Bank of Ireland (the "**CBI**") on the basis, *inter alia*, that it had concerns about the governance of Blackbee. The ultimate beneficial owner of Blackbee is Mr David O'Shea. As appears from the affidavit of Mr Farquharson sworn in these proceedings, Blackbee is an investment firm regulated by the CBI. Blackbee typically invested client funds in bonds issued by the Company, a company of which Mr O'Shea is also the principal. It appears that there are 61 companies within the Blackbee structure. Mr O'Shea is the principal or controller of all the companies within the group.

5. Bonds were issued by the Company to investors, and the Company then lent the monies raised on those bonds to special purpose vehicles ("**SPVs**") for investment in real estate or other assets. The investors in the bonds were given a fixed charge over the underlying assets as security for the benefit of the investors. Blackbee acted as arranger in respect of regulated investments, but other companies within the wider group structure were used to arrange unregulated investments. The investment by Mr Finneran was an unregulated investment in respect of which another entity, Blackbee Alternatives Limited ("**Blackbee Alternatives**"), was the arranger.

6. As appears from Mr Finneran's affidavit grounding the Petition, he invested the sum of €300,000 on 26 March 2021 on foot of an Investment Memorandum prepared by Blackbee Alternatives. The main terms of the investment were that it was a fixed two-year investment with a target return of 6% per annum, with the funds to be invested in a social housing project. The sums invested were to be secured by a first legal charge in favour of the investors over the underlying assets. The summary terms of the investment described Blackbee Alternatives as "*the investment arranger*" and the Company as the "*issuer*". The investment maturity date was stated in the summary terms as being 24 March 2023.

7. Mr Finneran's affidavit details the efforts he took to secure the return of his investment following the maturity date. On 14 March 2024 and again on 17 April 2024, Mr Finneran's solicitors made written demand for payment under section 570(a) of the Act. The letters indicated that if payment was not made within 21 days, Mr Finneran would petition to have the Company wound up. There was no substantive response to those letters. Mr Finneran presented a petition on 28 May 2024 ("**the Petition**").

8. On the first return date of the Petition, 24 June 2024, the Joint Liquidators indicated Blackbee's willingness to be substituted as petitioner in the event that the petitioner did not proceed to hearing. In an affidavit filed by the Joint Liquidators in support of the Petition on 27 June 2024, they indicated that they would be prepared to act as liquidators of the Company if the court considered that this would generate "*cost and time efficiencies*". They made clear that their interest in the winding up of the Company was in obtaining the books and records of the Company to which they had been denied access in the course of the liquidation of Blackbee.

9. In its response to the Petition, in an affidavit sworn by Mr O'Shea on 8 July 2024, the Company denied that Mr Finneran was a creditor of the Company.

10. On or about 8 July 2024, Mr Finneran indicated that he did not wish to proceed with the Petition and sought leave to withdraw it. The Joint Liquidators indicated an intention to apply to be substituted as petitioner. That application was heard before me on 30 July 2024, and judgment was delivered on 30 August 2024. By order dated 10 October 2024, I made an order substituting Blackbee for Mr Finneran as petitioner and directed that an amended Petition ("**the Amended Petition**") be served and filed. The Amended Petition was advertised in accordance with the court's directions and was listed for hearing on 8 November 2024. However, on that date, counsel advised that Mr O'Shea had discharged his solicitors the previous night on the basis of an alleged conflict of interest. In those circumstances, and notwithstanding my scepticism regarding the *bona fides* of Mr O'Shea's belated concern that the Company's solicitor had a conflict of interest, I adjourned the matter to 21 November 2024 to enable the Company to obtain new representation. The Amended Petition was heard on that date, the Company being represented by the same counsel as had previously been engaged. Mr Finneran appeared at the hearing of the Amended Petition in

support of same, as did a further party, Harvest Trustees Limited, which contends that it is a creditor of the Company in the sum of €7.3 million.

Power to wind up

11. In relevant part, section 569(1) of the Act provides as follows:

> *569. (1) A company may be wound up by the court—*
>
> *…*
>
> *(d) if the company is unable to pay its debts,*
>
> *(e) if the court is of the opinion that it is just and equitable that the company should be wound up,*

12. A company shall be deemed to be unable to pay its debts if one of the conditions in section 570 of the Act is fulfilled. Section 570(a) provides:

> *570. For the purposes of this Act, a company shall be deemed to be unable to pay its debts—*
>
> *(a) if, other than during the interim period—*
>
> > *(i) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 then due, has served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and*
> >
> > *(ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor,*

13. Section 571 of the Act is in the following terms:

(a) (1) An application to the court for the winding up of a company shall be by petition presented either by—

(i) the company, or

(ii) any creditor or creditors (including any contingent or prospective creditor or creditors) of the company, or

(iii) any contributory or contributories of the company,

14. Blackbee presents the petition as a creditor of the Company. There is a significant body of case law addressing the circumstances in which a creditor is entitled to present a petition and obtain an order winding up a company. The established principles were not in dispute in this application.

15. In *Re Pageboy Couriers Limited* [1983] ILRM 510, the High Court (O'Hanlon J) adopted as correct the following principle from the English case, *Stonegate Securities Limited v Gregory* [1980] 1 All ER 241 in which the Court of Appeal (Buckley L.J) concluded:

"*In my opinion a petition founded upon a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of s. 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding-up proceedings.*"

16. Similar reasoning has been adopted in the context of applications to restrain the presentation of a petition (see, for instance, *Truck and Machinery Sales v Marubeni Komatsu Limited* [1996] 1 IR 12 in which the High Court (Keane J) approved the statement of principle in *Pageboy*).

The evidence

17. The Joint Liquidators filed a total of five affidavits in support of the Petition and verifying the Amended Petition. In the first affidavit, filed in response to the Petition, the Joint Liquidators explained the relationship between Blackbee and the Company and Blackbee's role in the investment structure. It explained that its "*main role*" was as arranger, that it facilitated the execution of investment transactions and brought the parties to those transactions together. This structure was regulated by a document entitled 'Master Placing Terms (May 2017 Edition)'. Under those terms, Blackbee was entitled to charge a fee at the outset of an investment for its role as arranger. In addition, it was entitled to charge ongoing annual management charges ("**AMCs**").

18. The Joint Liquidators were able to establish that Blackbee had been paid more than €1 million in AMCs between 2017 and 2018. They were not, however, able to establish if all fees had been paid in the period 2019 to 2022. They did not, therefore, raise any invoices in relation to that period. They were able to confirm that no fees had been paid in 2023 and 2024. Those are the periods in respect of which it invoiced the Company and ultimately relied on in its Amended Petition. A total of 52 invoices were issued, all dated 12 June 2024. Some of the invoices include charges into the future, that is, for services yet to be provided where the terms of that investment product provided for payment in advance. Two of the invoices related to AMCs provided in relation to an investment identified as the iNUA Collection.

19. The Company's evidence is contained in three affidavits sworn by its sole active director, Mr David O'Shea. The first of the affidavits is a response to the original petitioner, Mr Finneran's, claim. As with his response to Blackbee, Mr O'Shea contended that Mr Finneran was not a creditor of the Company and therefore lacks *locus standi* to present a petition. Notably, however, he did not contend that the Company was solvent. Understandably, Mr O'Shea's first affidavit doesn't address Blackbee's claim.

20. His second affidavit was in response to Blackbee's application to be substituted as petitioner, but also addresses his contention that Blackbee is not a creditor of the Company. In this affidavit, Mr O'Shea addresses a claim not advanced by Blackbee, that it is a creditor in relation to fees owed by the Company for costs incurred in its role as

"arranger" of investments with the Company. Mr O'Shea notes that the Master Placing Terms refer to the fee for arrangement "*as shall be agreed*" and he says that there was no such agreement. However, all of the invoices relied on by Blackbee relate to AMCs. This response is, therefore, irrelevant.

21. In relation to the claim for fees due in relation to AMCs, Mr O'Shea makes a number of points. He refers to the fact that all the invoices were raised on 12 June 2024 and are sequential. He says that no basis is given for the percentage figures used to calculate the charges, and he points to the fact that two of the invoices have been raised in respect of an investment with a different entity, the iNua Collection, and that responsibility for those AMCs rests with those entities. As noted below, in the Amended Petition presented by Blackbee, no reliance was placed on these invoices.

22. Paragraph 19 of Mr O'Shea's second affidavit is in the following terms:

> "*It is also the case – and indeed it is not suggested otherwise by Mr Farquharson – that neither the joint Official Liquidators nor Blackbee have provided any management services to the Company since the Joint Official Liquidators' appointment on 8 May 2023. Indeed, following a group restructure, Blackbee Investments Limited had employees providing solely MIFID services and not management services since 1 October 2020 and so it could not provide any management services to the Company or any other entity from that date.*"

23. The affidavit did not contain any documentation supporting the contention that there had been a group restructure, nor did it indicate who had been providing the management services to the Company, or to anyone else, in place of Blackbee, after 1 October 2020.

24. In reply to this affidavit, the Joint Liquidators exhibited bank statements of the Company which, it was explained, had been received anonymously, together with bank statements of Blackbee. The Company's bank statements show payments to Blackbee from the Company throughout 2021 and 2022 in respect of AMCs totalling approximately €1.5 million and Blackbee's bank statements shows corresponding receipts. The Joint Liquidators also exhibit minutes of a meeting of Blackbee on 28 November 2020 in which the Chief Financial Officer of Blackbee indicated that Blackbee's only future income

would be agreed management charges.

25. In response to the suggestion that no management services have been provided, the Joint Liquidators make clear they have invoiced only for services provided by them since their appointment and describe in detail the services provided. The Joint Liquidators explain that the percentages used to calculate AMCs were all derived from the relevant product brochures, prepared and disseminated by the Company, which set out, in express terms, the percentage fees which would be charged by Blackbee in respect of AMCs.

26. In his third and final affidavit, Mr O'Shea says that the Company operates a "*global issuance programme*" governed by a full program of documents ("**the Program Documentation**"). He introduces a new argument, that the Program Documentation prohibits the appointment of a liquidator on the application of Blackbee.

27. He accepts that Blackbee was entitled to charge fees "*in relation to services that it provided*" on notes issued by the Company "*until such time as it was substituted in that role by Blackbee Group Holdings Limited. Following its substitution, Blackbee was no longer entitled to raise additional fees where services had not been provided.*"

28. Mr O'Shea exhibits two documents in relation to the alleged group restructuring by which, he contends, Blackbee's role in providing management services and its entitlement to AMCs from the Company for those services was transferred to a new entity, Blackbee Group Holdings Limited ("**BGHL**). One is a letter from the CBI which he describes as the CBI's approval of "*the proposed integration of Blackbee within the new Group structure.*" The second is said to be a copy of the novation agreement pursuant to which all of Blackbee's investment and operations team was transferred to BGHL. He says that "*payroll records further confirm that the transfer of the relevant employees took place*" and that only employees in Markets in Financial Instruments Directive ("**MIFID**") service roles remained after 1 October 2020. No payroll records are exhibited. He contends that the "*group re-structure is indisputable*."

29. In addition to the foregoing, Mr O'Shea exhibits management accounts for Blackbee, which he contends show no AMCs due from August 2022 onwards. He also exhibits what he describes as "regulatory returns". The first of these, which he describes as a FINREP Report, is simply a page with the heading "Non Trading Book Debtors" which, under the heading "Accrued income as 30 September 2022", has no entries. The others documents also appear to be management accounts.

30. Finally, in support of his contention that Blackbee was not a creditor of the Company in relation to AMCs, he exhibits financial projections prepared, he says, in the context of the proposed sale of Blackbee. These show no projected income from AMCs.

31. In relation to the bank accounts, which clearly contradict his averments that Blackbee was not providing, or being paid for, AMCs after 1 October 2020, he complains that the Joint Liquidators did not seek to confirm their validity. However, he does not dispute that they are the Company's bank statements, nor does he set out any basis for contesting Blackbee's bank statements. He further complains that the Joint Liquidators did not make any effort to understand "*wholly justifiable bank transactions and especially how they relate to the management and maturity of investment products, which is relevant to the liquidation of Blackbee itself.*" Separately, he says the following:

> "*Blackbee continued to source income through annual management charges where it was directly contracted to receive fees, e.g. iNUA plc. Management discretion was applied to continue to allocate certain fees to facilitate ongoing compliance with capital and liquidity regulatory requirements rather than as remuneration for the performance of services formally associated with these fees.*"

32. Without expressly saying so, this appears to be Mr O'Shea's attempt to explain the fact that payments were made to Blackbee after the time when he had previously alleged that Blackbee had stopped providing any services to the Company.

33. At the conclusion of his affidavit, Mr O'Shea avers that the Company operates "*within globally established financial market frameworks, utilising a globally recognised financial market clearing system.*" He refers to a letter he has submitted to the CBI in which he sets

out various complaints about the manner in which the Joint Liquidators have been conducting the liquidation.

34. He concludes his third affidavit without ever having addressed the core ground on which the Joint Liquidators rely for an order winding up the Company, that the Company is unable to pay its debts.

35. Luke Charleton delivered an affidavit in reply to Mr O'Shea's third affidavit, sworn on 25 October 2024. At the outset of the affidavit, he says that it will address two key points. The second key point is a response to the allegations of Mr O'Shea concerning the Joint Liquidators' conduct and is not of central importance to this application. I should record, however, that he contends that the Joint Liquidators have acted at all times professionally and in the best interests of the creditors of Blackbee.

36. The first key point, however, is Mr Charleton's contention that Mr O'Shea's evidence does not "*stand up to scrutiny*" and does not "*meet the test that the Amended Petition debt is* bona fide disputed on substantial grounds.*"*

37. Insofar as Mr O'Shea's arguments had not already been addressed by the Joint Liquidators, Mr Charleton makes the following observations. He accepts that the product brochures *did* permit Blackbee to be substituted as provider of management services, but he points out that there is simply no evidence that BGHL has been substituted as alleged. More importantly, perhaps, he points out that as BGHL is an unregulated entity, it could not be substituted to provide the services being provided by Blackbee, a regulated entity.

Discussion

38. The Company's opposition to this application rests entirely on the proposition that it is not a creditor. It was very properly accepted by counsel for the Company that its evidence in this regard was not compelling. He described it as a "*patchwork of evidence, it is higgledy-piggledy*". However, he contended that this patchwork is sufficiently coherent that Mr O'Shea's evidence cannot be rejected without being tested by way of cross-examination. In this regard, significant reliance was placed on the decision of the Supreme Court in RAS *Medical Ltd v The Royal College of Surgeons in Ireland* [2019] IESC 4,

[2019] 1 IR 63. That judgment concerns judicial review proceedings challenging a decision of the respondent in which there was a conflict of fact on affidavit between the parties as to whether particular guidelines had been applied by the respondent when making its decision. The Supreme Court determined that that conflict could not be resolved against the respondent without cross-examination of the respondent's deponent:

> "***[88]*** *Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question.*
>
> **…**
>
> ***[92]*** *But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.*

[93] *A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability.*"

39. The Company refers to the application of these principles in the context of a winding up petition by the High Court (Butler J) in her judgment in *Re Bayview Hotel Limited* [2022] IEHC 516. In that case, the petition to wind up was grounded on a debt of €479,249, said to be a loan payable on demand. The fact that the loan was repayable on demand was reflected in the terms of a mortgage debenture executed contemporaneously with the loan and the company's accounts, which provided that the loan was an "*amount falling due within one year*". However, it was claimed by another creditor that there existed an agreement between him and the petitioner that the loan amount would only fall due if and when the hotel, the main asset of the company, was sold. The court concluded that the dispute over whether the petitioner was a creditor of the company, *i.e.* whether the loan was repayable on demand or repayable only after the sale of the hotel, was not one which could be resolved without cross-examination, despite her clear doubts regarding the basis upon which the debt was disputed, concluding (at para. 60) "*with some reluctance… that I must hold that the petitioner has not discharged the evidential burden on it as regards proof of the debt the subject of the s. 570 notice*."

40. In *Bayview*, the court explained the evidential burden:

"*55. In the context of the deeming provisions of s. 570, the onus of proof is undoubtedly on the petitioner to establish the existence of the debt, the service of the notice and the nonpayment of the debt in response to that notice. The case law recognises that a petition should be dismissed if the company disputes liability for the debt in and on substantial grounds (see* In Re Pageboy Couriers (above), Stonegate Securities v. Gregory *(above) and* Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd *[1996] 1 IR 12). However, it does not follow that the petitioner bears the onus of proving the negative proposition that the company does not have substantial grounds for disputing a debt and cannot do so in good faith. In normal course, it is a matter for the company*

to put forward any grounds on which a debt is disputed. It is not necessary that the company establish that it will succeed in avoiding liability for the debt on those grounds, merely that there is a bona fide dispute which warrants the court refusing to wind up the company for non-payment of that debt."

41. Put otherwise, the petitioner must prove the existence of a debt in order to establish that it is a creditor. Once it has established *prima facie* that this is so, it falls to the company to show that the debt is disputed on substantial grounds and in good faith. The threshold to establish the existence of a *bona fide* defence is low, but it is not met by mere assertion. An analogy can be drawn with the extensive jurisprudence regarding applications for summary judgment. In *IBRC v McCaughey* [2014] IESC 44, [2014] 1 IR 749 (at p. 759):

"***[23]*** *Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in* Aer Rianta c.p.t. v. Ryanair Ltd *[2001] 4 I.R. 607. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.*"

42. The question, therefore, is whether the Company has put forward a potential defence to the Petitioner's claim for the petition debt which goes beyond mere assertion unsupported by evidence or facts which are contradictory and inconsistent with uncontested documentation. If it has, then the court must, for the purpose of this application, accept the

facts as asserted by the Company and conclude that the Petitioner has not met the evidential burden regarding proof of the debt on which it relies. In order to answer this question, it is necessary to interrogate carefully what precisely has been said on behalf of the Company and what has been tendered by way of documentation to support it.

43. When so analysed, it is clear that the Company's contention that there is no debt due to Blackbee barely merits the characterisation of "mere assertion". Mr O'Shea's evidence is often worded to give the appearance of a defence while falling short of so doing. It is riddled with inconsistencies. Tellingly, despite presenting documentation which he contends supports the assertion that the debt is disputed on substantial grounds, the documents provide no support at all.

44. Before considering the evidence in detail, it is worth highlighting that Mr O'Shea seeks to dispute the Company's debt against the background of the following facts which the Company does not or cannot seriously dispute. The evidence clearly establishes that Blackbee was engaged to provide services to the Company as arranger, but also ongoing management services for which AMCs were payable. Mr O'Shea expressly accepts that this was so. In some cases, the product brochures provided that those charges were payable in advance, in others they were payable only after the services were provided. Crucially, the Joint Liquidators unequivocal evidence is that Blackbee did, in fact, provide those services during the periods for which it has invoiced for work done, *i.e.*, the period after the Joint Liquidators were appointed. Mr O'Shea has identified no basis for contesting the Joint Liquidators' evidence to this effect.

45. Mr O'Shea does not contend that the work for which AMCs were payable has not been done at all. The Company has not provided any evidence, or even suggested, that the work was done by someone other than Blackbee. In particular, it has provided no evidence whatsoever that BGHL provided any services for which AMCs are payable. In this regard, the Joint Liquidators have made the point, which the Company has not addressed, that BGHL was not entitled to provide the relevant services because it was not a regulated entity.

46. Thus, the Company seeks to dispute the Petitioner's debt without, in fact, disputing that the Petitioner has done the work for which it has raised the invoices and without providing any evidence that the work has, in fact, been done by another party.

47. Mr O'Shea's basis for disputing Blackbee's debt changed between his second and third affidavit when presented with evidence which undermined the averments contained in his second affidavit. The change was not merely an evolution of the Company's argument. The averments in his third affidavit clearly contradict some of the averments in his second affidavit. It is helpful to consider his argument as it developed, by first considering the basis on which the debt was said to be disputed in his second affidavit, before considering the position after his third and final affidavit.

48. In his second affidavit, Mr O'Shea advances a series of observations on the invoices raised by Blackbee, none of which gives rise to an arguable defence. They are, in effect, quibbles about the invoices which have no relevance to the question of whether Blackbee is a creditor of the Company. The fact, for instance, that the invoices were all issued on the same day, after the original Petition was presented, *does* support the Company's argument that they have been issued for the purpose of establishing that Blackbee was a creditor of the Company. However, that does not affect the question of whether Blackbee actually was a creditor. If services were provided in accordance with an agreement to do so, then Blackbee was a creditor of the Company from the date that payment for those services fell due, whether or not an invoice had been issued. The suggestion that "*no basis was given for [the] percentages*" used for calculating management charges simply ignores the terms of the product brochures in accordance with which the AMCs were charged. Although Mr O'Shea raises a legitimate question about whether the iNUA Collection invoices were due from the Company or should have been issued to the Company, no reliance was placed on those invoices in the Amended Petition. None of the issues raised about the invoices, therefore, serve to undermine the contention that Blackbee was a creditor of the Company.

49. The only potential defence asserted in the second affidavit, almost as an afterthought, was that set out at paragraph 19 thereof. Mr O'Shea's averment in this paragraph is curiously, one might suggest carefully, worded. Rather than say that Blackbee did not provide the services for which it has invoiced, he suggests that it "*could not*" have done

because it had "*employees providing solely MIFID services and not management services since 1 October 2020*". Earlier in his affidavit (at paragraph 15), he says that Blackbee has provided no evidence of such work having been done. On a strict reading of these paragraphs, therefore, Mr O'Shea's averment is nothing more than an inference drawn – that Blackbee could not have provided services – from an asserted fact – there had been a group restructure. It is not an inference which flows from the fact asserted. The assertion that Blackbee had employees providing solely MIFID services and not management services does not equate to it having no employees providing management services and, therefore, does not support a conclusion that it could not have provided management services. As will be seen below, in his third affidavit, Mr O'Shea admits that Blackbee *did* continue to provide management services, for instance, in relation to the iNUA Collection, after October 2020.

50. Thus, even without this subsequent admission, Mr O'Shea's first affidavit in response to Blackbee's claim does not provide a basis for disputing Blackbee's claim other than a suggestion that it hadn't provided evidence of the work done. Even if a more expansive view is taken of what Mr O'Shea intended to convey by his averments at paragraphs 15 and 19 of his second affidavit, it is clear that what he says is no more than mere assertion unsupported by any documentation. As emerges once the documentation exhibited thereafter is considered, it becomes apparent that Mr O'Shea's assertions are not supported by the available documentation at all.

51. On the basis of Mr O'Shea's second affidavit, therefore, the Company had not established any basis for contending that Blackbee's debt was disputed in good faith and on substantial grounds.

52. Mr O'Shea's third affidavit goes further than his second but is also curiously worded. As noted above, he introduces the new argument that Blackbee was prohibited from presenting a petition to wind up the Company by reason of the terms of the Program Documentation. I will address this suggestion below.

53. As regards the substantive defence to Blackbee's claim, he acknowledges for the first time that Blackbee *was* entitled to charge AMCs but that this was "*until such time as it was substituted in that role by [BGHL]. Following its substitution, Blackbee was no longer*

entitled to raise additional fees where services had not been provided." Of course, the uncontested evidence from Blackbee is that the services *were* provided.

54. As evidence of this supposed "*substitution*", Mr O'Shea exhibits two documents: the approval letter from the CBI and a template employment novation agreement. Neither document supports in any way the contention that Blackbee's role as provider of management services had been transferred to BGHL. Mr O'Shea's presentation of them in support of that proposition, therefore, serves only to undermine his assertions. It can be recalled that it is the Joint Liquidators' position, not contested by the Company, that BGHL could not have supplied the services provided by Blackbee because BGHL was not authorised to do so, being an unregulated entity. When that fundamental difficulty with the Company's position was put to counsel for the Company, he could only suggest that Mr O'Shea "*may open himself to criticism in relation to the manner in which compliance with obligations to provide ongoing services was arranged*". That is a wholly inadequate basis for the Company to ask the court to accept that the debt is disputed on substantial grounds and in good faith.

55. O'Shea separately avers that he has "*at least provided an explanation which is not inconsistent with the documentation that's available to him*". His explanations, however, are not consistent with the documentation, or even his own averments. Mr O'Shea avers, similar to his second affidavit, that a number of employees were novated to BGHL. The "novation agreement" he exhibits to support this averment is simply a template, establishing nothing at all.

56. More importantly, he avers that the only employees remaining in Blackbee were providing MIFID services only, *i.e.,* not management charges. But he then almost immediately contradicts himself by averring that Blackbee *did* continue to source income from AMCs, *e.g.* from the iNUA Connection.

57. In addition to contradicting himself, Mr O'Shea's averments are contradicted by the bank statements of both Blackbee and the Company. It will be recalled that in his second affidavit, Mr O'Shea suggested that Blackbee *could not* provide management services from 1 October 2020. He was then faced with evidence of continuing payments thereafter up to August 2022. He describes this as the application of "*management discretion… to*

continue to allocate fees to Blackbee to facilitate ongoing compliance with capital and liquidity regulatory requirements rather than as remuneration for the performance of services formally associated with those fees." This gives the appearance of an explanation but actually explains nothing and, moreover, is inconsistent with Blackbee's bank statements which clearly establish that the payments relate to AMCs in respect of individual investments. Nor does it explain why payments stopped in August 2022.

58. Mr O'Shea is correct when he contends that some of the additional documents relied on, for instance, Blackbee's management accounts, appear consistent with there being no AMCs income due from the Company, but equally, they are consistent with the position as stated by the Joint Liquidators. They are not, therefore, probative either way. The forecasts Mr O'Shea relies on merely suggest that Blackbee did not expect to receive AMC income from the Company, consistent with the Joint Liquidator's position that the Company is unable to pay its debts. Of course, the forecast for no AMC income is inconsistent with Mr O'Shea's own evidence that it continued to be entitled to fees for management services from parties other than the Company.

59. Thus, the patchwork of evidence relied on by the Company, when closely examined, is shown to be too threadbare to offer any protection against Blackbee's claim to be a creditor. It is no more than bare assertion, riven with inconsistencies, which is not only unsupported by the documentation tendered to evidence it, but is contradicted thereby. It is also inconsistent with undisputed facts, that the services in question *were* provided by Blackbee, and that not only is there no evidence at all that the party said to have been substituted for Blackbee, BGHL, provided any services whatsoever, but it appears undisputed, it was not permitted to provide those services. To borrow the language of *IBRC v McCaughey*, it is a defence based on "*mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances*" and, therefore, does not provide an arguable defence.

60. Nor is there any relevant dispute of fact, such as was in issue in *Bayview*, as to whether two people reached an oral agreement, the determination of the truth of which can only be resolved by cross-examination. There *is* a similar dispute in the affidavits, regarding what was said by the Joint Liquidators at a meeting held in the offices of EY in

Cork on 19 June 2024. But that is not a factual dispute which it is necessary to resolve in order to determine whether Blackbee is a creditor of the Company and therefore does not require cross-examination for the purpose of determining this application.

61. I have considered whether there is a realistic suggestion evidence might be available in light of complaints by Mr O'Shea regarding access to records. In this regard, Mr O'Shea makes vague complaints in his affidavit that the Joint Liquidators have restricted his access to relevant group information. He has not pointed to any specific documents which he contends should be available, and I am, of course, mindful that the Joint Liquidators have presented their case on the basis of the information which is, in fact, available. More pertinently, any issue with access to group information does not explain Mr O'Shea's failure to put forward evidence which should be freely available if there was any substance to the defence, for instance, any evidence of any service provided by BGHL to the Company. The Company's bank statements do not show any payments to BGHL. Ultimately, the absence of a scintilla of evidence to support his central proposition – that from 1 October 2020, BGHL, not Blackbee, provided management services to the Company – is fatal to the Company's contention that it disputes Blackbee's debt on substantial grounds and in good faith.

62. In circumstances where Blackbee was substituted as petitioner, it does not rely on section 570(a) of the Act to deem the Company unable to pay its debts by reason of its failure to pay the debt on which it relies in presenting the Amended Petition. However, the evidence before the court clearly suggests that the Company is unable to pay its debts. Indeed, this is the clear inference which must be drawn from the Company's marked failure to say otherwise.

63. The Company has not filed accounts since 2018. At that point, the Company's debts dramatically exceeded its assets, and it was, therefore, balance sheet insolvent. It had net liabilities of €1,927,111 and had made net losses for the year ended 31 December 2018 of €955,467. The audited accounts stated as follows:

> "*The directors acknowledge that the company may be unable to realise its assets and discharge its liabilities in the ordinary course of business. The company will continue as a going concern on the basis that the directors anticipate that the company will*

continue to have the support of its related company to provide sufficient working capital for its needs for a period of not less than twelve months from the date of approval of the financial statement."

64. Curiously, the related company is not identified. For present purposes, though, the more relevant issue is that Mr O'Shea does not suggest that there exists any such commitment in 2024. Nor is there anything else to suggest that the Company's position has improved since those accounts were filed. In addition to its liability to Blackbee, other parties, including Harvest Trustees Limited, have indicated that the Company has significant liabilities to them. Several parties, including Mr Finneran, have expressed concern about their investments and support the Amended Petition.

65. In the circumstances, I am satisfied that Blackbee is a creditor of the Company and that the Company is unable to pay its debts as they fall due.

66. The final issue which remains to consider in relation to Blackbee's application to wind up the Company pursuant to s. 569(1)(d) of the Act is the Company's contention that there is a prohibition on it doing so by reason of the terms of the Program Documentation.

67. Having considered the terms of those documents, it seems to me that the Joint Liquidators are correct in contending that any restriction in the Program Documentation is limited to the presentation of a petition for reasons relating to Blackbee's role as arranger and not in relation to the provision of management services. In those circumstances, I do not need to consider the question of whether any such prohibition, if applicable, would have been unenforceable on public policy grounds.

68. For the above reasons, therefore, I will make an order winding up the Company on foot of the Amended Petition pursuant to s.569(1)(d) of the Act, that is, on the grounds that it is unable to pay its debts.

69. It is not, therefore, strictly necessary for me to consider whether an order winding up the Company on just and equitable grounds is appropriate. Had it been required, I would have had no hesitation in so doing.

70. The Company is at the heart of a complex scheme of investments in relation to which investors have raised significant concerns, for the reasons set out in the various affidavits. Moreover, it has failed to file accounts since 2018, contrary to its statutory obligations, heightening the concerns of investors and, frankly, the court regarding the manner in which it is being operated.

71. Notwithstanding the Company's apparent insolvency and failure to abide by its statutory obligations, the directors have not only failed to wind up the Company, they have resisted this application on the sole basis of disputing Blackbee's debt on grounds which I have not been persuaded were substantial and in good faith.

72. The Joint Liquidators have made clear from the outset that their primary motivation in seeking to have the Company wound up is to gain access to the books and records of the Company in order to gain a better understanding of where the money provided by investors has actually been invested. They identify a number of cases where the money transferred to the Company cannot be reconciled with the money transferred from the Company to the SPVs associated with each investment. It is manifestly in the investors' interests that these investigations take place as soon as possible.

73. In those circumstances, even if I had been unable to conclude that the Company was unable to pay its debts, I would be satisfied to make an order winding up the Company pursuant to section 569(1)(e) of the Act, that is, on the grounds that it is just and equitable to do so.

74. In light of the above conclusions, and, in particular the conclusion that Blackbee is a creditor of the Company, it is not necessary to address the difficult question of whether the court would have retained jurisdiction to wind up the company, either as unable to pays its debts or on just and equitable grounds, if I had concluded that Blackbee's debt was disputed on substantial grounds. The Company says it does not and that, as section 572 of the Act provides that a petition can be presented by a creditor, where a petition is presented on that ground, it is a prerequisite that the petitioner prove that it is, in fact, a creditor in order for it to have *locus standi* to proceed with the Petition.

75. The Joint Liquidators point to the fact that in *Bayview*, the court made an order winding up the company notwithstanding its (reluctant) conclusion that the petition debt

was disputed on substantial grounds. However, the question of the court's jurisdiction does not appear to have been raised in that case, and the Company argued, that it could not, therefore, be relied on as authority for a jurisdiction to make an order under section 569, notwithstanding that a debt was disputed on substantial grounds and in good faith.

76. Of course, the fact that a petitioner's debt is disputed on substantial grounds does not mean that the petitioner is not a creditor. Where no reliance is being placed on the deeming provisions in section 570, it may be, therefore, that a petitioner is not deprived of standing to present a petition merely because the debt is disputed, rather it may be that it is only deprived of the entitlement to have the company deemed insolvent by reason of an inability to pay the disputed debt. The resolution of this issue will have to await a case in which it may be determinative.

77. In the above circumstances, I will make the order sought winding up the Company. I will list this matter as soon as is convenient for the parties for the purpose of making final orders.