



**THE COURT OF APPEAL**

Neutral Citation Number:2017] IECA 227

**[2016 No. 412]**

**[2016 No. 242 COS]**

**STAR ELM FRAMES LIMITED  
AND IN THE MATTER OF THE COMPANIES ACT 2014**

**THE PRESIDENT**

**BETWEEN**

**ANTHONY FITZPATRICK**

**APPELLANT**

**AND**

**MICHAEL GLADNEY**

**RESPONDENT**

**JUDGMENT of The President delivered on 31st July 2017**

1. This is an application pursuant to O. 86A, r. 4 of the Rules of the Superior Courts to give the respondent, Mr. Michael Gladney, leave to admit the additional evidence of Mr. Myles Kirby as set out in his sworn affidavit of 9th March 2017 and Mr. Robert McKay as set out in his sworn affidavit of 7th March 2017 on the hearing of this appeal.

2. Mr. Gladney is the Collector General and an officer of the Revenue Commissioners and a creditor of the company, Star Elm Frames Ltd. By order of the High Court (Humphreys J.) of 10th August 2016 on the petition and affidavit of Mr. Michael Gladney, the court ordered, inter alia, that the company be wound up under the provisions of the Companies Act 2014 in accordance with Article 3(1) of Council Regulation (EC) No. 1346/2000; that Mr. Myles Kirby be appointed liquidator of the company under s. 575 of the Act, thereby relieving Mr. Anthony Fitzpatrick, the voluntary liquidator; that Mr. Fitzpatrick present all books, records, etc. to Mr. Kirby as soon as possible and not later than 15th August 2016; and that directors, Mr. Anthony O'Gara and Mr. Niall Freeman and an employee of the company, Mr. David Sage, were ordered to make and file a statement of affairs of the company pursuant to s. 593(1) of the Act. The court also ordered that the petitioner, Michael Gladney, recover costs of the proceedings against Anthony Fitzpatrick in his personal capacity, and the company jointly and severally when the same were taxed and ascertained. The court ordered that any costs payable to Anthony Fitzpatrick in his role as voluntary liquidator to the date of the order be set off against the costs payable by him.

3. Mr. Fitzpatrick has appealed against these orders and the application is made to adduce additional evidence on the appeal. The matter before the Court is an interlocutory application, a procedural application or motion which may be heard by the President or a judge nominated by the President pursuant to s. 9(60) of the Court of Appeal Act 2014.

4. The application is grounded on the affidavit of Davena Lyons, Assistant Principal Officer of the Revenue Commissioners sworn on 15th March 2017. In her affidavit, Ms. Lyons says that the proceedings were heard by affidavit in the High Court. The background to the case is that Mr. Gladney served a s. 570 demand on the company on 10th March 2016. The petition was presented to the High Court on 24th June 2016 and was made returnable for 18th July 2016. The company was served with a copy of the petition on 29th June 2016. On 6th July 2016, the company sent notices to creditors notifying them that a meeting pursuant to s. 586 of the Act had been convened for 18th July 2016. The creditors' meeting was advertised in newspapers on 7th July 2016.

5. Ms. Lyons says that the creditors' meeting was convened for 08.15am on 18th July 2016, the return date of the petition. The creditors appointed Mr. Fitzpatrick to act as voluntary liquidator.

6. The Revenue Commissioners, through Mr. Gladney, pursued their application for liquidation of the company under the supervision of the court and the appointment of an official liquidator. After a number of adjournments, the matter was ultimately heard on 8th August 2016 and judgment was given on 10th August 2016. There are disputed factual issues in the case and the decision of the High Court is under appeal to this Court. As this is merely a procedural application, I think it is incumbent on me to refrain from taking any view of the matters that are in dispute between the parties. It is clear, however, that there are allegations which are set out in the affidavit of Ms. Lyons and which were the subject of the hearing in the High Court. Other issues, whether legal or factual that were in issue in the High Court are also coming to this Court for decision on the appeal.

7. The additional evidence that the Revenue Commissioners seek to put before the court is in an exchange of emails between Anthony Fitzpatrick and Robert McKay. On 2nd August 2016, Mr. Fitzpatrick emailed Mr. McKay of McKay & Associates enclosing a draft letter for him to sign and return to Mr. Fitzpatrick. The email is as follows:

"Hi Robert,

Please see attached. This is a non-committal type of letter which consists of general observations – so you might do the necessary by return – note date.

Thanks.

Tony"

The attached letter is dated 28th July 2016 in the following terms:

"Dear Tony,

Re: Star Elm Frames Limited (in voluntary liquidation)

Disposal of Assts – expressions of interest, etc.

I am pleased to receive your instructions regarding the above.

Where stock consists mainly of cut-offs, they generally prove to be very costly to dispose of in an environmentally friendly manner and usually have a nil realisable value.

Also the Plant and Equipment is date as I was involved in this same site when Star Elm Limited was liquidated and it hasn't changed materially. If it has to be decommissioned, it will be of negligible value, so your best bet is to sell it in situ. Perhaps some of the staff might still be interested?

Following our recent advertising, I have had some expressions of interest but my view is that the equipment is of limited value and if you are not careful, it could end up costing you money, if you are left with it. Obviously individual items such as the Combi Lift has a second-hand value, subject it out mechanically, but most of what is included in the sale is the plant itself.

Yours"

8. Mr. McKay refused to send the draft letter and sent a responding email saying that it was not possible to offer the required advice without visiting Star Elm to inspect the assets in stock. He proposed to do that and he set out details of his intentions and charges.

9. These are the documents that the Revenue Commissioners, through Mr. Gladney, wish to put before this Court on the hearing. Ms. Lyons says that, as appears from the affidavit of Mr. Kirby, the emails were not included in the books and records that Mr. Fitzpatrick furnished to him, but were disclosed by Mr. McKay in the course of his dealings with Mr. Kirby. Ms. Lyons also refers to the report of the voluntary liquidator exhibited in the second affidavit of Mr. Fitzpatrick sworn on 2nd August 2016. She draws attention to the comparison between para. 10 of the interim report and the draft letter in question that Mr. Fitzpatrick sent to Mr. McKay.

10. Ms. Lyons sets out a number of comments and observations on this correspondence. Her fundamental point is that Mr. Fitzpatrick:

"Took steps to undermine the value of the assets of the company to the detriment of the creditors and thereby facilitate the establishment, if not continuance, of the new company and/or enterprise."

In regard to the latter part of this sentence, that is one of the disputed matters between the parties in regard to a lease and Mr. Fitzpatrick's conduct in relation thereto and also on the question of the continuation of the business and whether a Phoenix operation was in train. It is neither necessary nor appropriate for me to comment on any inferences or observations that arise in respect of any of this evidence. My function is to determine whether it is appropriate to permit the Revenue Commissioners to adduce the additional evidence outlined above and which is contained in the affidavits of Mr. Kirby and Mr. McKay and the materials exhibited thereto.

11. Relevant to the material in question in the email exchange are the affidavit of Mr. Kirby and the replying affidavit of Mr. Fitzpatrick. Among the matters in the affidavit of Mr. Kirby is correspondence with Mr. Fitzpatrick in regard to the issues now in question in the motion to adduce the additional or new evidence.

12. In his replying affidavit, Mr. Fitzpatrick maintains that much of the evidence in the affidavit of Davena Lyons is irrelevant for the purpose of the motion. He says that the affidavits of Mr. McKay and Mr. Kirby consist of hearsay evidence in regard to the matters under consideration now. Mr. Fitzpatrick denies the suggestion that he was telling Mr. McKay what to do, but rather says that this was in the way of an aide memoire for his own assistance. He has set out his view and his interpretation of the matter in question in a long letter to Mr. Kirby in response to the latter's enquiries. Moreover, he details his response in the affidavit which amounts to a rejection to the interpretation that is put on this exchange of email correspondence as asserted by Ms. Lyons.

13. On the hearing of this motion, submissions were made by the respective parties and it was argued on behalf of Mr. Fitzpatrick that the relevant legal tests for the admission of additional evidence on the appeal had not been met. It was also submitted that it would not be in the interest of justice to do so. Counsel also submits, inter alia, in addition to emphasising all the legal tests and the observations and the various authorities, that the interpretation of the emails in question is not agreed. Mr. Fitzpatrick disputes the interpretation and offers an entirely different and quite innocent explanation of his correspondence. This, it is said, represents a powerful argument against admission of new material.

## Discussion

14. There is no controversy about the test to be applied for the admission of new evidence on an appeal. In *Murphy v. Minister for Defence* [1991] 2 I.R. 161, Finlay CJ at p. 164 said as follows:

"The principles governing the admission of fresh evidence on an appeal to this Court have been set out in the decision of this Court in *Lynagh v. Mackin* [1970] I.R. 180. Neither counsel for the appellant nor the respondents on this motion has suggested to the Court that any other principles apply, although the Court should review that decision.

I am accordingly satisfied that the principles applicable are as follows:—

1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;
3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

15. In my judgment, the evidence ought to be allowed. It fulfils the test in *Murphy*. First, it was available at the time of the trial. As Ms. Lyons points out, 2nd August 2016, which is the date of the email from Mr. Fitzpatrick to Mr. McKay, is the same date as when Mr. Fitzpatrick swore his second affidavit. Secondly, it could not have been obtained by the exercise of due diligence on the part of the Revenue and Mr. Gladney because it was entirely in the possession and under the control of Mr. Fitzpatrick and unknown to the Revenue. Nor was it handed over – according to the affidavit of Mr. Kirby – pursuant to the order made by Humphreys J. in the High Court. It is manifestly credible in the sense that it emanates from Mr. Fitzpatrick so there can be no dispute about authenticity. In respect of the meaning to be ascribed or the interpretation to be placed on the email exchange, that is a matter for this Court when hearing the appeal by Mr. Fitzpatrick against the order of the High Court. The fact that there is a dispute as to interpretation does not exclude the material from being relevant. It is also a matter for this Court to decide how to resolve any conflict as to interpretation. The Court could take the view that the liquidator wrote a letter in terms that could be misunderstood or could be understood to contain a suggestion that would be irregular or improper even if that was not the intention of the writer. I am not suggesting that that is the interpretation that the Court ought to place on the matter, merely indicating that is among a range of possible meanings that the court might take from the material. At one end is the interpretation suggested by Ms. Lyons and at the other is the innocent explanation offered by Mr. Fitzpatrick. Depending on the interpretation placed on the email by Mr. Fitzpatrick, I think it is clearly relevant and of importance to the issue in the appeal as to whether the High Court was correct to order that the company be wound up under the direction of the court and in the appointment of an official liquidator to supplant Mr. Fitzpatrick, the voluntary liquidator. In respect of the rival claims to entitlement, the conduct alleged is clearly relevant within the meaning of the test. It is important, however, to emphasise that I say that without attempting to resolve any disputed question of interpretation.

16. In the circumstances, therefore, I propose to allow the application made.