COURT OF APPEAL

Neutral Citation Number: [2021] IECA 284

Court of Appeal Record Number: 2020/188

High Court Record Number: 2018/279 COS

Woulfe J.

Haughton J.

Collins J.

IN THE MATTER OF DOMINAR GROUP LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 638 OF THE COMPANIES ACT 2014

BETWEEN/

PRINT & DISPLAY LIMITED

APPLICANT/APPELLANT

- AND -

LIAM DOWDALL

RESPONDENT

- AND -

MICHAEL CURNEEN

NOTICE PARTY

Contents

JUDGMENT of Mr. Justice Robert Haughton delivered on the 27th day of October, 2021

Introduction

1. This appeal which was heard by this court on 17 June 2021 is an appeal from the judgment of the High Court (Sanfey J.) delivered on the 8th day of May 2020, whereby he refused to grant an order pursuant to s. 638(1) of the Companies Act, 2014 for the removal of the respondent as liquidator of Dominar Group Limited (in Voluntary Liquidation) ("the Company").

2. Section 638 provides: -

> "638 (1) In any winding up, the Court may, on the application by a member, creditor, liquidator or the Director or on its own motion –
>
> (a) appoint a liquidator if from any cause whatever there is no liquidator acting, or
>
> (b) on cause shown, remove a liquidator and appoint another liquidator.
>
> (2) Where the Court makes an order under (*subsection 1*), it may give such consequential directions, including directions as to the delivery and transfer of the seal, books, records and any property of the company, as it thinks fit."

The application to the High Court in this instance sought to show cause pursuant to subsection 1(b)

3. In the unanimous decision of this court, delivered in open court on 24 June 2021, the substantive appeal was dismissed, and the court indicated that a judgment would follow setting out the reasons for its decision, and its proposals in respect of costs orders. The reason the court took this approach was because the liquidation was ongoing and it wished to a avoid a situation in which any delay in the delivery of its decision might impact or further delay the completion of the liquidation of the

Company, including one of its subsidiaries, bearing in mind that the respondent was appointed liquidator in 2008 and the liquidation work was nearing completion. Accordingly, this judgment sets out reasons for the decision.

Background to the High Court Application

4. The Company operated as a holding company for subsidiaries principally involved in the business of printing billboard advertising displays. The Company has two shareholders, namely the appellant and Mr. Curneen, who continue to be equal 50% shareholders in the Company. Prior to being placed in liquidation the subsidiary companies included two Polish companies, namely Print & Display (Polska) Sp. Zo. o. ("P&D Polska") and P&D Polska's 100% owned subsidiary Grosbeak Sp. Zo. o. ("Grosbeak"). Both of these Polish companies were primarily managed by Mr. Curneen.

5. The appellant commenced oppression proceedings under s. 205 of the Companies Act, 1963 against Mr. Curneen due to a breakdown in their relationship in and about the management of the affairs of the Company. Those proceedings were compromised in a Settlement Agreement entered into between the appellant and Mr. Curneen on 3 March 2008. In Clause 1, the appellant and Mr. Curneen agreed to the appointment of a voluntary liquidator of the Company "for the purpose of realising the assets of that company" and that the liquidation would proceed as a members' voluntary winding up. Clause 6, for the avoidance of doubt, stated that the liquidator should realise the assets of the subsidiary companies, including P&D Polska and Grosbeak. In Clause 7 it was agreed that an insolvency partner of BDO Simpson Xavier should be appointed voluntary liquidator, and in Clause 8 that the directors of the Company would each swear a Declaration of Solvency.

6. Pursuant to the said Settlement Agreement, by resolution dated 9 April 2008 the respondent, a chartered accountant in Smith & Williamson, was appointed as liquidator of the Company

7. Mr. Jim Conway ("Mr. Conway"), a director of the appellant who swore a number of affidavits on behalf of the appellant in these proceedings, averred in his first affidavit sworn on 16 July 2018 that the s. 205 proceedings were brought due to "a serious breakdown in the relationship between the Applicant and Mr. Curneen", and that interim injunctive relief was obtained to restrain Mr. Curneen from giving effect to resolutions passed by the Company sanctioning "huge salary and pension contribution increases to Mr. Curneen, retrospective payments to him for several years in respect of salary and pension payments, a one-off bonus payment of €300,000, future bonus payments…".

8. Although Mr. Curneen and a fellow Director of P&D Polska, Ms. Katarzyna Frejlichowska, had control of the day to day management of the Polish business, the Settlement Agreement made no provision for the alteration or replacement of the existing management structure of the Polish subsidiaries during the realisation of assets. On 8 May 2008 the respondent entered into a Memorandum of Understanding ("the MOU") with Mr. Curneen and Ms. Frejlichowska which provided that as directors they should remain *in situ*, subject to certain restriction and reporting obligations. The trial judge found that there was no evidence before the High Court that the appellant was unaware of, or objected to, the liquidator's reliance on the existing management of the Polish subsidiary companies on the basis of the MOU.

9. Following his appointment, the respondent was furnished with a Declaration of Solvency which recorded the directors' view at that time that the company would be in a position to pay its debts within 12 months and that it would yield a surplus of €631,316.

10. The main assets of the Company or its subsidiaries which required realisation were: -

(1) the P&D Polska trading printing business operated through P & D Polska;

(2) an undeveloped parcel of land located in Osmanska 7, Warsaw, held through P&D Polska's 100% Polish subsidiary Grosbeak ("the Osmanska 7 Site"); and

(3) A claim being taken through the courts in Poland by P&D Polska/Grosbeak against Polskie Pracownie Konserwacji Zabytkow S.a. ("PPKZ"), the Warsaw City's public authority. This claim was for compensation and reimbursement of costs arising from PPKZ's failure, prior to sale, to disclose the existence of restitution claims filed by ex-owners of the Osmanska 7 Site or their heirs. These are restitution claims of a sort that became common in Poland and relate to public body expropriation of property from private individuals.

11. It is the manner in which the respondent addressed the realisation of each of these assets that gave rise to the appellant's dissatisfaction with the respondent and ultimately the commencement of these proceedings for removal of the respondent and the appointment of Mr. Myles Kirby, Chartered Accountant, as replacement liquidator. The proceedings were commenced by notice of motion issued on 16 July 2018. It is appropriate therefore to give some further detail in relation to the respondent's dealings with each of these matters. Before doing so it should be noted that at this point in time the respondent has dealt with all of the Company's creditors and has disposed of all of the assets in the liquidation, including the P&D Polska trading business and the Osmanska 7 site.

12. By the time the proceedings issued the respondent had realised considerably more than the estimated surplus of €631,316, and had made distributions to the appellant totalling €1,649,226.60, and he has since achieved further realisations following sale of the Osmanska 7 site. The respondent's handling of the Company's liabilities, which is summarised in para. 10 of the replying affidavit which he swore on 2 November 2018, is also not in dispute. However from 16 December 2013 Mr. Conway raised concerns in relation to delays in realisation of the Osmanska 7 Site, and costs and delays in the liquidation, and from 2014 Mr. Conway and/or the appellant's solicitors pursued these issues and concerns over a perceived failure to achieve optimal price for assets, failure to protect the Osmanska 7 site, a lack of transparency, liquidator's remuneration, delay, and allegations of hostility

demonstrated by the respondent towards the appellant and its solicitors. Ultimately these concerns prompted the issue of these proceedings.

13. Some 12 affidavits were sworn before the matter came before the High Court, where it was heard over the course of 4 days in January/February 2020. The hearing included cross-examination of the respondent on his affidavits, limited leave in that regard having been granted by order made on 27 July 2019 (O'Connor J.) after a contested application. The leave granted was limited to whether the respondent failed to preserve and safeguard the assets of the Company, and the financing of the removal of waste from the Osmanska 7 site. O'Connor J. also granted leave to the respondent to cross-examine Mr. Conway, but in the event only the respondent was cross-examined.

14. To understand the nature of the appellant's application and the thrust of argument in this appeal it is appropriate to refer in some detail to the background and evidence relevant to the respondent's attempts to dispose of the assets listed at (1), (2) and (3) above. It should be noted that since judgment was delivered in the High Court (8 May 2020, with a supplemental judgment in relation to costs having been delivered on 26 July 2020) a further affidavit was sworn by Mr. Tom Casey solicitor on 15 June 2021 on behalf of the appellant in order to bring before the court "certain recent events that have occurred since the judgment and the lodging of the books of appeal before this Honourable Court surrounding the proposed liquidation of Grosbeak". This relates in essence to unanticipated additional costs and delay in the liquidation of Grosbeak, and the proposal that Mr. Curneen should be appointed the Polish liquidator of Grosbeak. I will return to this in more detail later in this judgment.

(1) P&D Polska

15. P&D Polska was the only trading entity of the Company. The respondent's averments show that his initial intention was to sell P&D Polska to a third party in late 2008 and early 2009. The

respondent avers that he approached 50 potential buyers but was unable to find a third party purchaser for the business. In light of this, he invited bids from the appellant and Mr. Curneen. A letter dated 14 May 2010 from A&L Goodbody Solicitors (acting for the respondent), to LK Shields Solicitors (citing for the appellant), records that in late November 2009 the respondent initially entered into heads of agreement to sell the shares to the appellant. The appellant failed to advance the purchase of the shares and the period of exclusivity provided for in the heads of agreement was accordingly terminated, and the respondent sought revised offers from the appellant and Mr. Curneen. He set out the basis on which such offers would be assessed. The appellant made an offer of €1.3M, but indicated that he could not commit to a closing date prior to 1 September,2010. That offer was not acceptable to the respondent having regard to the criteria identified by him in advance. He then accepted an offer of €975,000 from Mr. Curneen, which satisfied those criteria, and which included a personal guarantee from Mr. Curneen. Accordingly, the respondent sold the company's 100% shareholding in P&D Polska to Mr. Curneen in 2011 (the €975,000 paid by Mr Curneen was for 50% of the company; he was already effectively (but indirectly) the owner of the other 50%) .

16. The appellant's concerns include that it was not privy to the terms of the sale of the shares to Mr. Curneen, and its belief that the disposal of the shareholding to Mr. Curneen was in terms that did not reflect the true value of the business, particularly having regard to the appellant's own higher offer of €1.3M.

17. These complaints led to the issue of proceedings by the appellant against the liquidator on 7 February 2011 by Plenary Summons entitled "*The High Court Record No. 2011/1157P* between *Print & Display Limited Plaintiff and Liam Dowdall Defendant*". The General Indorsement of Claim claims damages for negligence/damages for breach of duty to include breach of fiduciary duty and interest pursuant to the Courts Act, 1981. Those proceedings have never been advanced by the appellant and at the date of hearing of this appeal the court was advised that the respondent had

brought a motion to strike out the proceedings for delay/want of prosecution which stood adjourned to 12 July 2021.

18. It is not disputed that the respondent has in fact made his files on the transaction available to the appellant following requests from the appellant's solicitors. In his replying affidavit of 2 November 2018 the respondent noted at para.11 that –

> "(c) P&D Polska was included in the DOS [Declaration of Solvency] at a value of €1,895,908. It yielded a dividend in 2008 of €1,588,453 and was sold in 2011 for €1,950,000 realising a total of €3,538,000. From this, a total sum of €1,649,226.60 was distributed to the Applicant."

The reference to a sale price of €1,950,000 reflects Mr. Curneen's offer, which was accepted, of €975,000 being the value of 50% of the shareholding.

(2) The PPKZ proceedings

19. This claim was filed by Grosbeak in March 2009. The background, progress and failure of the claim at first instance is one of the items dealt with in a report dated 9 December 2015, prepared by Mr. Curneen for the respondent and furnished by the respondent to Mr. Ronan Conway (son of Mr. Jim Conway, and Managing Director of the appellant), on 17 December 2015. The relevant section of the report reads:

> "PPKZ Court Case
>
> At the time of purchasing Osmanska 7 we had no information about restitution claims but given how common they were we sought to mitigate the risk and insisted the 2006 sale contract included a restitution claim warranty from the seller PPKZ. In 2009 Grosbeak issued proceedings on foot of this warranty. We agreed fixed fees for running the case at €30k and in the circumstances decided the upside potential was good enough to proceed. The claim

against PPKZ was lodged for an ambitious PL|N 5 million in the hope of winning PLN 1 maybe PlLN 2 million. The case was expected to complete within three years. In fact the case lasted almost seven years. The case was uneventful until March 2014 when the court appointed valuer valued Grosbeak's damage at PLN 6.5 million. At 2009 prices he valued Osmanska 7 without claims at PLN 12 million but with its claims at only PLN 5.5 million. He made specific reference to the extensive value damage claim caused by the Janiszewski claim which splits the site. This valuation was very positive from a compensation perspective but on investigation it became clear that PPKZ could not pay such an award. Every asset they owned was mortgaged or the subject of restitution claims. They had fared badly during the years of the court case and had sold off their good assets to keep the company afloat. It became clear that a Grosbeak win would be very difficult if not impossible to monetise. As it happened the Judge sided with PPKZ. She stated that PPKZ had no liability under the warranty and that the obligation to identify claims lay with Grosbeak. This was a ridiculous judgment which provided Grosbeak with numerous grounds for appeal. However given PPKZ's deteriorating financial condition, the time and costs involved in an appeal (circa PLN 150k) and the risk of another impartial Judge being appointed to the case it was decided not to proceed with an appeal."

20. It is evident from an email dated 16 December, 2013 from Mr. Jim Conway to the respondent that the appellant was aware of the legal action being taken against PPKZ. Mr. Conway's queries at that time were dealt with in a response from the respondent dated 6 February 2014, in which a section on the PPKZ court case indicated that the case was then at an advanced stage, and referred to the appointment of a court valuer and that "We have always expected to win the case but could never predict what a win means in terms of compensation."

21. Notwithstanding this expectation it appears that the Polish court dismissed the PPKZ claim on 5 February 2015. The appellant was not immediately notified, but the appellant was notified of the failure of the PPKZ proceedings in the detailed status report provided by the respondent on 17 December 2015. It is important to note that there was no response from the appellant or Mr. Jim Conway to the respondent's report in December 2015.

22. An AGM of Grosbeak was held on 25 April 2016, and attended by the appellant's solicitor Mr. Tom Casey on behalf of the appellant, by the respondent and his solicitor, and by Mr. Curneen. The meeting was not amicable. A Memorandum of the discussion that took place at that meeting recorded Mr. Casey asking about the circumstances in which Grosbeak decided not to proceed with an appeal of the Polish Court's adverse decision. It records that Mr. Curneen explained the Polish Court decision "… on the basis that the judge had determined that Grosbeak had two weeks to conduct due diligence and the judge had determined that the restitution claims should have come to the purchaser's attention." Mr. Curneen confirmed that the solicitors currently advising the liquidator had been engaged in the litigation. Mr. Casey then raised the issue of lawyers' liability, asking if anybody had considered the failure to acquire good title when purchasing. The Memorandum then records –

> "[Mr. Curneen] and [the respondent] commented who would pay for this and [Mr. Curneen] also stated that before the solicitors could be pursued the judgment would have to be appealed. [Mr. Casey] asked why PW Legal was not consulted about the question of an appeal. [The respondent] stated that he, as liquidator, formed a view that it shouldn't be appealed and also that PW Legal [the solicitor who acted originally in previous firm and was currently acting in a new firm] was not at fault. [Mr. Casey] asked on what basis [the respondent] had come to this view, [the respondent] did not reply. [Mr. Casey] asks if the other parties present understand our concerns re. lack of transparency, the fact that [Mr. Curneen] appears to be clearly controlling and dictating everything. [Mr. Curneen] stated he is not dictating matters,

that he is a 50% shareholder and everything he does is to maximise returns for both shareholders. [Mr. Casey] asks if [the respondent] took advice re. the case against the solicitors. He responded that he did and that it would have cost a fixed fee of €25/30,000. [Mr. Casey] asked if it was lack of money which influenced the decision but [Mr. Curneen] stated it was lack of time, and a desire to not have another case pending with lands to be sold. [Mr. Casey] asked how much the litigation had costs [*sic*] and [Mr. Curneen] replied that the solicitors had agreed and been paid a fixed fee of some €25,000."

The Memorandum also records that the respondent, in response to questioning, stated that he was aware that the PPKZ claim had been lost soon after the event, and when asked why the appellant had not been told "… he apologised and said that it was an inadvertence and that 'it fell through the cracks'. [Mr. Casey] stated he believed we were deliberately not told. [Mr. Curneen] stated that it became obvious before the decision that there was no money left in the State company and that there was nothing left to pursue".

23. At paragraph 29 of his first affidavit the respondent addresses the PPKZ proceedings in the following terms: -

"29. At the time of my appointment, Grosbeak was involved in litigation against an entity known as [PPKZ]. The purpose of the proceedings was to recover damages from the vendor of the Omanska 7 property, which had wrongly represented to Grosbeak and its predecessor in title that there were no restitution claims in being at the time of the purchase. The claim was filed in March 2009. It was ultimately dismissed by the court on 5 February 2015. On the advice of its lawyers, Grosbeak did not appeal the decision. A Memorandum explaining the proceedings and the rationale for the decision not to appeal was prepared by Ms. Wasik and appears at Tab 9 of the Booklet."

24. Tab 9 consists of a "report of the PPKZ proceedings", and describes the claim and the reasons for commencing the proceedings. At para. 5 Ms. Wasik of PW Legal sets out a summary of the judgment and provides her comments. The first reason for justifying dismissal was that –

> "PPKZ does not have any liability under the warranty because PPKZ was diligent and provided all available information to Grosbeak and issued a power of attorney to Grosbeak to review various files. In the Judge's opinion PPKZ took all reasonable steps to obtain information about any proceedings. There was no evidence that PPKZ knew of any proceedings. Since PPKZ did not know of any proceedings the warranty issued was in line with PPKZ state of knowledge."

Other reasons appear to have been that the court appointed valuator opinion showed that the value of the property with claims "is more or less equal with the price paid"; that Grosbeak had not sufficiently proved that the property could not be sold and/or that Grosbeak made any actions directly aimed at developing the site; that Grosbeak sold part of the real estate to the Road Authority leading to the conclusion that no damage was done; and other reasons that appear to be subsidiary. In relation to "the appeal process and the risks" Ms. Wasik advised –

> "The appeal could have been filed within 14 days since receipt of the justification of the ruling, i.e. by 14 April 2015. The appellant fee would amount to PLN 100,000 (maximum fee). The legal fees would have amounted to PLN equivalent of EUR 7,000, as per arrangement made prior to the proceedings when the total legal fees were agreed at EUR 20,000 payable in two tranches: EUR 13,000 upon filing the lawsuit and EUR 7,000 upon filing the appeal or the response to the appeal."

While Ms. Wasik considered that there were strong legal arguments for the appeal, she cautioned –

"However, appeals are always a risk. Main problem or risk with the appeal would be the commercial view of the appellant court judges i.e. whether they would treat value and price for the Osmanska land as similar or separate terms. Also whether they would treat the damages purely virtual (theoretical) and deny Grosbeak the benefit of increased value.

Second problem with the appeal was financial status of PPKZ. Based on publicly available documentation, PPKZ financial condition was poor and therefore even if the appellant judgment [sic] would be satisfactory to Grosbeak, there would be major problems with enforcing the judgment."

25. The respondent was cross-examined in relation to the decision not to appeal. That decision has to be taken within a "two week window" (which appears to have been the first two weeks of April 2015), and the respondent stated that he had discussions with the management team at Grosbeak, and consulted with Ms Wasik's firm. He stated he also consulted with his legal advisers in Dublin, A&L Goodbody. He gave evidence that he got "a very good briefing and a very good summation of what the case was" from Ms. Wasik's firm, but he could not recall whether he got written advices from the firm. A&L Goodbody also gave advice but not in writing. The Grosbeak management team advice seems to have centred on the parlous financial position of PPKZ. The respondent gave evidence that he assessed the financial information (from publicly available documents) and formed his own view on it. Although Grosbeak was the entity conducting the litigation, he "as liquidator had a job to oversee and to look at what was going on". While the legal advice was given by Ms. Wasik's firm, he stated –

"But I would have considered those advices and I would also have considered if I needed to look at anything else."

He said he might have considered consulting with the appellant as the shareholder in the Company, but the decision of whether or not to appeal was his to make, and he decided not to consult. He

accepted that there should have been communication with the appellant in relation to the outcome of the court case. When pressed on the advice received from Ms. Wasik in February 2015 regarding a possible appeal, the respondent replied that Ms. Wasik "ultimately formed a view that she was going to propose that we didn't go forward". He accepted that he was told that there were strong arguments in favour of an appeal, but that his decision was based on whether PPKZ was "ultimately a mark so that we could get value". When it was put to him that Ms. Wasik had acted for Grosbeak in relation to the purchase of the property and might therefore be seen to have a conflict of interest in advising Grosbeak in relation to the proceedings, the respondent said that he "did look at that and formed the view that we should continue in using Ms. Wasik", and said he was satisfied with the legal advices given.

26. On the fourth day of the hearing in the High Court, the respondent, who had been invited to check his records in the interim to see if there was any record of advices from PW Legal (Ms. Wasik's firm), indicated that there was a problem in that he had been unable to retrieve documentation beyond a certain date. In response to further questioning he also confirmed that he had not consulted with Ms. Wasik directly in relation to an appeal, but that "the Directors on my behalf consulted with her" – and he said he did not seek her advice directly because "I already knew her advices from the Directors of where she stood in relation to the matter". He also did not contact Ms. Wasik in relation to the "report of the PPKZ proceedings" referred to earlier. The respondent stated that he instructed the Directors of Grosbeak to procure it from Ms. Wasik.

27. Under cross-examination the respondent was asked about the costs of the unsuccessful litigation and whether they might be a continent liability. He responded that he had no intimation of an adverse costs order since 2015, but admitted that he had not been in communication with Ms. Wasik on the subject, and he accepted that "there could be a contingent liability".

28. I have dwelt on this at some length as the respondent's handling of the PPZK issue was the subject of some criticism by the trial judge and a key issue for the appellant.

(3) The Osmanska 7 Site

29. The Osmanska 7 site comprised 24,489 square metres of development land located close to Chopin Airport in Warsaw. It is owned by the Polish State, and until recently was held by Grosbeak by way of a long-term lease known as a "right of perpetual usufruct". The Omanska 7 site was expropriated by the Polish State under laws which entitled the prior owners to claim restitution in the event that the lands were not used for a defined purpose within a defined period. Eight former owners of lands forming part of the site filed restitution claims with the Polish Courts between 1997 and 2012. Grosbeak was not a party to those proceedings. The last of the restitution claims were finally resolved in June 2018. While the length of time taken to determine the restitution claims was considerable, counsel for the respondent opened to the High Court authorities from the European Court of Human Rights which demonstrate that similar delays are not unusual in such cases in Poland. The trial judge refers to these at para. 142: -

> "142. Counsel did bring my attention to four decisions of the European Court of Human Rights: *Grabinski* (appeal no. 43702/02), *Tymieniecki* (33744/06), *Pradzynska-Pozdniakow* (20982/07) and *Radoszewska* (858/08). In each case, the respondent was the Republic of Poland. The cases involved complaints of delay by the respondent State in dealing with restitution claims similar to those involving Osmanska 7. Each of the applicants received a monetary award in respect of the cases, which involved delays of between 13 and 16 years. Counsel's point was that the delays involved in resolving the restitution claims in the present case were not unusual."

30. The respondent exhibited information and correspondence concerning the restitution claims from Ms. Wasik, Grosbeak's attorney. The main document which is undated but appears to have been produced in late 2016 is headed "Insight into Restitution Claims" and gives detailed background to the claims, and in a schedule provides details of the claimant, the original date of claim, (varying from 1989 to 2008), the decisions issued up to that date, the number of appeals, and the date on which the decision becomes final or the anticipated date of closing of the proceedings. As to "time frame of the proceedings", Ms. Wasik stated –

> "Prior to May 2004, administrative proceedings for restitution claims took years and there were no real measures allowing speeding them up. After EU accession in May 2004 and therefore introduction of two instances administrative courts system, claims to the Administrative Court for delay in the Administrative Court has been introduced and gradually most of administrative proceedings have speeded up. In or around 2005, it typically took approximately 10 to 12 years to sort out one case. In recent times, the process is faster and it currently takes between 2 and 5 years."

31. Also exhibited is Ms. Wasik's letter of 17 September 2018 in which she confirms that the Osmanska 7 site is now free from any restitution claims, and that in early February 2018 her office received official confirmation that no appeal was lodged in respect of the last claim. She attached a summary of the confirmation on lack of restitution claims against the site. It seems that the Warsaw City letter of confirmation contained a reservation clause that information on proceedings currently run by "Voivode SKO or Ministries may be lacking". Ms Wasik opined –

> "We read the reservation that there may (theoretically) be proceedings regarding decisions issued in proceedings listed in sub points 2.1 to 2.8 above that the office of the President of Warsaw is not yet aware of. We are not aware of such proceedings, either."

The appellant would have been aware of this position at an earlier point in time because at the AGM of the company held on 20 April 2018 it was confirmed that the Osmanska 7 site was finally free of restitution claims, and that the exercise of obtaining the appropriate legal confirmation was also.

32. The appellant's primary concern about the site was that, due to the unlawful activities of one of Grosbeak's tenants JMR Trans, a soil and rubble mountain arising from illegal landfill and fly tipping developed onsite, creating danger for its continued use for storage, and issues in respect of the disposal of unknown materials with unknown pollution. This adversely affected the condition and value of the site.

33. The respondent obtained a valuation of the Osmanska 7 site from Andrezj Zalewski dated 7 April 2016, valuing the lands at PLN 14,916,000 (approximately €3.44M at current exchange rates), assuming no claims to the property, but €2.04M taking into account the then outstanding restitution claims. This was supplied to the appellant with detailed financial data by letter dated 15 August 2016, including an update on the restitution claims. The respondent relied *inter alia* on this material to await the ultimate resolution of the restitution claims before selling the site. He obtained an up to date valuation and report from January 2018, which was provided to the appellant, valuing the Osmanska 7 site at €4.7M. These higher valuations all assumed that the lands would be in a fit state to sell, and clear of restitution claims.

34. On behalf of the appellant the site was viewed by Colliers International in company with Mr. Jim Conway and the appellant's solicitor Mr. Casey, resulting in a comprehensive valuation report of 1 June 2018. Collier's estimated the market value as of 20 May 2018 – assuming that the property was marketable –at PLN 20,190,000 (€4,700,000), and Colliers applied a 20% discount on the property value arising from the costs of cleaning the property and uncertainties arising in connection with that operation. A preliminary budget estimate of the cost in relation to removal of the imported soil and waste material was €1.62M, based on certain assumptions.

35. The evidence shows that Grosbeak experienced difficulty recovering rent from two of the seven tenants to whom the land was leased. Eight separate sets of proceedings were brought by Grosbeak against JMR Trans, which resulted in potential criminal liability for a director of that entity. The respondent accepted that JMR Trans dumped a large volume of rubble on the lands. The respondent refers to advice given by Ms. Wasik to Grosbeak to the effect that it would not have been practicable to have sought an order restraining dumping on the lands (relayed to the respondent in a letter from Ms. Wasik dated 19 September 2018).

36. The respondent obtained a number of quotes for the removal of 100,000 cubic metres of offending material from the site, and the most competitive of these was for €840,000 plus VAT (Eurokop quote of 3 October 2018). Additional items – security, waste disposal, water supply and electricity during the works and disposal of material thereafter – were priced separately.

37. Shortly before the proceedings came on for hearing before the High Court the respondent produced a detailed proposal for the sale of the Osmanska 7 site, including a proposal to fund the cost of clearing the lands. The soil was to be removed at a cost of €840,000 plus VAT with the directors of Grosbeak providing the funding to complete the soil removal on the basis that they would be reimbursed from the sale proceeds. The estimated outcome for the sale in the liquidation indicated a surplus of €1.2M would be available to shareholders. There was an exchange of correspondence between the parties in relation to this proposal and a meeting of the shareholders took place on 20th January, 2020, two days before the hearing in the High Court. There was no consensus. Mr. Curneen was supporting the sale. Mr. Jim Conway on behalf of the appellant did not want to block the sale, but insisted on obtaining answers to various queries that had been raised in the appellant's solicitor's letter of 17th January, 2020. These were responded to by the respondent's solicitors by letter of 21st January, 2020. The evidence before the High Court also showed that there was a proposed purchaser

in place and that due diligence had been completed – this was confirmed in the respondent's letter to the appellant dated 30th January, 2020.

Cross examination of the respondent

38. The respondent was examined at length in relation to the clean-up of the soil and rubble on the Omanska 7 site, and the dealings between Grosbeak and JMR Trans. He acknowledged that his awareness of the tenancy of JMR Trans and the issue of liability of the tenant to Grosbeak derived mainly from the directors of Grosbeak, and that he did not retain a lawyer, as Grosbeak had done so, and that he "got legal advice from PW through Grosbeak". He indicated that he told the directors of Grosbeak to take charge of the process of taking whatever action was required to deal with the illegal dumping, including taking legal advice and dealing with the environmental authorities. He defended this approach by stating it was more appropriate to instruct Grosbeak to deal with the matter given that it was the named party in those actions. He conceded that the commissioning of the report as to whether the soil was decontaminated in 2018 did not occur until after the s.638 application had commenced, but stated "we were always going to have to get the soil tested" and these proceedings were "a factor" in commissioning the report, albeit that "until the restitution claims were finalised we weren't going to be doing anything with the land, with the soil, other than trying to enforce JMR Trans to remove the soil to take it away…". He explained that Grosbeak acquired the rights to the soil, stating that the cost of acquiring the soil in an auction by the authorities had been set against the liabilities to Grosbeak of JMR Trans. As to when he became aware the removal costs were not going to be met by JMR Trans, his evidence was that in June 2015 when the lease expired he took the view that "the force of the environmental authorities in the proceedings would hopefully lead to a situation where Trans would ultimately remove the soil, but that did not… transpire". As to whether it ever occurred to him that the management of Grosbeak could have a liability arising from this management

of the tenancy he responded that this was not something he considered in 2015; he had considered it since 2015 but had not sought legal advice.

39. A letter dated 7 December 2018 from Ms. Wasik to the respondent, in which she advised that any liability for breach of environmental regulations in relation to the Omanska 7 site "remains Grosbeak's liability and potentially, Grosbeak's director's liability" was put to the respondent and he was asked whether this caused him to consider whether the directors of Grosbeak might have some liability. He responded that, while this was a possibility, he did not see it as a risk based on his knowledge and information in relation to the matter. He did not see a conflict between his position as liquidator and that of Mr. Curneen and Ms. Katarzyna as directors of Grosbeak, being of the view that "they have sought to manage a very difficult situation extremely well and extremely professional[ly]". The respondent accepted that the cost of the clean-up would be borne equally by the shareholders in Grosbeak. When it was put to him that there was "a potential liability on the part of Mr. Curneen personally for some of that liability he agreed only that there was "potential". He also confirmed that his means of knowledge in relation to the Osmanska 7 site was not limited to reliance on the directors of Grosbeak – he also received information from a number of sources including PW Legal, and CBRE. He did not accept that a possible liquidator's liability in respect of the clean-up costs should be the subject of review by a replacement liquidator, observing that "if your client had a problem with that then your client obviously has recourse to take a professional action against me or whatever". In his reply he also addressed the difficulties in terms of time and costs that a replacement liquidator would face, stating that the assignment as a replacement liquidator was "not an easy task and it is only done in extreme circumstances".

40. The respondent was also examined by his own counsel. He explained his view of the purpose of the MOU of 8th May 2008, emphasising that Grosbeak was "a normal company running day to day", and that he only retained an oversight role given the Company's 100% shareholding in

Grosbeak. He said he regarded the views of Grosbeak management in relation to the question of whether or not to appeal the PPKZ proceedings as relevant given their involvement with the issues day to day, but that he had "had to bring [his] objectivity to that". He emphasised that the liquidation was not a hands off liquidation –

> "It couldn't have been because of the sets of issues between both shareholders. It was a very actively managed liquidation."

He outlined the role played by his assistant Mr. Sean McNamara, who made frequent visits to Poland, but said that he "left dealings with the tenants to the Grosbeak management". He outlined the various proceedings which had been brought against JMR Trans, and explained what he saw as the necessity for Grosbeak to acquire the material on the land, expressing the view that "the land… with the soil on it, it wasn't a commercial proposition".

Sale process for Osmanska 7 site

41. On the third day of the hearing in the High Court (24 January 2020) the appellant's counsel confirmed to the trial judge that there was no longer any objection to the respondent's proposal to clear and sell the lands, and by letter dated 3rd February, 2020 the appellant's solicitors formally notified the respondent of agreement to the proposed sale. While the appellant confirmed its acceptance of the respondent's proposal for the sale of the Osmanska 7 site, this was without prejudice to the appellant's position that the respondent should still be replaced as liquidator of the Company. The trial judge proceeded on this basis, noting that by 30th January, 2020 the proposed purchaser had undertaken due diligence and was satisfied that no environmental, legal or technical issues arose. The trial judge stated at para. 147 of his judgment that "… the way is clear to realisation of the last asset of the company and the distribution being made to the members."

Post High Court sale of site

42. Subsequent to the trial and judgment in the High Court, amended terms of sale were agreed between the respondent and the purchaser, including an increased sales price of PLN 15.75M (approximately €3.3M). The purchase was paid into an escrow account in December 2020 and transfer documents were executed on 14 January 2021. The purchase price was released to Grosbeak, save PLN 200,000 which was retained by the Notary pending clearance of the material from the lands. The lands were fully cleared by 18 February 2021 at a cost of approximately €795,000 and the balance of PLN 200,000 was released to Grosbeak. The respondent confirmed this in a letter to the appellant dated 22 April 2021. That letter reported further in relation to the winding up of Grosbeak, and what that would entail, and will be referred to later in this judgment under the heading of "Fresh Evidence – The Winding up of Grosbeak".

Submissions in the High Court

43. In written submissions in the High Court, counsel on behalf of the appellant Mr. McEntaggart S.C. submitted that cause was shown and that the respondent should be removed as liquidator on account of the following matters: -

> "(a) The financial position of the Liquidation,
>
> (b) The potential failure to convert the [Members Voluntary Liquidation] into a creditors Voluntary Winding up,
>
> (c) The failure to achieve optimal price for assets,
>
> (d) The failure to secure and protect the Company's assets and specifically the Osmanska 7 site,
>
> (e) Lack of transparency in relation to how the liquidation has been conducted;

(f) The costs of the liquidation, approval of fees and distributions made to date.

(g) The failure to obtain approval of shareholders for the liquidator's remuneration,

(h) The Liquidator's fees compared to the assets of the company,

(i) The delay in realising value from the Company's shareholding in the Grospeak [sic] subsidiary/the Osmanska property,

(j) The failure to finalise the liquidation in an efficient manner within the specified timeframe and notwithstanding that significant recurring costs are being incurred in keeping the liquidation open and Grosbeak is operating at a loss, and,

(k) The open hostility demonstrated by the [Respondent] in his dealing with the Applicant and his representatives".

44. It was also submitted that an independent liquidator should be appointed to evaluate the respondent's conduct of the liquidation and if necessary take appropriate action. Counsel relied on the authority of *Re Buildlead Limited (No. 2)* [2006] 1 B.C.L.C. 9 (Etherton J., Chancery Division of the UK High Court) as authority for the proposition that an independent replacement liquidator could investigate and review the work undertaken and fees charged by the previous liquidator, including reviewing any loss that might have accrued to the Company as a result of the PPKZ litigation and the necessity to incur €840,000 plus VAT in removal of material from the Osmanska 7 site.

45. Of significance is that in the High Court, counsel confirmed in unequivocal terms that the appellant was not making the case that the respondent had acted dishonestly. This position was further confirmed to this court.

46. In replying submissions counsel for the respondent relied on the evidence before the court to submit that there was no basis for suggesting the Company was insolvent; that the respondent had dealt with all liabilities existing at the time of his appointment; that significant distributions in excess of €1.6M had been made to the appellant; and that the sale proceeds of the Osmanska 7 site would be sufficient to discharge all liabilities and yield a significant return for the shareholders. He argued that there was no basis for converting the liquidation into a creditor's voluntary liquidation – as the Company had no liabilities that would not be covered by the sale of the Osmanska 7 site. Counsel contested that the respondent had failed to achieve optimal price for the sale of the assets, or that there was failure to secure and protect the Company's interests, and he relied on the advice given by Ms. Wasik to Grosbeak in relation to actions taken. The respondent accepted that his fees and charges on liquidation would ultimately either be agreed or have to be sanctioned by the High Court. He submitted that the relations which were at times strained between the respondent and the appellant would not justify his removal as liquidator.

The High Court Judgment

47. The judgment delivered in the High Court on 8 May 2020 is comprehensive, running to 212 paragraphs. The trial judge sets out the background to the application and traces the appointment of the respondent and the progress of the liquidation. He sets out at some length the issues raised by or on behalf of the appellant, and the responses from the respondent and/or his solicitors in correspondence and at meetings between the parties. He traces in detail the developments during the liquidation from 2015 to 2018, and particularly in relation to the three issues highlighted earlier in this judgment. In so doing he sets out the complaints and concerns raised by the appellant, and the respondents' position, and recounts the relevant facts as they appear from the affidavits. He recounts from paras. 102 – 122 the relevant evidence that emerged from examination of the respondent by counsel for the appellant and his own counsel.

48. The trial judge then addresses experts' reports: the reports of Mr. Aidan Garcia Diaz of Collins Diaz dated 21 September 2018 and 23 November 2018 on behalf of the appellant, and the reports of Mr. Jim Luby of McStay Luby dated 6 November 2018 and 12 December 2018. It records Mr. Diaz's opinion that the respondent's conduct as liquidator of the Company had fallen short of the standards that could be expected from competent and experienced insolvency practitioner, and that he had failed to carry out the liquidation in accordance with best practice. He noted "unsurprisingly" that Mr. Looby took the opposite view. Having considered their views the trial judge stated –

> "125. … I find their reports to be of little assistance to the court.
>
> 126. An expert can clarify issues in which the court has perhaps little or no experience or expertise, allowing the court to develop an understanding of those issues and the differing views in relation to them, so that the court may appraise the evidence more effectively. Generally, the more technical or abstruse the issues on which the experts are called to opine, the more valuable their assistance to the court tends to be."

In the ensuing paragraph the trial judge notes that in expressing his expert view Mr. Garcia Diaz was briefed with documents by the appellant's solicitors and assumed that the information given was "reliable and accurate, and that he did not have the benefit of speaking with the respondent – and indeed at the time of Mr. Garcia Diaz's main report the respondent had not yet sworn an affidavit in response to the appellant's case". In para. 128 the trial judge notes that the respondent addressed Mr. Garcia Diaz's report at paras. 51 – 62 of his affidavit sworn on 2nd November, 2018, and that Mr. Luby's report also addresses Mr. Garcia Diaz's original report *after* having had an opportunity of considering the respondent's replying affidavit. The trial judge noted that neither expert was in a position to address the correspondence or events since the last report was filed on 12 December 2018, and in particular the proposals for the removal of soil and sale of the Omanska 7 site. Noting that the experts were not examined on their affidavits, the trial judge commented and concluded –

"130. The applicant is of the view that the removal of the respondent as liquidator of the company is warranted by his conduct of the liquidation. Accordingly, the judgment of the respondent throughout the course of the liquidation is called into question. The exercise of that judgment can only be assessed with regard to the circumstances in which the respondent found himself, and the information available to him, and the opinion of the experts would have been more valuable had they been made aware of all of the evidence at the hearing, including the respondent's evidence under examination. This would perhaps have enabled the experts to give a more informed and nuanced view as to the respondent's conduct, reducing the dangers of hindsight which, as the popular phrase has it, is often '20/20 vision'.

131. In any event, when I raised with counsel the problem caused by the fact that neither expert was to be examined, counsel for the applicant accepted that I could not determine matters where the experts were directly in dispute – as they were on almost every issue. In the circumstances, the utility of the experts' evidence was greatly diminished."

49. The trial judge then sets out the law in relation to applications for the removal and replacement of liquidators, noting that there was "little dispute between the parties as to what were the relevant case law and the principles to be derived therefrom" (para.132). He sets out section 638 of the Companies Act, 2014, observing that it is in identical terms to the equivalent provisions which preceded it, s. 228(c) and 277(2) of the Companies Act, 1963, and that the provisions of the Insolvency Act, 1986 in the UK are expressed in similar terms, so that the UK case law is helpful.

50. There was again little dispute between the parties as to the relevant case law and principles in submissions and argument before this court on appeal, although counsel for the appellant put considerable emphasis on the decision of Etherton J. in *Buildlead.* As I am of the view that the trial judge correctly set out the law it is convenient here to repeat the relevant paragraphs from his judgment: -

"135. The leading authority in this jurisdiction is in *Re. Ballyrider Limited* (in voluntary liquidation): *Revenue Commissioners v. Fitzpatrick* [2016] IECA 228 ('Ballyrider'). That case involved a creditors' voluntary liquidation, in which the Revenue Commissioner applied for, *inter alia,* an order pursuant to s.277 of the Companies Act 1963 removing the respondent as voluntary liquidator of Ballyrider Limited. The High Court acceded to this application, and made certain consequential orders for payment over of certain monies and transfer of books, records and the seal of the company to the replacement liquidator. The liquidator appealed, and in a decision of the court given by Irvine J., the court dismissed the appeal. An application to the Supreme Court for leave to appeal to that court was refused: see the determination at [2015] IESC DET 119.

136. While it is not necessary to consider in detail the facts of that case, it is relevant to say that the Revenue Commissioners, whose application it was, raised ten separate complaints concerning the conduct of the liquidation. The High Court was satisfied that the liquidator had not conducted the liquidation in an efficient and cost-effective manner, and Irvine J. expressed herself to be 'entirely satisfied as to the validity of Mr. Fitzpatrick's removal as liquidator' [para. 85, p.38].

137. The Court of Appeal cited with approval the judgment of Neuberger J. in *A.M.P. Music Box Enterprises Limited v. Hoffman* [2003] 1 B.C.L.C. 319, in which the court considered its power under s.108(2) of the Insolvency Act 1986 to remove a liquidator and appoint another 'on cause [being] shown'. The court found 'particularly instructive' paras. 23-27 of the judgment, which, although lengthy, I set out below for ease of reference:

> '23. In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his

conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.

24. Support for this approach is not only to be found in *Keypack*, but also in some cases where the court has compulsorily wound up the company and appointed a new liquidator in circumstances where there is already a voluntary liquidator in place – see for instance, *Re. Zirceram Limited* [2000] 1 BCLC 751, especially at para. 25(5). Also, where the liquidator could not be seen as independent – see for instance, *Re. Lowerstoft Traffic Services Ltd* [1986] BCLC 81 (where the liquidator concerned seems to have been the same liquidator as in *Keypack*).

25. It may also be right to remove a liquidator where the circumstances are such that, through no fault of his own, he is perceived to be – even though he may not be – biased in favour of, say, one or more of the creditors – see per Robert Walker J in *Re. Gordon & Breach Science Publishers Ltd* [1995] 2 BCLC 189, another case concerned with a compulsory winding-up order in circumstances where there was already a voluntary liquidator in place.

26. While the removal of the liquidator is not necessarily based on any fault on his part, most such cases will involve a degree of criticism. Although in *Keypack* Millett J emphasised that there was no criticism of the general ability, experience and professionalism of the liquidator, and that, even in relation to the particular case, there was no evidence of his being biased or dishonest, it is nonetheless clear that he was removed because the judge took a dim view of the way in which he had conducted the particular liquidation. As the judge said, the fact that this may to some extent resound to the discredit of the liquidator, does not mean that the court should shy away from

making the order. On the contrary, in an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner.

27. On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s.108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who is appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay.'

138. Irvine J. also referred to the decision of the English Court of Appeal in *Finnerty v. Clark* [2012] 1 BCLC 286, a case dealing with the discretion to remove an administrator from office,

in which Mummery L.J. held that an applicant need not prove misconduct, personal fitness or lack of integrity on the part of the administrator. Irvine J. also found significant the emphasis placed by Mummery L.J. on 'the importance of the court of first instance exercising its discretion in a judicial manner based on the evidence before it and on the application of the correct legal principles and having regard to all the relevant circumstances'[para. 26, p.17].

139. The Court of Appeal set out the following principles which apply on an application to remove a liquidator:

> '(i) The burden of proof is on the applicant to show good cause for the removal of the liquidator.
>
> (ii) Whether good cause has been shown is to be measured by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed.
>
> (iii) The Court has a wide discretion as to the circumstances in which it may remove a liquidator and it is not dependent on proof by the applicant of misconduct, personal unfitness or any particular of their statutory obligations. What will amount to good cause will depend upon the particular circumstances of each individual case.
>
> (iv) Failure on the part of a liquidator to conduct the liquidation in a vigorous, efficient and cost-effective manner may provide good cause, as may a conflict of interest or loss of confidence in the liquidator on the part of one or more creditors. However, in the latter case the creditor/creditors concerns must be real and reasonable.

(v) The fact that a liquidator's conduct has been shown in one or possibly more than one respect to have fallen short of ideal will not afford good grounds to support an application to remove a liquidator.

(vi) The Court among other considerations, ought to pay due regard to the potential impact of the proposed removal on the liquidator's professional standing and reputation. If he has been generally effective and honest, the Court should think carefully before deciding to remove him.

(vii) The Court must bear in mind that in almost any case where an order to remove a liquidator is made the same will likely have undesirable consequences in terms of costs and delay.

(viii) In seeking to strike a careful balance in each case the Court should take into account whether, on the evidence before it, it could be confident that if left in *situ* the liquidator would not repeat matters complained of and could be relied upon to complete the liquidation in accordance with his obligations.'

140. The applicant laid particular emphasis on the judgment of Etherton J. in *Re Buildlead Limited (No. 2)* [2006] 1 BCLC 9, in which the court referred with approval to the comments of Neuburger J. *A.M.P. Enterprises* that 'it should not be easy to remove a liquidator merely because it can be shown that in one more respects his conduct has fallen short of the ideal, and it is necessary to bear in mind the expense and disruption of a substitute appointment'. The court also referred to the dicta of Nourse J. in Re *Edennote Limited* [1996] 2 BCLC 389 that 'the creditor's lack of confidence must be reasonable, and the court will pay due regard to the impact of removal on the liquidator's professional standing and reputation'. The court then cited the dicta of Millett J. in *Re Keypack Homecare Limited* [1987] BCLC 409, approved

by the Court of Appeal in *Re Edennote.* These dicta include a passage particularly relied upon by the applicant in the present case:

> '… the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause required; and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation.'"

51. The trial judge then proceeded to give his reasons as to why he did not consider there was "cause shown". He noted the progress that was made during the hearing before him as to the process for dealing with the sale of the Omanska 7 site, and that the purchaser had undertaken due diligence and was satisfied to proceed, and stated–

> "… the way is clear to realisation of the last asset of the company and the distribution being made to the members."

Notwithstanding this the appellant was still maintaining his position that the respondent should be removed as liquidator based on the concerns set out in submissions at para. 14(a) – (k) (which I have set out earlier in this judgment). He noted that these submissions did not take into account the progress made with the sale of the Omanska 7 site. He then states –

> "150. Accordingly, I asked Mr. McEntaggart during the course of his oral submissions what benefit he contended would accrue to the company in the event that the respondent was replaced. Counsel's position was that an independent liquidator replacing the respondent was 'by far the most efficient way' to evaluate the respondent's conduct of the liquidation and, if necessary, take appropriate action."

The trial judge goes on to refer to counsel's examples of matters which might be reviewed by a replacement liquidator – firstly the issue of unbilled work and secondly the question of any loss that may have accrued as a result of the PPKZ litigation, and thirdly the cost incurred of €840,000 plus VAT in the removal of material from the Osmanska 7 site and the question of whether the Directors of Grosbeak or the respondent should bear any liability in respect of that loss, noting counsel's submission that "the respondent could clearly not carry out an independent review of his own conduct". At paragraph 154 he records counsel's submission that it would be more efficient for there to be an independent peer review of the respondent's conduct of the litigation rather than the respondent being sued at the behest of the appellant as an aggrieved shareholder, which would require a derivative action. At para. 156 the trial judge states –

> "156. I should say in fairness to both parties that Mr. McEntagart confirmed in unequivocal terms that the applicant was not making the case that the respondent had acted dishonestly. The essence of the applicant's case was that the respondent's conduct of the liquidation required detailed scrutiny which could only be carried out by a replacement liquidator who would take action on behalf of the company if that were warranted."

52. The trial judge then records the reply submissions by Mr. Abrahamson B.L. on behalf of the respondent. These included –

(1) that there was no basis for converting the liquidation into a creditor's voluntary liquidation as the Company did not have any liabilities;

(2) that the sale of the shareholding of P&D Polska to Mr. Curneen was "objectively justifiable" but was in any event the subject of separate proceedings which the appellant had not advanced, and in any case this related to events in 2010;

(3) that there was no evidence adduced by the appellant to suggest that the advice given by Grosbeak's lawyers in respect of the Osmanska 7 site was incorrect, nor had it been suggested what additional steps the respondent ought to have taken to secure and protect the Company's interests – and that the valuation of the site demonstrated that the value of the site would have had been significantly lower if it had been sold subject to claims; and that in respect of fees, the respondent's initial fee estimate was €250,000 but the extent of the work was underestimated and although he received €389,000 up to April 2013 he took no further fees in order to preserve the resources to fund the liquidation, and the respondent accepted that his fees must ultimately either be agreed or sanctioned by the court.

53. From paragraph 163 on the trial judge analyses the position in the light of the principles enunciated by Irvine J. in *Ballyrider*. He found it notable that it was a member's voluntary Liquidation rather than a creditor's liquidation, and that all the pre-liquidation creditors of the Company had been discharged and that the sale of the Osmanska 7 site would likely generate a substantial dividend to the shareholders, the appellant and Mr. Curneen [para. 164]. He then stated –

> "165. In the present case therefore, the interests of the members rather than the creditors fall to be considered, and whether the concerns of the applicant as a shareholder of the company are, as Irvine J. put it, 'real and reasonable'".

At para. 167 he states –

> "167. The sole substantive issue regarding the realisation of assets is that of the clearance and sale of Osmanska 7. As we have seen, the respondent and the shareholders are keen to proceed with the sale, and the applicant is agreeable in principle to proceeding in the manner suggested

by the respondent. One hopes that, since the hearing, progress has been made in advancing the sale."

54. The trial judge then addressed the claim for a replacement liquidator to conduct independent scrutiny of the conduct of the respondent stating: -

"168. What, then, is the 'good cause' for removal of the respondent which must be established by the applicant? It is clear from the submissions on behalf of the applicant, to which I have referred in some detail above, that the applicant's position is that the conduct of the liquidation has been such that it warrants the removal of the liquidator and the appointment of a replacement who would conduct an independent scrutiny of that conduct with a view to determining whether action on behalf of the company is warranted against the respondent in order to recover monies which have been lost to the company due to what the applicant alleges is the incompetence or ineffectiveness of the respondent or some other third party. This scrutiny would extend to whether the fees already appropriated by the liquidator, and those now sought by him in respect of his work from 2013 onwards, are objectively justified."

55. After referring to the appellant's complaints about the respondent's conflicts of interest, and about how he dealt with the realisation of assets, the trial judge proceeds –

"171. It is worth reminding oneself that the liquidation itself arose out of a compromise agreement between the shareholders of the company of litigation arising from what Mr. Conway calls in his grounding affidavit a '… catastrophic deterioration in the relationship between the company's shareholders'. The agreement required that the liquidator who was to be appointed would realise the assets of the subsidiaries of the company 'as soon as possible'. The respondent would certainly have been aware, from the circumstances of his appointment,

of the depth of enmity and distrust between the principals of Print and Display Limited and Mr. Curneen.

172. Notwithstanding this, on 8th May, 2008 the respondent entered into the MOU with Mr. Curneen and Ms. Frejlichowska, who were the directors of the subsidiary companies, including P&D Polska and Grosbeak. The MOU acknowledged that the directors would remain in situ, subject to not being able to enter into transactions above a certain value or deal with certain other matters without the approval of the respondent, and notification requirements in relation to information such as accounts and marketing reports. It is not suggested in any of the evidence before me that the applicant was unaware of or objected to the fact that the respondent proposed to rely on the existing management of the Polish subsidiaries.

173. In any liquidation, a liquidator seeks to realise the assets of the company as effectively and economically as possible. In doing so, he will often rely to a significant degree for his understanding of the company's affairs on the knowledge and expertise of the company's directors. Often a liquidated company or its subsidiaries may continue to trade for a period so that the value of those companies may be maximised. It is therefore not uncommon that a liquidator will rely on directors for their specialised knowledge, or allow directors of subsidiary companies to continue in office subject to suitable oversight. If those subsidiaries operate abroad, it is even more likely that the liquidator will allow the directors to continue to some degree unless there are particular reasons not to do so.

174. Ultimately, the shareholding of the company in one of the subsidiaries, P&D Polska, was sold to Mr. Curneen rather than the applicant. I have addressed the matters relating to the sale at paras. 16-19 above. From all of the evidence available to me, it appears that this sale to Mr. Curneen was the genesis of a perception on the part of the applicant that the respondent

was too close to Mr. Curneen and was relying on Polish management to an unacceptable degree, without sufficient scrutiny.

175. As regards the PPKZ proceedings, the respondent's evidence is that, when the adverse decision of the Polish Court was handed down in February 2015, he discussed the matter with the directors of Grosbeak, who had in turn consulted with Ms. Wasik, who had advised that there were strong grounds for appeal. The respondent ultimately formed a view that PPKZ was not a mark, and that the appeal should not proceed. The respondent suggested that Ms. Wasik had given advices to this effect, but it is unclear when or to whom such advice was given.

176. I did not find the respondent's evidence impressive in relation to this issue. He was unable to produce any documentation which would illustrate to whom he had spoken or the contemporaneous advice that either he or Grosbeak had received. It did not appear that he personally received any advice from Ms. Wasik, but relied on advice which he was told had been given to Grosbeak. The extent to which the respondent was involved in the decision not to appeal was unclear from his evidence, although I have no reason to believe that the respondent was not informed of the court's adverse decision or consulted by the directors of Grosbeak in the aftermath of that decision.

177. As set out above at para. 107, the respondent acknowledged that he did not seek independent legal advice in relation to the apparent conflict of interest of the legal advisors to Grosbeak, and whether proceedings against that firm might be appropriate. One would have thought that it would have been advisable for the respondent to do so, particularly as he acknowledged in his oral evidence that he had ‘looked at’ the question of a possible conflict. The respondent did not offer any clear rationale as to why he did not seek legal advice in this regard. Of course, if the respondent had incurred the expense of getting an independent

opinion in this regard, and the advice had been that proceedings against PW or Ms. Wasik should be issued, he would have had to persuade Grosbeak to incur the expense and risk of proceedings notwithstanding any ongoing matters on which PW may have been advising Grosbeak at the time, particularly in relation to dealings with JMR Trans. It might also have been the case that, for such a case to be validly grounded, it would be necessary to appeal the adverse decision of the Polish Court, thereby incurring further expense.

178. However, I am of the view that the respondent should have got legal advice in Poland on this issue, or at least been able to produce contemporaneous documentary evidence setting out the consideration he gave the matter, and the reasons why he decided that Grosbeak should not appeal. The respondent does acknowledge the delay in apprising the applicant of the decision not to appeal, and accepts that this should not have occurred, even if his decision would not have been altered. However, my impression from the evidence was that the discovery that the PPKZ case had been lost and not appealed without reference to it strengthened the perception of the applicant that the respondent was not conducting the liquidation in a proper and unbiased manner."

The trial judge then analysed the respondent's conduct in respect of the Osmanska 7 site: -

"179. As regards the respondent's conduct in relation to Osmanska 7, I have considered the many criticisms of the applicant in this regard. Two issues are of particular concern to the applicant. The first is how the soil and rubble 'mountain' came to be on the site, with the liability for its removal now that of Grosbeak at a cost of €840,000 plus VAT, and the dealings with the tenants. The second is the general question of the restitution claims and the reliance by the respondent on advice received from Grosbeak and its advisors in relation to both this issue and the soil and rubble issue.

180. …

181. There is no evidence to suggest that there was any reason to believe that the tenants of Osmanska 7 were not suitable prior to their coming on site. When difficulties arose with payment of rent, and the dumping of material on the site, it appears that Grosbeak took legal advice and appropriate action where necessary. It was advised that an action to force JMR Trans to remove the material would not be successful for a number of reasons. Ultimately, the material was acquired by Grosbeak at what in effect is a notional cost, thereby facilitating its removal.

182. The respondent appears to have monitored the situation on an ongoing basis. There is no reason to believe that he did not liaise with Grosbeak, or that he was not apprised of the advice that company was getting. The interactions which I have set out above in detail suggest to me that, by and large, he was responding to queries from the applicant's representatives as they arose, and reporting on any significant developments regarding the site.

183. To the extent that the applicant decided to accept the legal advice given to Grosbeak concerning the various issues regarding Osmanska 7, it seems to me that the respondent was entitled to do so. There is no reason to believe that the interests of the company and Grosbeak diverged in procuring the efficient administration of the site and the most advantageous sale possible. Any legal advice given to Grosbeak, or the advice of the directors in relation to the management of the site, was as much in the interests of the company as it was of Grosbeak and Mr. Curneen.

184. Also, while it is most unfortunate that the activities of JMR Trans have given rise to the necessity to incur a removal bill of €840,000 plus VAT, this reduces the amount ultimately payable to Mr. Curneen as much as it disadvantages the applicant. It is not apparent to me

how this liability arises from some neglect of oversight on the part of the respondent; still less is it the case in my view that the respondent should have taken on the role of supervising the site himself, thereby incurring considerable expense in circumstances where he had no local knowledge.

185. As regards the restitution claims, the respondent relied on the advice provided by PW to Grosbeak as to the progress of these claims. The advice was to the effect that such a multitude of claims would take a long time to resolve, but that the land would be far more valuable if it were sold without the claims attaching. The valuation evidence presented by the respondent bore out this latter assertion. As neither Grosbeak nor the company was a party to the claims, the litigation was not subject to the respondent's control. While it may have taken an inordinate amount of time before the claims were resolved, it would appear from the ECHR cases relied upon by Mr. Abrahamson that such delays are not unusual.

186. In all the circumstances, it does not seem to me that the respondent's oversight of the restitution claims issue was ill-advised or unreasonable. The strategy of awaiting the resolution of the restitution claims was never seriously challenged by the applicant. As the respondent points out at para. 8.27 of his written submissions, in a letter of 17th August, 2015, the applicant's solicitor criticised the delay in realising the company's shareholding in Grosbeak. The liquidator's solicitors, in their reply of 28th August, 2015, replied as follows:

> ‘Since the commencement of the liquidation, the strategy which has consistently been adopted by the Liquidator with regard to the Grosbeak asset has been a medium term strategy whereby the property will be ‘cleansed’ of the restitution claims before it is put on the market. This strategy was approved by both shareholders. Please clarify if your client now wishes for the property to be sold at a reduced price on account of the pending restitution claims.’

No response was made to this request for clarification, notwithstanding that the applicant was well aware of this strategy prior to August 2015.

187. As regards the question of fees, the respondent's initial letter of engagement of 9th April, 2008 set out the basis of calculation of the respondent's fees and provided an initial estimate of €250,000. He asserts that the level of work necessitated by the liquidation was far in excess of that anticipated at his appointment, but that he has not received any fees since 2013. Mr. Garcia Diaz in his report criticises the level of fees, and states that "the transparency in relation to the fees incurred is unsatisfactory". Mr. Luby on the other hand describes the matter as "a complex and difficult liquidation, involving monitoring of the directors' management of foreign subsidiaries, foreign litigation, sale of foreign and Irish subsidiaries, and attempting to walk a fine line between disputing members. The duration and cost of the liquidation has also been significantly impacted by the restitution claims process, and by the extent of legal correspondence in this case. It is not at all surprising that fees have exceeded the early stage estimate".

188. The respondent acknowledges that, if his fees cannot be agreed with the shareholders, they will have to be sanctioned by this Court. The onus of proof of justifying the fees will rest with the respondent."

56. The trial judge then considered the question "Is an investigation necessary?" and stated: -

"189. As all of the creditors have been discharged, and as only one asset remains to be realised, the question of removing the respondent because of some ongoing defect in his conduct of the liquidation does not arise. I have to decide whether, notwithstanding that the liquidation is almost complete, I should order the respondent's removal to facilitate an investigation by an independent liquidator of his conduct of the liquidation. I am required to

be satisfied that the applicant has shown good cause for such removal, with reference to the 'real and substantial interests of the liquidation and the purpose for which a liquidator is appointed'.

The trial judge proceeded –

"192… The applicant is primarily concerned over what it sees as the ineffective and dilatory progress of the liquidation, the over-reliance on Grosbeak and its directors, the lack of transparency in the respondent's dealing with the applicant, and the perceived need for a review of the respondent's conduct which cannot be carried out by the respondent himself.

193. The allegation of lack of transparency is at the heart of the applicant's desire for an investigation of the respondent's conduct. …

194. The respondent's conduct at times did not serve to assuage the evident disquiet of the applicant. There appears to have been some fractious exchanges at meetings, although the suggestion that the respondent's demeanour went as far as 'open hostility … in his dealing with the applicant and its representatives' is denied by him. I think that this characterisation perhaps exaggerates the discord between the respondent and the applicant, but it is very evident that dealings between the parties were often tense, to say the least.

195. The atmosphere was not improved by the discovery in December 2015 by the applicant that the PPKZ proceedings had been lost in February 2015, and that a decision not to appeal had been taken by the respondent without either informing the applicant or seeking its opinion on the matter. This deepened the suspicion on the part of the applicant that matters were being decided by the respondent in conjunction with Mr. Curneen without reference to the applicant, and possibly that there was information relevant to the liquidation which was being withheld from the applicant.

196. However, having reviewed the course of the dealings and correspondence between the parties from 2013 to the issue of the present motion as summarised above, it does not seem to me that it can be said with justice that there has been a material lack of transparency on the part of the respondent. In relation to the sale of P&D Polska – a sale process in which the applicant was directly involved – the respondent made his files relating to the sale available to the applicant's solicitors, and, as we have seen, the proceedings issued by the applicant in this regard have not been advanced.

197. The course of correspondence between the parties indicates that the respondent furnished updates and accounts of Grosbeak, and generally responded to requests for information, keeping the applicant apprised of the Osmanska 7 situation in particular, and the progress – or lack of same – with the restitution proceedings. While the level of information and the regularity of supply of same may not have been to the standard demanded by the applicant, I do not consider, on the evidence available to me, that it can be said with justice that the respondent did not conduct the liquidation in a transparent manner.

198. If this is so, how can an investigation of the liquidation by a replacement liquidator be warranted? It might be that a replacement liquidator would turn up further information which would shed more light on the operational decisions taken by the respondent, and that such information could lead to a conclusion that proceedings against the respondent or some other party would be warranted. However, I consider that I would have to be convinced that there was at least a strong possibility that an investigation would reveal conduct or disclose hitherto unknown documentation or information which would suggest that such proceedings on behalf of the company were justified.

199. I am somewhat troubled by the respondent's conduct in relation to the PPKZ proceedings, in particular the failure to inform the applicant of the decision not to appeal the

Polish Court's adverse decision, which the respondent attributes to inadvertence, and his failure to address the conflict of interest of Grosbeak's legal advisor who had acted for Grosbeak in the purchase of Osmanska 7. It is true to say that any decision to appeal was that of the respondent alone, as the controller of the shares of Grosbeak, although Grosbeak rather than the company was the party prosecuting the PPKZ proceedings. Likewise, any decision to pursue the possibility of Grosbeak taking action against its legal advisors was ultimately that of the respondent. While there may well have been valid reasons not to embark upon a possible legal action, it would have been far better if the respondent could show objectively that he had sought advice in that regard, or at least recorded his detailed reasons for not at least taking preliminary steps to establish whether proceedings were feasible or advisable. However, while I do not think that the respondent's actions in respect of the PPKZ proceedings represent his finest hour, neither do I consider that those actions alone warrant his removal as liquidator."

57. The trial judge then addresses the delay in the realisation of the Omanska 7 site but notes that official confirmation of the resolution of the restitution claims was not received until June 2018, and that the parties had, during the course of the hearing before him, agreed on the basis for moving forward with the sale. In para. 201 the trial judge expresses puzzlement at the allegation of delay by the respondent. He notes that the Settlement Agreement did not set a timeframe within which the liquidation had to be completed, nor was there any time commitment in the respondent's letter of engagement, and in paragraph 202 he states –

"202. It seems to me that the factors causing delay have been sufficiently explained by the respondent, and do not warrant the appointment of a liquidator to investigate the causes of the delay. Equally, for the reasons set out above, I consider that the circumstances surrounding the necessity to incur liability of €840,000 plus VAT in respect of removal of the material

from Osmanska 7 have been sufficiently explained, and do not require the appointment of a replacement liquidator to investigate them.

203. The court must consider the consequences of removing the respondent as liquidator. A replacement liquidator would have to become familiar with all matters relevant to the liquidation. The books and records of the respondent would have to be examined. Contact would have to be established with the directors of Grosbeak and Ms. Wasik and perhaps others to enable the new liquidator to investigate the conduct of the liquidation. The new liquidator would have to oversee the sale by Grosbeak of Osmanska 7, and the possibility that the proposed sale might be disrupted or delayed by the change of liquidator – who ultimately controls Grosbeak – cannot be discounted. A replacement liquidator would presumably have to engage legal advisors in Poland to review the various issues on which PW advised Grosbeak.

204. All of the foregoing matters would cause significant expense for the liquidation. The liquidator's costs would be borne equally by the shareholders, Print and Display Limited and Mr. Curneen. The removal of the respondent is strongly opposed by Mr. Curneen, although it should be said that his affidavit was submitted so late in the proceedings that an application for examination of Mr. Curneen as part of the hearing was not a realistic proposition. It might well be that, if he were examined, Mr. Curneen could have shed light on the issues of which the applicant requires investigation. However, the fact remains that the appointment of a replacement liquidator will inevitably give rise to the liquidation continuing for months and possibly years to come – particular if further litigation ensues – and considerable extra cost, 50% of which will be borne by Mr. Curneen.

205. The conduct of the applicant is perhaps relevant to the question of removal. In August 2014 and again in August 2015, the applicant's solicitor intimated the intention of the applicant

to proceed with an application to remove the respondent from office: see paras. 32 & 38 above. At that stage, most of the issues in relation to realisation of assets were still "live", and it might have been that a significant loss of trust and confidence of a 50% shareholder in the respondent would have been a significant influence on the court's discretion in a removal application at that time, with so many crucial tasks to be performed and decisions to be taken. However, the applicant did not carry out its threat to apply to remove the liquidator until July 2018, at a time when it had been informed that the restitution claims had now been resolved, leaving the way open to a sale of Osmanska 7 free of restitution claims, and at an enhanced value.

Conclusions

206. Taking all of the foregoing into account, I do not believe that "good cause" has been shown for the removal of the respondent as liquidator. I am satisfied that the respondent will conduct the remainder of the matters in the liquidation – primarily the removal of the material from the site and the sale of Osmanska 7, the discharge of all expenses and the distribution of net sale proceeds to the shareholders – in a prompt and orderly fashion, and those issues do not warrant the appointment of a replacement liquidator.

207. I am not disposed to order the removal of the respondent where the only point of doing so would be to permit a replacement liquidator to investigate the respondent's conduct, at very considerable cost, and with the inevitability of prolonging the liquidation considerably. I would need to be persuaded that there was a strong possibility that such an investigation would reveal conduct or disclose hitherto unknown documentation or information which would reveal matters warranting action to be taken on behalf of the company. A failure of transparency or conduct on the part of the respondent, particularly since December 2013, might have pointed towards such a possibility. However, I do not believe that the respondent has, in general terms, been remiss in providing information and documentation to the

applicant. It seems to me that any investigation which would be conducted by a replacement liquidator would be somewhat speculative.

208. I must also have regard to the potential impact of the proposed removal on the respondent's professional standing and reputation. There has been no suggestion – as the applicant's counsel very properly confirmed – of dishonesty on the part of the respondent. I am satisfied that the respondent gave his evidence under examination honestly, although his recall of events in relation to the circumstances surrounding the decision not to appeal the adverse PPKZ decision was somewhat confused and unsatisfactory. It was also hampered by an inability to retrieve documentation relevant to that issue, which was somewhat puzzling given that the respondent must have known that he would be examined thoroughly in relation to the matter. However, I am satisfied that the events surrounding that issue are tolerably clear, and do not require further investigation.

209. Having observed the respondent and heard his evidence under examination, in addition to assimilating all of the affidavit evidence, documentation and submissions, it seems to me that while the respondent's conduct has on occasion fallen short of ideal, he has been – in the words of the Court of Appeal – "generally effective and honest". The court would not flinch from removing him as liquidator if there were compelling reasons for doing so. However, only in those circumstances would it be appropriate to remove a liquidator of such long standing and experience as the respondent, as the very removal of the respondent, even if no adverse consequences ultimately flowed from his replacement, would likely cause significant damage to his professional reputation.

210. I wish to clarify that the only substantive issue before me is whether or not to order the removal and replacement of the respondent as liquidator of the company, and the decision at which I have arrived must be viewed in that context only. I do not express any view as to

whether the respondent's conduct of the liquidation gives rise to a cause of action against him on behalf of the company. This is entirely a matter for the applicant, which has already issued one set of proceedings against the respondent, and will take its own view as to whether further proceedings may be warranted.

211. Likewise, I express no view on the appropriateness or otherwise of the respondent's entitlement to fees, either those already discharged, or those now claimed by him. If these cannot be agreed, it may be necessary to apply to court to have that issue determined."

Grounds of Appeal

58. The appellant raised 23 grounds of appeal, which are repeated in written submissions: -

"1. Failing, in light of the findings of fact, to find that that 'good cause' had not been shown for the removal of the Respondent.

2. Concluding that the only point in ordering the removal of the Respondent would be to permit a replacement liquidator to investigate the Respondent's conduct and, by such conclusion, misdirecting himself as the correct test at law or misapplying the test to the instant case.

3. Having found that (a) the recall of the Respondent of events in relation to the circumstances surrounding the decision to appeal the adverse PPKZ decision was somewhat confused and unsatisfactory, (b) his evidence was hampered by an inability to retrieve documentation relevant to the issue, an investigation by a replacement liquidator would not reveal conduct or disclose hitherto unknown information or documentation which would reveal matters warranting action to be taken on behalf of the Company.

4. Having found, that in arriving at his decision, he was not expressing any view as to whether the Respondent's conduct of the litigation gave rise to a cause of action against him on behalf of the Company, concluding against the appointment of a replacement liquidator on the grounds outlined at 3 above.

5. Having concluded that the supply of information on behalf of the Respondent was unsatisfactory in so far as the PPKZ proceedings were concerned and, in circumstances where the test at law does or ought to provide that a failure in this regard should constitute a ground for removal, misdirecting himself at law.

6. Having concluded that he was expressing no view with regard to the Respondent's entitlement to fees, either those already discharged or those now claimed, and having concluded that it may be necessary to apply to Court to have the issue determined, failing to take into account the manifest dispute in this regard as ventilated before the Court as constituting a valid grounds for the appointment of a replacement liquidator with the benefit of independent insight.

7. Having concluded that the case constituted one which could be distinguished from the pre-existing authorities on the basis that the liquidation at issue constituted a voluntary liquidation, failing to take account of the relevance in this case of the expressed absence of trust and confidence on the part of the Applicant in the Respondent and failing to take account of both the pre-existing and potential future proceedings against the Respondent in this context.

8. Failing to take account of the conflicts that arose other than those as referenced at 7 above arising in consequence of the fact that the decision to delegate management to the directors in Poland imputed those conflicts of interest that arose with regard to those

Polish directors to the Respondent himself given his decision to delegate. in this regard failing to take particular account of those matters as referenced at paragraph 116 of the Judgement.

9. Concluding that the finalisation of the liquidation would, in effect, be brought about by the sale of the Osmanska-7 lands and thereby failing to take into account the relevance of all issues of liability on the part of the Respondent to the Company in liquidation as part of the process of liquidation.

10. Failing to take account of the as yet unresolved issue of liability with regard to the cleanup costs of the Osmanska-7 lands on the part of any party on an indemnity or damages basis by way of recoupment of those costs to the Company in liquidation as part of the process of liquidation.

11. Failing to take account of the potential of suit against the Respondent himself and his own evidence in that regard given the potential for conflict that arises if and while he remains in situ pending determination of such claims.

12. Failing to take account of the fact that the sole decision in respect of such suits (as referred to at 1 1) is a matter for the Company in liquidation as well as the Applicant and not "entirely a matter of the Applicant' (paragraph 210) and thereby misdirecting himself as to the central issue of conflict of interest.

13. Failing to take account of or give appropriate weight to the admitted defaults of the liquidator with regard to the failure to inform the Applicant with regard to the decisions allegedly made with regard to the PPKZ appeal and failing to apply weight or appropriate weight to the said admitted defaults given the compounding effect of the failure of the

Respondent to produce evidence at trial by reference to documentation notwithstanding the opportunity then afforded to cure the defect.

14. Failing to apply appropriate weight to the failure of the Respondent to take independent advice with regard to the potential liability of PW Legal subsequent to the apparent loss of the PPKZ proceedings.

15. Failing to take account of, or add weight as appropriate to, the admitted determination on the part of the Respondent absolving himself of liability with regard to the clean-up costs of the Osmanska-7 site without reference to independent legal advice as set forth in the evidence recorded at paragraph 119 of the Judgment.

16. Equating the sale of the Osmanska-7 site with the realization of the last asset of the Company (paragraph 147).

17. Reserving to the Court the function of determining disputes with regard to the liquidator's levies and thereby discounting that issue in terms of its relevance to the issue of appointing a replacement liquidator.

18. Adding undue weight or, indeed, weight to the fact that the sale of the lands will generate more than sufficient proceeds to cover all expenses of sale and yield a substantial dividend to shareholders.

19. Misdirecting himself with regard to the relevance of the view of the Applicant with regard to the continuation of the Respondent in situ given the fact of his appointment in the manner as set out in the Judgement.

20. Failing to apply appropriate weight to the fact that the appraisal of the Applicant was subject to the provision of information by the Respondent, not just prior to the institution of proceedings, but after (paragraph 180).

21. Finding that, in light of the facts as found, that the conduct of the Respondent with regard to the management of the Osmanska-7 site was such as to not warrant removal.

22. Failing to take account of the fact that the sole cause of the cost incurred in the liquidation by reference to the Osmanska-7 clean-up was the activities of persons that were permitted into possession after the commencement of the liquidation and, ipso facto, the depletion in maximisation of return occurred, in this respect, entirely, under the management of the Respondent. In the premises the Court, de facto, misdirected itself in equating the issue as to the existence of a legal liability for recoupment of those costs with the issue as to the appropriateness of the Respondent liquidator continuing in situ. The Appellant contends the appropriate legal test provides that management of the liquidation such as to give rise to a diminution in available distributable resources should have constituted a ground for consideration of removal. The Court misdirected itself by restricting its consideration to the issues of mismanagement or culpable mismanagement giving rise to legal liability instead of management giving rise to loss. In the premises, the Court failed to give any weight to the issue of loss of confidence arising out of management in a voluntary liquidation.

23. Failing to apply appropriate weight to the timescale involved in the liquidation."

Appellant's Submissions

59. In written Submissions counsel for the appellant argued that the trial judge misapplied the principles (i)-(viii) set out by Irvine J. in *Ballyrider*. It was submitted that the appellant had shown

good cause "measured by reference to the real and substantial interests of liquidation and the purpose for which a liquidator is appointed" (principle (ii)). It was submitted that the genesis of the liquidation was a manifest breakdown in relations between the appellant and Mr. Curneen, and the absence of trust between them, and that the liquidator was appointed to realise the assets of the subsidiary companies as soon as possible. As to principle (iv) it was submitted that the liquidator failed to conduct the liquidation in a vigorous, efficient and cost-effective manner, and that there was conflict of interest and loss of confidence as borne out by the findings of the trial judge in relation to the handling of the PPKZ issue. It was argued that the loss of confidence on the part of the appellant in the respondent was "real and reasonable". As to principle (v) it was submitted that the comments of the trial judge in relation to the PPKZ's issue far surpassed the conduct of the respondent being "short of ideal", and that this constituted good ground for removal of the respondent.

60. In respect of principle (vi), under which the Court is required to pay due regard to the potential impact of the proposed removal on the liquidator's professional standing and reputation, it was submitted that the trial judge misdirected himself as to that potential impact in para. 209 of the judgment where he referred to the "longstanding and experience" of the respondent and the "likely…significant damage to his professional reputation" if removed. It was submitted, in line with para. 62 of the judgment of Irvine J. in *Ballyrider* that this consideration is a very much subsidiary to the other principles and her statement in para. 63 that "any such considerations cannot trump the rights of creditors to have liquidation conducted by the liquidator in a vigorous, effective and independent manner".

61. In reference to principles (vii) (removal having undesirable consequences in terms of costs and delay) and (viii) (the carrying out of a balancing exercise such that the Court must be confident that it left in situ the liquidator would not repeat matters complained of and could be relied upon to complete the liquidation), it was submitted that the trial judge erred in making his determination based

on "often limited material available to the…members during the course of liquidation", and that the absence of sufficient information or explanation by the respondent warranted a replacement liquidator investigating the respondent's behaviour.

62. It was further submitted that the trial judge erred in concluding that the sale of the Omanska 7 site would result in the finalisation of the liquidation, particularly having regard to the possibility of a cause of action against the respondent, and the lack of agreement as to the appropriateness or otherwise of his fee entitlement.

63. In oral submissions to this Court counsel premised his arguments by emphasising the distrust between the appellant and Mr. Curneen, and the s.205 origins of the liquidation, and the loss of faith in the liquidator for delegating the management function in respect of Grosbeak to Mr. Curneen and his fellow director. He argued that the MOU between the respondent and the directors of Grosbeak was not something in which the appellant acquiesced, and did not relieve the respondent of his general duties as a liquidator in any respect.

64. Secondly – and this seemed to be the primary submission of the appellant – counsel argued that due to the loss of confidence and lack of transparency a new liquidator should be appointed to undertake an investigation and review of the liquidation, and that this would be in the interests of the liquidation, and that this would be so even though the liquidation was approaching a conclusion. Counsel argued that while principle (viii) *Ballyrider* was forward looking, in that the Court needed to have confidence that in leaving a liquidator in position he/she would complete a liquidation in accordance with his/her obligations, past conduct of the liquidation was also relevant, and in this instance needed to be reviewed, and the remuneration claimed by the respondent also needed to be subjected to scrutiny and review. Counsel highlighted the cost of dealing with waste material on the Omanska 7 site (€840,000 + VAT) and the failure to appeal the adverse court decision in the PPKD proceedings as particularly warranting investigation and review. Under questioning from the Court

counsel argued that even if any cause of action against the liquidator in respect of failure to appeal the PPKD decision might be statute barred, and even if no benefit would result to the Company from the appointment of a new liquidator, nonetheless the Court should in the circumstances appoint a new liquidator to undertake a review as this would have inherent value. It was, counsel argued, an issue of a lack of transparency, with the possibility that there may be a cause of action against the directors of Grosbeak or its lawyers, or the liquidator, which would benefit the Company.

65. In further questioning by the Court counsel was asked who would pay for a review by a replacement liquidator of the liquidation back to 2010 given that such a review could involve significant fees. It was put to him that if this was paid by the company, and led to nothing, it would result in a loss to Mr. Curneen of 50% of the amount of such fees, and that this would be a waste of company assets. Counsel was asked whether the cost of such a review should be underwritten by the appellant as the requesting shareholder. Having taken instructions on this issue in reply submissions counsel expressed the view that the fees of the replacement liquidator should in ordinary course be discharged by the Company, and that there was no reason why this should be underwritten. Nevertheless, his instructions were that the Court might consider that discrete fees related to the review of the conduct of the liquidation should be underwritten (unless issues arose in respect of which the respondent or Grosbeak's directors had a liability to the company).

66. In support of his submission that a new liquidator should be appointed to investigate the respondent's conduct of the litigation, counsel relied on the decision in *Re Buildlead Limited (No. 2)* [2004] EWHC 2443 (Ch). Buildlead Limited was a wholly owned subsidiary of Quickson (South and West) Limited. In 1996 Buildlead executed a written guarantee in favour of its bank guaranteeing payment on demand of all Quickson liabilities, and a debenture over its assets in respect of its own liabilities to the bank, and also a debenture creating charges over its assets in respect of its own liabilities to Lloyds and TSB Bank plc. Days before Buildlead ceased to trade four transfers totalling

GBP£155,355 were paid to Quickson. Buildlead's liquidators carried out an investigation, without reference to Quickson, and as a result took proceedings to declare these payments as voidable preferences. Quickson then brought an application to strike out the voidable preference proceedings on procedural and substantive grounds, and also applied for the removal and replacement of the joint liquidators.

67. Etherton J refused the application for a strike out of the voidable preference proceedings but granted the application to remove the liquidators. He held that it was not necessary for an applicant to show that a liquidator failed to act in an efficient, vigorous and unbiased manner, or was likely to continue to fail to do so in the future. On the facts, he held that the manner in which the liquidators had conducted their investigation into the issue of the inter-company balances and the actions they took in consequence of those enquiries was inappropriate, and likely to give rise to a reasonable loss of confidence by Quickson and its directors, and in particular that they had conducted their investigation without requesting a formal proof of the amount claimed from Buildlead and without giving Quickson or its directors or advisors the opportunity to explain the discrepancy between the amount claimed by Quickson and the amount put forward by the liquidators. At para. 230 and 231 Etherton J. criticises the lack of enquiries pursued by the liquidators, and states –

> "Whatever the proper legal analysis of the debenture, the liquidators have not, for the reasons I have given, conducted their enquiries into preferences and any possible claim in an efficient and timely manner"

68. Counsel relied on *Buildlead* as authority for the twin propositions that it is not necessary for an applicant to show that the liquidator was guilty of misfeasance, and that the Court can remove a liquidator and appoint a replacement for the purpose of undertaking a proper investigation. Counsel relied particularly on the following extracts from the judgment:

"POSSIBLE CLAIMS AGAINST LIQUIDATOR

241. The conduct of the liquidators, which I have described in this judgment, gives rise to the reasonable possibility that there may be a claim against the liquidators under s.212 of the 1986 Act because of cost and expense that have been unnecessarily incurred by virtue of the manner in which the liquidation has been conducted. That is not to say that any such claim would succeed. It is sufficient, in order to be a relevant matter to take into account for the purposes of s.108(2) of the 1986 Act that there are reasonable grounds for an independent enquiry: compare Jacob J.'s observations in Shepheard v. Lamey [2001] BPIR 939.

242. This is of particular practical significance in the case of Buildlead's liquidation since, as I have said, if the liquidators are entitled to the full amount that they claim by way of unbilled work-in-progress, there would be no assets for distribution to any of the creditors: a disturbing situation in a liquidation which has already run for some seven years and is not yet at an end.

243. Miss Giret submitted that there already exists a means by which Quickson can challenge excessive remuneration of the liquidators, namely by an application under r.4.131 of the 1986 Rules. Under that rule, any creditor may, with the concurrence of at least 25% in value of the creditors (including himself) apply to the Court for an order that the liquidator's remuneration be reduced, on the grounds that it is, in all the circumstances, excessive. Obvious practical disadvantages of that course, as compared with the appointment of a replacement liquidator in the present case, are that a new liquidator would be able to exercise an independent professional judgment about the liquidators' conduct, having investigated all the circumstances, and to decide not only whether past fees had been excessive and whether the charges for unpaid work are excessive, but also whether other expenses and payments to third parties have been incurred, in whole or in part, or other loss (such as non-payment or late payment of a dividend) has been suffered by any of the creditors, due to culpable conduct on the part of the liquidators."

Fresh Evidence – the winding up of Grosbeak

69. Counsel for the appellant also relied on fresh evidence relating to the cost of liquidating Grosbeak, the anticipated time frame for such winding up, the proposal to appoint Mr. Curneen as the Polish liquidator of that company, and the proposal to retain substantial money from the Osmanska 7 sale pending completion of that winding up. This was presented to this court in the form of an affidavit from Mr. Tom Casey, solicitor for the appellant, sworn on 15 June 2021, and filed in court just two days before the hearing of the appeal in this court.

70. Mr. Casey exhibits a letter which he sent to Hayes Solicitors, acting for the respondent, dated 11 June 2021, setting out a chronology since the sale by Grosbeak of the Omanska 7 site, which closed in March 2021. From this it appears that the respondent wrote to the appellant on 22 April 2021 advising that that sale had closed, that the proceeds of sale had been received in full, and that Grosbeak had paid the majority of its third party creditors with the exception of some small balances due to professional advisors, and that the final cost of the soil removal had been PLN 3,623,192 compared to the original budget of PLN 3,614,332. The liquidator had also attached management accounts and indicated –

> "We are now in a position to commence the liquidation of Grosbeak and have engaged third party legal advisors, Andersen, in relation to overseeing and providing ongoing legal advices in respect of the liquidation of the Company".

71. The respondent enclosed with his letter a memorandum prepared by Andersen providing a detailed overview of the process of liquidating a company in Poland. In their memorandum dated 13 April 2021 Andersen detail the resolution that would be required for the dissolution of Grosbeak, and stated–

> "2A Appointment of Liquidators

> According to the provisions of Companies Commercial Code, as a matter of law liquidators of limited liability company are members of its management board, unless the Articles of Association of the Company or Dissolving Resolution state otherwise. Thus unless [Grosbeak] decides otherwise, the liquidators of the Company will be members of its management board. In Poland there are no professional liquidators requirement. The function of the liquidator may be performed, similarly to the function of a member of the management board, by a natural person who has not been punished for offences in … the Criminal Code and in … the Commercial Companies Code."

Andersen also noted that Polish liquidators are entitled to remuneration for performing their duties, and that they should be specified in the Resolution, and the amount will depend on "the will of the parties". They are obliged to provide a financial statement and balance sheet, which in practice is prepared by an accountant. Andersen advised at some length as to the formal opening of the liquidation, the liquidation activities and duties of the liquidators, the preparation of financial statements of liquidation and the division of assets, the preparation of a financial statement at the end of liquidation, and the final application for deletion of the Company from the National Register. A section of their advice notes that "liquidators are liable for damages suffered by the Company as a result of their actions or omissions that are against the law or the Articles of Association of the Company.

72. In an accompanying email dated 21 April 2021, Andersen advised –

> "In our opinion it would be more efficient to appoint as liquidators of the Company: members of the management board of the Company or other people involved in activities of the Company. Most of all, these people have the best knowledge of current situation of the Company and conditions relating to the operations of the Company. Therefore they would not need additional time to get to know issues of the Company. Also they would not charge

the Company extra for analysis of the Company's situation. It means that they may carry out the liquidation faster and probably cheaper. As well please take into account that liquidators may be liable for obligation to the Company. The risk of potential liability may be included in the remuneration of the independent liquidator. While members of the board may be likewise liable for obligation of the Company. Thus change of their function to liquidator would not change anything to their liability.

On the other hand it may be difficult to find other candidates for becoming liquidators of the Company. Even it is not easy to find entities which provide services regarding performing duties of liquidator in Poland. There is no requirement to appoint an independent liquidator at the Company in Poland. Also there is no specific profession like professional liquidator of the Company. Appointing an independent liquidator is not a very popular solution in Poland. In most cases, members of the board or other people involved in activities of companies become liquidators."[sic]

73. The respondent also advised that it was envisaged that the liquidation process would take some 15 months, and that, given the advices from Andersen, "we believe it is appropriate to appoint Michael Curneen as liquidator of Grosbeak. We hope to be in a position to commence liquidation of Grosbeak in the coming weeks."

74. Mr. Ronan Conway of the appellant wrote on 27 April 2021 requesting confirmation that the creditor balances owing by Grosbeak to the Company would be paid in advance of the liquidation of Grosbeak. By further email of 29 April, 2021 Mr. Conway again sought confirmation on the credit balances due to the Company and elaborated on the movement in the Grosbeak balance sheet and cash at bank.

75. Mr. Michael Battrim, on behalf of the respondent, replied to Mr. Ronan Conway on 21 May 2021 confirming that "all known third party creditor balances will be paid in advance of Grosbeak being placed in liquidation", but that the liquidator of Grosbeak would retain "a certain level of these funds in [Grosbeak] in order to meet any unforeseen liabilities that could arise during the course of the liquidation. This would be standard practice in a solvent liquidation scenario like this, in both Poland and Ireland." Mr. Battrim also gave details of the balance sheet, and likely distribution from the proceeds of sale following payment of the cost of soil removal and other indebtedness.

76. Mr. Ronan Conway responded by email of 27 May 2021 raising further queries about the creditor balances, and the anticipated six month delay in making a distribution. Mr. Battrim replied on the 3rd of June seeking to address these queries. He confirmed that the entire inter-company loan balance of €394,359 would be paid to Dominar Group Limited in advance of Grosbeak being placed in liquidation and stated that the Dominar credit balance of €1.1M would be retained in Grosbeak to allow sufficient time for any unforeseen issues/liabilities including potential tax, as would be standard practice.

77. In his letter of 11 June 2021 Mr. Casey complained that in the High Court at no point was it indicated by the respondent that post the sale of the Osmanska 7 site Grosbeak would be placed into liquidation, with Mr. Curneen assuming the role of liquidator, or that the proceeds of sale would not be distributed to the shareholders, or that €1.1M of the sale proceeds would be retained in Grosbeak. Mr. Casey referred to the respondent and Mr. Curneen's evidence to the High Court and to pre- and post-High Court hearing communications which in summary were: that the net value of the Osmanska 7 site would be sufficient to discharge Grosbeak's liabilities and yield a significant return for the shareholders; that there was no factual dispute as to the intended future steps with regard to the liquidation, or the finalisation thereof; that the way would be clear to realisation of the last asset of Grosbeak and distribution being made to its members; that once the Osmanska 7 site was sold the

final costs and distributions to shareholders could be dealt with and the liquidation closed off and the respondent discharged; that the appointment of a replacement liquidator would give rise to the liquidation continuing for months if not years to come with additional considerable extra cost; and that on receipt of the sale proceeds "there would be surplus funds of €1.2M to be distributed to the shareholders which would equate to a distribution of €600K each", with a retention of a buffer of €55K to meet the costs of liquidating Grosbeak, fund ongoing costs and to meet any unforeseen costs that might arise before closing including €25K for ground soil remediation" (Report of the respondent to the appellant 23 December 2019). Mr. Casey sought an explanation for why things had changed.

78. In their response dated 14 June 2021 Hayes Solicitors on behalf of the respondent referred to the advices of Andersen as evidence of the common practice in Poland of a member of the management team acting as liquidator. They referred to "significant doubt as to whether an independent liquidator could be found", and state –

> "An independent liquidator would undoubtedly charge significant fees and take significant time to be brought up to speed on the company, this would inevitably delay the conclusion of the liquidation. Michael Curneen has confirmed that he will not charge a professional fee to act as liquidator. On that basis and having taken independent legal advice, our client has formed the opinion that the quickest and most cost-effective way of progressing the liquidation would be to appoint Michael Curneen as liquidator of Grosbeak, subject to our client's oversight."

They went on to point out that a liquidator in Poland can face personal liability for debts of a company, and that therefore sufficient funds needed to be retained in Grosbeak to meet any unforeseen liability that might arise. They then stated –

> "On that basis, our client has agreed with the proposed liquidator, Michael Curneen, that the entire inter-company loan balance owed to Dominar Group Limited (in voluntary liquidation) of €394K will be paid up to Dominar Group Limited (in voluntary liquidation) in the coming days. In addition, it has also been agreed that €700K of the creditor loan balance owed to Dominar Group Limited (in voluntary liquidation) will also be paid up in advance of Grosbeak being placed in liquidation, subject to an indemnity and undertaking from Dominar to put Grosbeak in funds to discharge any unforeseen creditor balances that may arise.
>
> … Our client has formed the opinion as liquidator that appointing Michael Curneen is the most efficient and cost effective course of action and the initial retention of €400,000 of the Dominar creditor balance in Grosbeak is reasonable."

It is clear from this correspondence that the issues raised by the appellant and its solicitors prompted a rethink by the respondent on the what would be the appropriate level of retention, with a reduction from €1.1 million to €400,000.

79. In argument before this court counsel for the appellant relied on these developments to bolster the argument that, in light of the origins and purpose of the liquidation, the breakdown in relationship between the appellant/its directors and Mr. Curneen, the conflict of interest that Mr. Curneen would have, and the increase in the reserve to be held by Grosbeak from €55,000 to €400,000, that there could be no confidence in the respondent continuing to act as liquidator of the Company. Counsel made very clear the appellant's objection to the appointment of Mr. Curneen as liquidator of Grosbeak, and submitted that the appellant's views in this regard were being ignored, and that it did not appear that Andersen had been advised of the background to the liquidation and in particular the s. 205 proceedings and the breakdown of trust between the appellant and Mr. Curneen. Emphasising Mr. Curneen's involvement in the losses resulting from the PPKZ claim and its non-appeal, the mismanagement of the tenancies and the €840,000 plus VAT required to clear the soil to enable a

sale of the Omanska 7 site, counsel argued that the respondent should be removed for persisting in his decision to appoint Mr. Curneen as liquidator of Grosbeak. Again relying on the decision in *Buildlead* counsel submitted that the appellant did not need to establish misfeasance, and the complete loss of trust in the respondent, and in Mr. Curneen, was sufficient to show cause and justify the removal of the respondent.

Respondent's Submissions

80. The case for dismissal of the appeal was fully argued by Mr. Abrahamson B.L., counsel for the respondent. In essence, counsel argued that the trial judge correctly found that no cause was shown, and correctly exercised the discretion vested in him under s. 638 to decline to remove the respondent as liquidator. Counsel relied on the governing principles as being those set out in *Ballyrider*, and sought to distinguish *Buildlead*. Counsel argued that the length of time that the liquidation has been ongoing, and the appellants' delay in issuing s. 638 proceedings, were factors that this court should take into account in favour of leaving the respondent in place. Counsel also argued that the appointment of Mr. Curneen as liquidator of Grosbeak was reasonable in the circumstances. It is not necessary to refer to these arguments in any further detail at this point as they found favour with the court and are referred to further in the next section in this judgment.

Reasons for decision to dismiss appeal

81. In addressing this appeal this court is not in the position of the High Court hearing a case in full, nor does it conduct a *de novo* hearing; it has a more limited role. This was emphasised by this court in *Ballyrider* where Irvine J. at para. 26 stated:

> "…the role of the appellate court is not to substitute its own judgment for that of the trial judge but to assess whether the correct legal principles were applied and whether on the evidence the decision of the judge can be justified".

82. The legal principles governing an application to remove a liquidator under s. 638 are those set out by this court in *Ballyrider*. This was not in dispute. In relation to the principle (i) which affirms that the applicant bears the burden of proof to show good cause, Irvine J. stated at para. 23 –

> "It is clear from the language in s. 277(2) of the 1963 Act and, in particular, the words 'on cause shown' that a party who seeks to remove a liquidator bears the burden of advancing substantial grounds to satisfy a court as to why such relief should be granted. Those words are very much stronger than words such as 'if the Court shall think fit 'or 'if the Court is of opinion' which regularly appear in other statutory provisions."

Under principle (ii) the question whether there is good cause is to be measured "by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed".

83. The trial judge correctly approached his task on the basis of these principles, and sought to "strike a careful balance" (principle (viii)). The trial judge undertook the "difficult balancing exercise" described by Neuberger J. in *AMP Music Box Enterprises Limited v Hoffman* [2003] 1 BCLC 319 in paras [23] – [27] which are quoted by Sanfey J., and are passages which were quoted with approval by Irvine J. in *Ballyrider*.

Principle (iv) requires that there needs to be a failure on the part of a liquidator to conduct the liquidation "in a vigorous, efficient and cost-effective manner" in order to show good cause and this *may* include a conflict of interest or loss of confidence in the liquidator, but "in the latter case the creditor/creditors concerns must be real and reasonable". As the trial judge correctly identified in this case the balancing exercise relates not to creditors but to a member's concerns, and these must be "real and reasonable", and it was to this that he addressed his mind.

84. It is apparent from his judgment that the trial judge carefully took into account all of the relevant evidence that was before him in the High Court, and carried out this balancing exercise in his

"analysis" at paras. 163 – 205 of his judgment. In the course of his judgment he made a number of findings of fact that are important to his conclusions, and these were helpfully identified by counsel for the respondent in his written submissions as follows –

1. There was no evidence that the appellant was unaware of, or objected to, the respondent's reliance on the existing management of the Polish subsidiary companies.

2. Where difficulties arose with the payment of rent and dumping of material on the Osmanska 7 property, Grosbeak took legal advice and appropriate action where necessary.

3. The respondent was monitoring the situation concerning the Osmanska 7 property on an ongoing basis. He was responding to queries from the appellants solicitors as they arose, and reporting on any significant developments regarding the site.

4. The interests of the Company and Grosbeak did not diverge as to procuring the efficient administration of the Osmanska 7 property and the most advantageous sale possible.

5. The costs incurred in clearing the Osmanska 7 property did not arise from any neglect or oversight on the part of the respondent.

6. The delay in realising the Company's interest in the Osmanska 7 property arose mainly from the necessity to await the resolution of the restitution claims. The strategy of awaiting the resolution of the restitution claims was never seriously challenged by the appellant, and the appellant did not respond when invited to clarify whether it wished for the property to be sold at a reduced price on account of the restitution claim.

7. There was no material lack of transparency on the part of the liquidator in conducting the liquidation of the Company.

8. The respondent liquidator had been generally effective and honest in the conduct of the liquidation.

These findings were not based solely on the trial judge's consideration of the affidavit evidence and documentary material before him but rely also on his assessment of the oral evidence given by the respondent over 2 hearing days.

85. The circumstances in which an appellate court may disturb findings of fact are circumscribed by the principles established in *Hay v O'Grady* [1992] 1 IR 210, recently affirmed by the Supreme Court in *Tracey v Anderson* [2020] IESC 76 where Charleton J. stated: -

"3. For the purposes of clarity, these principles can be more concisely stated as follows:

1. Findings of fact supported by credible evidence are not to be disturbed.

2. Inferences of fact derived from oral evidence can be reconsidered, but an appellate court should be slow to do so.

3. Inferences drawn from circumstantial evidence can be more readily put aside by an appellate court since that court is in as good a position to draw its own inferences as the court of trial."

86. In my view there was credible evidence for these findings of fact and conclusions of the trial judge. It is perhaps not surprising therefore that the appellant did not address this issue at all in his submissions, and instead in oral submissions concentrated on the compromise of s. 205 oppression proceedings - which themselves were grounded on loss of trust and confidence – and lack of transparency in the respondent's dealings with the liquidation and with the appellant/its solicitors, and conflicts of interest. I am satisfied however that there is no sound basis for revisiting or setting aside these findings of facts.

87. It is also clear, contrary to certain submissions of counsel for the appellant, that the trial judge in his judgment and analysis was aware of and kept in mind "the depth of enmity and distrust between the principals of" the appellant and Mr. Curneen - see for example para. 171 of the judgment. He was also cognisant of the purpose of the liquidation, as declared in the Settlement Agreement, which was the realisation of the assets of the subsidiary companies as soon as possible.

88. As to issue (1) – the sale of the P&D Polska business (the sole trading entity) to Mr. Curneen at a figure less than Mr. Conway was prepared to offer – I am quite satisfied that the trial judge was correct to find that no cause was shown for removal of the liquidator. The respondent took appropriate steps, including approaching 50 potential buyers, before concluding that finding a third party purchaser was not feasible. It must also be recalled that the economic climate in 2009 was not propitious. The respondent then conducted a fair auction between the appellant/its principals and Mr. Curneen. He accepted a bid from the appellant and entered into heads of terms in November, 2009 which included a period of exclusivity. However the evidence was that the appellant failed to complete or substantially advance the purchase, and it was agreed with the appellant that the period of exclusivity should be terminated and revised offers sought. The respondent indicated that these would be assessed by reference to (a) their conditionality, (b) ability to complete by 31 May 2010, and (c) price. It became apparent during the ensuing negotiations that the existing management team of P&D Polska was not prepared to work with Mr. Conway or his son. While the appellant offered €1.3 million, this was subject to a condition that the sale would not close until 1 September 2010 at the earliest, to enable the appellant to find new management. Ultimately while Mr. Curneen's offer of €975,000 was lower by some margin it was not subject to similar conditions and was accompanied by protections including a personal guarantee.

89. In the circumstances it is hard to see how any criticism could be levelled at the respondent for accepting Mr. Curneen's offer. In my view the manner in which the respondent conducted this sale

was eminently fair and sensible. The trial judge correctly commented at para. 196 of his judgment that there was no material lack of transparency on the part of the respondent in relation to the sale of P&D Polska; not only was the appellant directly involved in that sale process, but the respondent also made his files relating to that sale available to the appellant's solicitors.

90. The weakness of this element of the appellant's case is apparent when one considers the Plenary Summons issued by the appellant on 7 February 2011 seeking damages arising out of the sale of the P&D Polska shareholding. These proceedings had not been progressed in the ten year period up to the hearing of this appeal, and were at the time of that hearing the subject of an application to dismiss for want of prosecution.

91. It is only in respect of issue (2) – the PPKZ proceedings – that the trial judge was not so impressed with the respondent's evidence. His criticisms centre on the failure to produce any documentation to illustrate to whom he had spoken, or the contemporaneous advice that he or Grosbeak received, before deciding not to appeal the adverse decision in the Polish court. At para. 176 the trial judge finds that the respondent personally did not receive any advice from Ms. Wasik, but relied on advice relayed to him by Grosbeak/Mr. Curneen, and the extent to which the respondent was involved in the decision not to appeal remained unclear from his evidence. However, having considered the respondent's evidence on affidavit and heard him under cross-examination, the trial judge concluded that –

> "… I have no reason to believe that the respondent was not informed of the court's adverse decision or consulted by the directors of Grosbeak in the aftermath of that decision".

He was critical of the respondent for not having obtained independent legal advice and/or legal advice in Poland on the appeal issue. As the trial judge points out at para. 195, the atmosphere between the parties was "not improved by the discovery in December 2015 by the applicant that the PPKZ

proceedings had been lost in February 2015, and that a decision not to appeal had been taken by the respondent without either informing the applicant or seeking its opinion on the matter."

92. This criticism by the trial judge of the respondent was relied on by the appellant, and was a key element in this appeal. However, while the trial judge was troubled by the respondent's conduct in relation to the PPKZ proceedings, he did not consider that this warranted his removal as a liquidator. His reasons for this appear to be given in para. 199 of his judgment. He correctly points out that the decision whether to appeal was that of the respondent alone, as the controller of the shares in Grosbeak, even though Grosbeak was prosecuting the proceedings. He correctly points out that any decision to pursue legal action against Grosbeak management or its legal advisors for not appealing or negligent advice was ultimately one for the respondent. While accepting that there may have been valid reasons not to embark upon a possible legal action, the trial judge opines that it "would have been far better if the respondent could show objectively that he had sought advice in that regard, or at least recorded his detailed reasons for not taking at least preliminary steps to establish whether proceedings were feasible or advisable."

93. In my view the trial judge was entitled to take this critical view of this issue, but ultimately to decide that the appellant had not shown good cause. This is particularly so in light of the respondent's evidence on affidavit and under cross-examination in relation to the legal advice of Ms. Wasik that he received through Grosbeak, and in particular his evidence that his decision was based on whether PPKZ was "ultimately a mark so that we could get value". The respondent's evidence was that he assessed the financial information in relation to PPKZ which was publicly available and formed his own view on it. The respondent accepted that he should have informed the appellant much earlier of the decision not to appeal, but that is an issue of transparency, and not one that bears on the substance of the decision that the respondent had to take in relation to whether to appeal or not. While it might

have been desirable, the respondent had no obligation to consult with the appellant over this decision, which related to whether or not a subsidiary company should appeal proceedings that it had taken.

94. It is not absolutely clear from reading paragraph 199 of the judgment whether the trial judge considered the respondent's conduct in relation to the PPKZ proceedings did, or could, amount to "cause shown", or whether in the exercise of the discretion that the court has under s.638 (and principle (iii) in *Ballyrider* which states that "The court has a wide discretion as to the circumstances in which it may remove a liquidator…"). He did not consider that this conduct alone would warrant the respondent's removal as a liquidator. However when para.199 is read in conjunction with the trial judge's Conclusions, and in particular para. 206, it becomes clear the trial judge did not consider in all the circumstances of the case that the appellant had satisfied the onus of proving "good cause" for removal.

95. In my view this was a conclusion that was open to the trial judge on the evidence that was before him, and in particular based on his finding of fact that the decision not to appeal the PPKZ proceedings was one that was open to the respondent on the information and advice available to him at the time; this was quintessentially a judgment call for the trial judge in the exercise of his discretion, and it is not one with which this court should interfere.

96. In relation to this issue it is also important to recall that by December 2015 the appellant was aware that the PPKZ proceedings had not been appealed, and raised complaints, and indeed threatened proceedings to remove the respondent as liquidator. However, the application under s. 638 did not issue until 16 July 2018, over two and a half years after the appellant became aware of the position. By the time this appeal came on for hearing, six years and some months had elapsed since the last date upon which an appeal could have been lodged in the Polish courts. This court raised the question whether any claim in professional negligence against the respondent for not pursuing an appeal could ever be maintained by a replacement liquidator (or any other party) given

this lapse in time. While these issues of delay, and possible legal consequences, were not fully ventilated in argument, they are factors that I believe this court is entitled to take into account in considering this appeal.

97. The appellant also criticised the respondent for not considering, taking formal legal advice on, or pursuing, a possible cause of action in negligence against PW Legal, or indeed against the management of Grosbeak.This would require consideration of Polish law.. However, the appellants, on whom the onus fell, did not adduce any opinion of a Polish lawyer to support an argument that any such cause of action lay, or whether it could now be maintained given the lapse of time.

98. Accordingly the trial judge was entitled to find no cause shown arising out of respondent's involvement in the PPKZ proceedings.

99. As to issue (3) – the Osmanska 7 site – the findings of fact referred to above, and which this court should not disturb, are particularly relevant. The respondent fully appraised himself of the restitution claims on which advice was given by Ms. Wasik, Grosbeak's attorney. The decision taken to await the resolution of those claims was explained to the appellant/his solicitors, and no objection was taken. It is clear that the determination of such claims can take considerable time, as the authorities in relation to similar claims before the European Court of Human Rights which were opened to the High Court judge. Those restitution claims were not finally resolved until in or about June 2018, and certification was obtained which enabled Grosbeak to dispose of the Osmanska 7 site with good title. Further the appellant did not take issue with the background and facts outlined by Ms. Wasik in the advices received by the respondent.

100. The appellant's complaints appear to have been that the respondent should have taken control of the property sooner, that he failed to keep the appellant appraised of the situation concerning the site, and that the amount that could be realised from the sale of the property was reduced by the

significant costs incurred in clearing the building waste left by JMR Trans. The substance of these complaints was undermined by the evidence before the High Court and the facts as found by the trial judge. There was no evidence to suggest that Grosbeak or the respondent could have anticipated that JMR Trans was unsuitable or would prove to be an unsatisfactory tenant. The trial judge found that, when the tenancy ended in June 2015, the respondent was monitoring the situation on an ongoing basis, and responding to queries from the appellant's solicitors as they arose, and reporting on any significant developments. Under cross-examination the respondent explained the means by which Grosbeak acquired the rights to the soil/waste material, and that the cost of acquiring it at auction had been set against the liabilities to Grosbeak of JMR Trans. He explained his view that on expiry of the lease he believed "that the force of the environmental authorities and the proceedings would hopefully lead to a situation where Trans would ultimately remove the soil, but that did not … transpire". In my view the trial judge was entitled to regard that as reasonable.

101. The trial judge was also correct to comment that the interests of the Company and Grosbeak in procuring the efficient administration of the Osmanska 7 site, and the most advantageous sale possible, did not diverge. He was entitled to conclude – and this finding cannot be disturbed – that the costs incurred in clearing the site did not arise from any neglect or oversight on the part of the respondent. Further, the appellant cannot contest that it never seriously challenged the strategy of awaiting the resolution of the restitution claims. In particular, the appellant did not respond when by letter dated 28 August 2015 A&L Goodbody on behalf of the respondent invited it to clarify whether it wished for the site to be sold at a reduced price on account of the restitution claims rather than await their resolution.

102. For these reasons I am satisfied that the trial judge was entitled to come to the conclusions that he did, and that these were warranted on the evidence. In particular, he was entitled to reject the

claim that the respondent's oversight of the restitution claims was ill-advised or unreasonable, or that there was any material lack of transparency on this issue.

103. On the question of liquidator's fees, the respondent's letter of engagement of 9 April 2008 gave an initial estimate of €250,000, but in the High Court he asserted that the level of work necessitated by the liquidation was far in excess of that anticipated, yet no fees had been received since 2013. The appellant's expert Mr. Garcia Diaz in his report criticised the level of fees, but Mr. Luby on behalf of the respondent considered there was justification for higher fees based on the complexity, difficulty and duration of the liquidation.

104. More importantly, the respondent acknowledged that if his fees could not be agreed with the shareholders they would have to be sanctioned by the High Court, and the onus would be on him to justify the fees claimed. There is a statutory procedure that mandates this, as set out across ss. 646 - 648 of the Companies Act, 2014, and s.646(2)(d) provides in effect that where members fail to pass a resolution in a voluntary winding up agreeing the amount of the remuneration the liquidator is not entitled to receive payment until the amount of the remuneration has been affixed by the court. The trial judge was therefore correct to regard the availability of such a procedure as a factor favouring the retention of the respondent as liquidator and militating against the appointment of a replacement for the purpose of investigation *inter alia* of the fees claimed by the liquidator.

105. Turning to the appellant's argument, based primarily on *Buildlead*, that a replacement liquidator should be appointed to investigate the respondent's conduct of the litigation, the first point to note is that this was fully argued in the High Court, and indeed the trial judge records at para. 140 of his judgment, that counsel placed particular emphasis on the judgment of Etherton J. There can be no doubt but that the trial judge fully considered whether he should appoint a replacement liquidator in order to undertake investigation, and his analysis and conclusion appear at paras. 189 – 205 under the heading "Is an Investigation Necessary?" of his judgment.

106. Secondly, I agree with counsel for the respondent that *Buildlead* can be distinguished from the facts of the present appeal having regard to a number of features of that case. Firstly, in *Buildlead* the Company was insolvent with an estimated deficiency of STG£644,000, and the liquidation was a creditors voluntary winding up in which the liquidator was required to report to a liquidation committee in accordance with the applicable Insolvency Rules. Secondly, the basis for the application to remove the joint liquidators concerned their failure to conduct enquiries into preferential payments allegedly made by the Company to its parent company Quickson in an efficient and timely manner, and to institute proceedings to recover those payments. Thirdly, if the liquidators in *Buildlead* were entitled to the full amount that they sought by way of un-billed work–in-progress, there would have been no assets available for distribution to any of the creditors. Fourthly, Etherton J. appears to have been of the view that –

> "[230] … The absence of a clear legal analysis of the basis for any preference claim, and the failure to communicate that analysis to Quickson [the parent company] and its advisors in support of requests for particular information so as to demonstrate that such information was relevant and necessary to the appraisal of the merits of the preference claim."

107. In his judgment in *Buildlead* Etherton J. reviews case law on "good cause" for removal of a liquidator, and cites with approval passages from the judgment of Neuberger J. in *AMP Enterprises Limited* at paras. [23] and [27], which in turn were cited with approval by Irvine J. in *Ballyrider*, and were again quoted by Sanfey J. in his judgment herein. These extracts, quoted earlier, refer to the "difficult balancing exercise" to be undertaken by the court, and that if "a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him." Etherton J. notes that Neuberger J.'s "… ultimate concern was not with the past but with the future, and it would be unfair on the liquidators, and unnecessary for the creditors and the

company's interests, as well as unnecessarily expensive and disruptive, if he was to remove the liquidators."

108. While *Buildlead* is undoubtedly an example of a case where a judge was prepared to remove joint liquidators and appoint a replacement primarily for the purposes of undertaking an investigation of the conduct of the liquidation, it was a case that fell to be decided on its own facts. In my view Etherton J. did not decide or establish any new principle, but rather applied existing principle which was broadly in line with that approved and adopted by Irvine J. in *Ballyrider*. Etherton J. concluded his review of the law and legal submissions by stating –

> "[168] In my judgment, the touchstone for an appraisal of whether good cause has been shown for the removal of a liquidator is the principle stated by Bowen LJ in *Re. Adam Eyton* (at 306):-
>
> > '… The due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed.'
>
> [169] As Neuberger J. observed in *AMP Enterprises* (at para [23]) that appraisal may involve the court carrying out a difficult balancing exercise."

This reflects principle (ii) as enunciated by Irvine J., which refers to "the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed", and principle (viii) which refers to "seeking to strike a careful balance in each case". As Irvine J. stated in principle (iii), the court "has a wide discretion as to the circumstances in which it may remove a liquidator", and –

> "What will amount to good cause will depend upon the particular circumstances of each individual case."

109. There may be cases in which it would be appropriate for the court to remove a liquidator and appoint a replacement solely or partly to undertake an investigation of the conduct of the litigation. The trial judge gave due and appropriate consideration to taking just such a step in the present application, but came to the conclusion that this was not appropriate. His reasons are fully set out in his judgment. They include –

- that the liquidation was almost complete;
- that the respondent had been generally effective and honest;
- that a liquidator should not be removed merely because in one, or possibly more than one respect his conduct has fallen short of ideal;
- that there was no material lack of transparency;
- that updates and accounts of Grosbeak were furnished to the appellant and the respondent generally responded to requests for information;
- that while "somewhat troubled" by the respondent's conduct in relation to the PPKZ proceedings, he did not consider those actions alone warranted his removal as liquidator;
- that the delay in completing the liquidation was sufficiently explained;
- that the circumstances surrounding the necessity to incur liability of €840,000 plus VAT in respect of the removal of waste material from the Osmanska 7 site had been sufficiently explained.

110. It is important to emphasise the extent of a trial judge's discretion in relation to finding cause shown. In the exercise of its discretion the trial judge was entitled, and possibly required, to take into account other reasons that led to his decision that an investigation by a replacement liquidator was

not warranted. The first of these is his consideration of the practical consequences of removing the respondent as liquidator. As he points out in paras. 203 and 204, a replacement liquidator would have to become familiar with all matters relevant to the liquidation, examine the books and records of the respondent, establish contact with the directors of Grosbeak and Ms. Wasik/PW Legal, and possibly have to engage with independent legal advisors in Poland to review various issues on which PW Legal advised Grosbeak. At the time the trial judge gave judgment he was also concerned that a new liquidator would have to oversee the sale by Grosbeak of the Osmanska 7 site, which might well have led to disruption or delay. As the trial judge points out "all of the foregoing matters would cause significant expense for the liquidation. The liquidator's costs would be borne equally by the shareholders…" He also correctly noted Mr. Curneen, one of the two shareholders, was strongly opposed to the application.

111. The second factor considered by the trial judge is dealt with in para. 205 of his judgment and concerned the undisputed fact that in August 2014, and again in August 2015, the appellant's solicitor intimated the appellant's intention to proceed with an application for removal, yet the appellant did not carry out its threat until July 2018, some three years on, and at a time when it had been informed that the restitution claims had been resolved, leaving the way open for the sale of the Osmanska 7 site.

112. These factors – the duration of the liquidation, the stage that it had reached, and the appellant's delay in issuing the application – were circumstances which the trial judge properly took into account. While no Irish authority was cited to this court to support the entitlement of the trial judge to have regard to these factors in my view none was required as they clearly come within the contemplation of principle (iii) as enunciated in *Ballyrider*. Counsel for the respondent also helpfully cited the Supreme Court of New South Wales' decision in *Re Biposo Pty Ltd: Condon v Rodgers* [1995] A.C.S.R. 730. In his judgment Young J. stated, at page 734: -

"The present winding up has been in place for less than a month. A relevant factor is the costs that would be incurred if another liquidator had to come in and complete the winding up, wasting the work that the present liquidators had already done. Thus the Court is less likely to discharge a liquidator towards the end of the winding up, after he has become acquainted with the affairs of the company, than it would in the early winding up: see for instance *Re. George A. Bond & Co. Ltd* [1932] 32 SR (NSW) 301."

113. Counsel also referred the court to a Supreme Court of Northern Territory decision in *ATSIC v JARCAC (In Liquidation)* [1992] 10 A.C.S.R. 121, where Asche J. approved the following statement of principle from *McPherson Law of Company Liquidation* 3rd Ed. By J. O'Donovan (1987) at p. 228:-

"Consequently, those who assert that the liquidator should be removed, are under a duty to establish at least a *prima facie* case that this is for the general advantage of the persons interested in the winding up, and the onus of proof will not be easy to discharge if the liquidator has become well-acquainted with the business and affairs of the Company, or the process of winding up has almost reached a completion."

If any authority is required these Australian cases support the proposition that the trial judge was fully entitled to take into account how advanced the liquidation was, and the obvious disadvantages of removing the respondent and appointing a replacement.

114. At paragraph 198 of his decision the trial judge stated –

"I consider that I would have to be convinced that there was at least a strong possibility that an investigation would reveal conduct or disclose hitherto unknown documentation or information …"

that might suggest proceedings on behalf of the Company were justified. His ensuing analysis indicated that, while he was troubled by the PPKZ issue, he was not convinced that there was such a strong possibility. That, in my view, equates to the trial judge deciding that there was not cause shown for removal of the liquidator and the appointment of a new liquidator to conduct an investigation, and that is confirmed by his conclusion in para. 206 where the trial judge states that he did not believe "good cause" had been shown. Furthermore, the trial judge accepted that the respondent had considered legal advice of Ms. Wasik and publicly available documentation on whether PPKZ was a 'mark' before deciding not to appeal, and no satisfactory basis has been demonstrated for further investigating possible proceedings by the company against Grosbeak or its managers or legal advisors.

115. Many of the grounds of appeal pleaded in the Notice of Appeal were not addressed substantively or directly in the appellant's written or oral submissions. Most of these however are aspects of the main arguments put forward on this appeal, and have been taken into account in this judgment. For instance Ground 5 concerns deficiency of information in respect of the PPKZ proceedings, and this has been dealt with under the rubric of lack of transparency, as has the plea of lack of trust and confidence in the liquidator set out in Ground 7. Ground 8 concerns the delegation of management to the directors of the Polish subsidiary companies, and that has been covered in the treatment of the MOU, and when addressing the sale of the P&D Polska business to Mr. Curneen. Grounds 9 – 12 raise the question of a potential claim against the respondent, and that has been addressed in this judgment when considering all three main issues raised by the appellant. It is also worth observing that if the appellant is of the view that it can, as a shareholder, maintain a claim against the liquidator then that is a matter for the appellant to pursue in the normal way. Grounds 13 and 14 concern the PPKZ proceedings, and have been addressed. Ground 15 concerns the clean-up

costs on the Osmanska site, and I have approved of the manner in which the trial judge concluded that the respondent was not responsible for the costs so incurred.

116. Ground 16 criticises the trial judge for equating the sale of the Osmanska 7 site with the realisation of the last asset of the Company. The appellant has failed to explain the basis for that ground, and the trial judge was correct to hold on the evidence that the way was clear to the realisation of the last asset in the liquidation. As we now know, that asset has been realised and what remains is only the winding up and dissolution of Grosbeak.

117. Grounds 6 and 17 relate to the liquidator's remuneration and, as I have held, the trial judge was correct in pointing to the procedure provided by the 2014 Act for the fixing of liquidator's remuneration if the members of the Company fail to pass a resolution agreeing same.

118. Ground 18 pleads that the trial judge applied undue weight to the fact that the sale of the Osmanska 7 site will yield further dividend to the shareholders. This has in fact proved to be the case, and in my view the trial judge was entitled to find material the fact that the appellant had derived a substantially better return from the Company following a liquidation and then envisaged in the Declaration of Solvency.

119. At Ground 19 the appellant asserts that the trial judge misdirected himself "with regard to the relevance of the appellant's view with regard to the Respondent continuing in situ given the fact of his appointment in the manner as set out in the judgment". This is not really understood, but appears to criticise the trial judge for failing to have adequate regard for the dispute, and the loss of trust and confidence, that gave rise to the s.205 proceedings and Settlement Agreement. This ground cannot succeed as the trial judge clearly had regard to history of the appointment and considered and analysed the past conduct of the liquidation, and with relatively little work remaining to be done to complete the liquidation he was entitle focus on the future; in my judgment the trial judge did not conduct an

overly narrow forward looking test, and he correctly applied the overriding test namely the real and substantial interests of the liquidation.

120. Ground 20 pleads that "the appraisal of the Applicant was subject to the provision of information by the Respondent, not just prior to the institution of proceedings, but after (paragraph 180)". However the trial judge found as a fact that there was no material lack of transparency. Also after the institution of proceedings the appellant chose not to seek discovery. Counsel for the appellant submitted that he had never encountered a proceeding of this nature where discovery was sought, and that the decision had been made to rely on cross-examination of the respondent. He submitted that it should not be incumbent on an applicant to seek discovery in the context of a claim that a liquidator failed to provide information or documentation that had been requested.

121. While applications of this nature are grounded on affidavit, and it is unusual in such cases that a party will seek discovery, there is certainly no bar to an applicant, or indeed a respondent, seeking discovery where the documents sought are relevant and necessary and are required for the just disposal of the proceedings. Discovery is not infrequently agreed or ordered in other proceedings *prima facie* heard on affidavit, including proceedings brought by way of judicial review or to challenge a procurement decision. There is no reason in principle why the appellant could not have pursued discovery, and had it done so, such discovery might have resulted in the listing on affidavit and production of relevant material which could have satisfied the appellant's desire for information, or answered his complaints, or supported the complaints which he sought to pursue.

122. Grounds 21 and 22 concern the respondent's management of the Osmanska 7 site and I have addressed these in this judgment.

123. Ground 23 concerns the time scale involved in the liquidation, but this clearly was addressed by the trial judge, and is addressed in this judgment, and in particular it was entirely reasonable for

the respondent to await the outcome of all the restitution claims before proceeding to sell the Osmanska 7 site.

The Fresh Evidence

124. I have also considered whether, in the light of the fresh evidence set out in Mr. Tom Casey's affidavit and exhibits, this court should now decide to remove the respondent and appoint Mr. Kirby as a replacement. Essentially three complaints are made against the respondent since the completion of the sale of the Omanska 7 site. The first is that the High Court was misled as to the extent of the work still required to complete the liquidation, and in particular the need to liquidate Grosbeak, and the time that that would take. The second is the proposal to appoint Mr. Curneen as the Polish liquidator of Grosbeak. The third is the increase in the reserve to be held by Grosbeak from €55,000 to €400,000.

125. I am satisfied that these matters, and the more detailed points arising from same made by Mr. Casey in the correspondence which he exhibits from April-June 2021, do not warrant this court removing the respondent as liquidator. When this appeal was heard, all that remained to be done in the liquidation of the Company was the winding up of Grosbeak and the distribution of its surplus funds to the Company for onward distribution to the shareholders; the finalisation of the respondent's remuneration which, if it could not be agreed by the shareholders, could be fixed by the court; and final distribution of the assets of the Company.

126. The parties would always have been aware that it would be necessary to wind up Grosbeak. It was specifically mentioned in the report of the respondent to the appellant dated 29 December, 2019 which referred to the distribution of surplus funds from Grosbeak "with a retention of a buffer of €55K to meet the costs of liquidating Grosbeak".

127. The respondent acted properly in obtaining advice from Andersen in respect of the winding up of Grosbeak. I have referred earlier to the content of the Andersen Memorandum dated 13 April 2021, which was detailed in its advice and made it clear that in Poland the liquidators of the Company would normally be members of the management board because there is no statutory requirement that professional independent liquidators be appointed. In their email dated 21 April 2021 Andersen further advised very clearly that members of the management board were best placed to undertake the liquidation work because of their knowledge of the operations of the Company, and they would achieve the winding up faster and probably cheaper. Perhaps more importantly they advised that "it is not easy to find entities which provide services regarding performing duties of liquidator in Poland", and there does not appear to be a specific liquidator's profession in that jurisdiction. Andersen's clear advice was that it was appropriate to appoint Mr. Curneen as a liquidator, and they further advised that the process could take in the order of 15 months.

128. I am satisfied that the respondent was entitled to act on foot of this professional and expert advice notwithstanding that Mr. Curneen had long ago lost the trust and confidence of the appellant, and that the s. 205 proceedings were initiated because of that breakdown in relationship. While the concept of a director of a company being appointed its liquidator is strange to lawyers and accountants in this jurisdiction, it does appear to be the norm in Poland, where it is unusual to have an independent liquidator, and difficult to find one.

129. The respondent will have a full oversight over Mr. Curneen's conduct of the liquidation of Grosbeak and will doubtless require to be consulted in relation to all key decisions, and to be kept fully informed and provided with relevant documentation, and will require full accounting in respect of all income/expenditure and the final distribution of Grosbeak's surplus assets. He will in turn have to account to the shareholders of the Company. It must also be borne in mind that Mr. Curneen, as a 50% shareholder in the Company, stands to benefit to the same extent as the appellant in respect of

all realisations, savings and distributions arising from the winding up of Grosbeak. It is also significant that Mr. Curneen has undertaken not to charge fees in his capacity as liquidator of Grosbeak, and this is to the advantage of the appellant, and will render the process of accountability for which the respondent is responsible more straightforward.

130. Counsel for the appellant, when asked by the court who should be appointed liquidator of Grosbeak, suggested that it should be someone with local expertise, perhaps someone from PW Legal. No expert evidence or opinion was adduced to support this suggestion, or to indicate what professional or local alternative there might be to the appointment of Mr. Curneen. Counsel simply pointed to the involvement of Mr. Curneen as a director of Grosbeak in the failed PPKZ proceedings, what he alleged was mismanagement of the tenancy of JMR Trans, and the cost of clearance of the Omanska 7 site, as reasons for not appointing Mr. Curneen; he also pointed to the loss of confidence and trust, which he claimed was sufficient without any proof of misfeasance, whether on the part of Mr. Curneen or the respondent. In all the circumstances I did not find these arguments persuasive, particularly having regard to how little remains to be done to complete the liquidation of Grosbeak and the distribution of its surplus funds, and the oversight that the respondent is duty bound to exercise over the conduct of the Grosbeak liquidation. The appointment of Mr. Curneen to undertake the liquidation is also likely to lead to the greatest expedition, which is a significant factor given that the liquidation of the Company has been ongoing for some 13 years, and it is also likely to be the most cost-effective.

131. In the circumstances I am satisfied that there is nothing inherently improper in the respondent following Andersen's advice and appointing Mr. Curneen as liquidator of Grosbeak, and while it is not ideal it is pragmatic in all the circumstances.

132. As to the buffer or retention of monies in Grosbeak pending its dissolution, I am satisfied with the explanation given by Hayes Solicitors on behalf of the respondent in their letter of 14th June. 2020.

This proposed that the entire inter-company loan balance owed to the Company, of €394K, would be paid to the Company "in the coming days", and that a further €700K of the creditor loan balance owed to the Company would also be paid in advance of Grosbeak being placed in liquidation, subject to an appropriate indemnity and undertaking from the respondent to put Grosbeak in funds to discharge any unforeseen creditor balances that might arise. Hayes Solicitors then indicated that the figure retained by Grosbeak from the proceeds of sale of the Omanska 7 site would be €400,000. It was not anticipated that there would be any significant outgoings, as Grosbeak has no creditors, but this retention seems designed to cover Polish tax obligation (if any) and any other potential liability of Mr. Cureen acting as Grosbeak's liquidator. It can therefore be envisaged that there will be a further significant distribution to the Company shareholders before the end of the Grosbeak liquidation. While the reserve of €400,000 is a significant increase on an earlier proposed reserve of €55,000, it is a figure that has been advised as reasonable, and I do not consider that this court should interfere with this liquidator (let alone remove him) where he is acting on appropriate professional advice.

133. For these reasons the appellant's further evidence does not persuade me that the respondent has acted improperly since the hearing or judgment in the High Court. I am further not satisfied that this new evidence, taken in conjunction with the complaints and evidence related to the conduct of the liquidation that was before the High Court, show good cause for removal of the respondent as liquidator.

134. It is for the foregoing reasons that the appeal has been dismissed.

Costs

135. In a supplemental written judgment delivered on 24 July 2020 the trial judge, having considered the parties' detailed submissions in relation to costs, made an order for the respondent's costs, to

include all reserved costs (including the costs of the application for leave to cross-examine heard and determined by O'Connor J., which Sanfey J. treated as "costs in the cause" in favour of the respondent), to be paid by the appellant, such costs to adjudicated upon if not agreed, and he ordered a stay on execution of the costs order to continue until the determination of this appeal.

136. In light of the decision and judgment of this court dismissing the appeal it is proposed that this court should affirm the order of the High Court that the respondent do recover against the appellant the costs, including reserved costs, of the appellant's motion and order, and that the respondent should further recover as against the appellant the costs of this appeal, the said costs to be adjudicated by a legal costs adjudicator in default of agreement. Should either party seek a different order in relation to costs in the High Court or in this court they will have fourteen days from the electronic delivery of this judgment to set out in writing to the Court of Appeal Office the alternative orders sought, and should succinctly set out the reasons why such orders are sought, and a short hearing will be arranged, but any party seeking different orders in respect of costs will be at risk of having the costs of such application awarded against them in the event that their application is unsuccessful

Judges Woulfe and Collins have indicated their agreement with this judgment and the orders proposed therein in respect of costs.