



THE COURT OF APPEAL

Appeal No. 2016/218

2015/443

2015/394

**Finlay Geoghegan J.
Irvine J.
Hogan J.**

In The Matter of Ballyrider Limited (In Voluntary Liquidation) And In The Matter Of The Companies Act 1963 - 2012

Between/

REVENUE COMMISSIONERS

APPLICANT

RESPONDENT

- and -

ANTHONY J. FITZPATRICK

RESPONDENT/

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 26th day of July 2016

Introduction

1. The principal issues that arise for consideration on this appeal are:

(i) the circumstances in which a court might properly order the removal of a liquidator pursuant to s. 277 of the Companies Act 1963 ("the 1963 Act") or s. 638 of the Companies Act 2014 ("the 2014 Act") and whether on the evidence before Murphy J. in the High Court she was entitled to make such an order concerning the appellant ("Mr. Fitzpatrick") on 24th July, 2015, and

(ii) whether the consequential orders made by her on the same date in pursuance of the Court's power under s. 638(2) of the 2014 Act were lawful and warranted in light of Mr. Fitzpatrick's removal from his role as liquidator pursuant to s. 277 of the 1963 act.

Background facts

2. Ballyrider Limited ("the company") was incorporated on 17th August, 1987, and traded from premises known as the Hazel Hotel, ("the hotel"), Monasterevin, Co. Kildare. Mr. Fitzpatrick was appointed liquidator of the company at a creditors meeting held on 19th November, 2010. The Revenue Commissioners ("the Revenue") are preferential creditors in the liquidation in the amount of €109,027.00. A Committee of Inspection was duly appointed pursuant to s. 168(1) of the 1963 Act and this comprised Ms. Noreen Considine, representing the Revenue, and four other individuals representing the interests of other creditors

3. The hotel, which was subject to a charge in favour of Allied Irish Banks in the sum of €237,364.00, was initially sold by the liquidator at auction on 11th May, 2011, for a sum of €630,000 and a deposit of some €34,000 was paid by the purchaser, a Mr. Michael Phibbs. Unfortunately, the sale to Mr. Phibbs fell through following which the hotel was re-advertised and later sold in November 2011 to an alternative purchaser for the lesser sum of €479,000. Essentially, the hotel was the company's only significant asset. It is not disputed that the conveyance of the property was relatively complicated as the sale necessitated the purchase of certain adjacent lands, including a property owned by one of the directors.

4. As a result of these events, in January 2012 Mr. Fitzpatrick commenced proceedings against Mr. Phibbs to recover, for the benefit of the creditors, the loss considered to arise by reason of his default, that being a sum of approximately €150,000. In relation to this claim and indeed all other aspects of the liquidation Mr. Fitzpatrick retained the services of Mr. John Tobin, Solicitor, Limerick.

5. In his progress report dated 25th February, 2013, Mr. Fitzpatrick advised as to the likely outcome of the liquidation in the following terms:-

"Due to the lower than expected realisation on the sale of the company premises there will be no dividend available for the unsecured creditors of the Company. However, my Solicitor is seeking recovery of the shortfall between the price obtained at auction (€630,000 less €34,000 deposit) and €479,000 which was subsequently received by the Auctioneer in a delayed sale to Mr. Keane. The buyer at Auction, by failing to complete effectively ruined our Auction and resulted in a much reduced price being achieved in the subsequent sale.

The eventual outcome of the liquidation will be determined by the tangible result of this litigation, the legal costs arising and whether or not these costs will be recovered from the defendant. My next report is expected to be conclusive on this matter."

6. For reasons that will later be referred to, by originating notice of motion dated 19th August, 2014, the Revenue brought an application to the High Court seeking the following relief against the respondent, namely:-

- (i) an order pursuant to s. 280 of the Companies Act, 1963 directing the Respondent herein to refrain from bringing any action or other legal proceeding in the name and on behalf of the company; and
- (ii) an order pursuant to s. 280 of the Companies Act, 1963 declaring that the costs, charges and expenses incurred by the respondent, or a proportion thereof, are not properly incurred and therefore cannot be paid out of the assets of the company in priority to other claims;
- (iii) Or in the alternative to (i) and (ii), a order pursuant to s. 277 of the Companies Act 1963 removing the Respondent as voluntary liquidator of the company;
- (iv) such further or other directions as to the Court seem fit; and
- (v) the costs of this application."

7. The Revenue's application was based on an affidavit sworn by Ms. Noreen Considine dated 12th August, 2014, which spawned a number of further affidavits wherein the parties set out their respective positions. When this process was complete an oral hearing was conducted in the High Court in May, 2015 following which the High Court judge delivered a lengthy written judgment on the 21st July, 2015.

8. Following a further hearing on 24th July, 2015, in the course of which both parties made submissions as to the jurisdiction of the Court to grant the relief sought under the relevant provisions of the 1963 Act and the 2014 Act, the High Court judge made an order removing the liquidator pursuant to the provisions of s. 277 of the 1963 Act. While not so recorded on the face of that order, it is accepted that the consequential orders which she made directing the liquidator to pay over three particular sums of money, namely €51,000, €2,752 and €50,000, to the new liquidator, were made pursuant to the provisions of s. 638(2) of the 2014 Act.

9. It is also not in dispute that, while not so recorded in the order of the 24th July, 2015, the High Court judge directed Mr. Fitzpatrick to hand over to the new liquidator, when appointed, all of the books, records and the seal of the company, as well as the sum of €73,460, that being the sum the Court had been told was in the liquidator's account as of the time of the application. That she made such an order is clear from the content of her order of 30th July, 2015.

10. As is apparent from the order of 24th July, 2015, the High Court judge then adjourned the proceedings until 30th July, 2015, to permit, *inter alia*, the company's creditors to be notified of the Revenue's application to appoint Mr. George Maloney, of Baker Tilly Ryan Glennon, Accountants, to be liquidator.

11. On 30th July, 2015, the Court acceded to the Revenue's application to appoint Mr. Maloney as liquidator. The order of the Court of that date also recites as follows concerning the order of 24th July, 2015:-

"The COURT AFFIRMS the said consequential orders as being operative as and from today's appointment of George Maloney as replacement liquidator and the Court retains sesin of any issues arising hereafter in the liquidation. THE COURT GRANTS LIBERTY to the liquidator to apply to this Court in relation to future matters."

12. A notice of expedited appeal against the judgment and order of 24th July, 2015, was filed on Mr. Fitzpatrick's behalf on 30th July, 2015. By further notice of expedited appeal issued on 17th August, 2015, Mr. Fitzpatrick sought to appeal the order made by the High Court judge on 30th July, 2015. By notices of motion dated 29th July, 2015, and 27th August, 2015, Mr. Fitzpatrick, *inter alia*, sought a stay on both orders pending the determination of his two appeals. By order of my colleague, Finlay Geoghegan J., made on 3rd September, 2015, Mr. Fitzpatrick was granted a stay upon certain undertakings and was granted leave to amend his notice of expedited appeal dated 17th August, 2015, in terms of the draft notice of expedited appeal exhibited in the affidavit of his solicitor, Ms. Katherine Hunter, filed on 2nd September, 2015.

13. As a result of the aforementioned order, Mr. Fitzpatrick's separate appeals against the orders made on 24th and 30th July, 2015, are now all contained in his notice of expedited appeal filed on his behalf on 10th September, 2015. That notice contains a handwritten note to the effect that the document is a "merged Notice of Expedited Appeal" concerning appeals numbered 2015/394 and 2015/443.

14. In her supplemental written judgment of 27th October, 2015, the High Court judge ruled upon the Revenue's application brought pursuant to s. 280 of the 1963 Act seeking a declaration that the costs, charges and expenses as had been incurred by Mr. Fitzpatrick had not been properly incurred in the course of the liquidation. The conclusions of the trial judge are reflected in her order dated 29th April, 2016, which provided that neither the costs of the Revenue or those of Mr. Fitzpatrick were costs properly incurred in the liquidation. Mr. Fitzpatrick appealed this order by notice of appeal dated 10th May, 2016 and bearing appeal number 2016/218.

15. Accordingly, under appeal before this Court are the following orders namely:-

- (i) The order of 24th July, 2015, removing Mr. Fitzpatrick from his role as liquidator of the company pursuant to s. 277 of the 1963 Act.
- (ii) The consequential orders made on 24th July, 2015, made pursuant to s. 638(2) of the 2014 Act that Mr. Fitzpatrick hand over to the "new liquidator" the three specific sums of money referred to at para. 8 above.
- (iii) The order made on 30th July, 2015, appointing Mr. Maloney as liquidator.
- (iv) The order of 29th April, 2016, declaring that pursuant to s. 280 of the 1963 Act the costs which had been incurred by the Revenue and the liquidator in relation to the s. 277 proceedings were not costs properly incurred in the liquidation.
- (v) The order of 29th April, 2016, directing that the costs of the Revenue in respect of the s. 277 proceedings be discharged personally by Mr. Fitzpatrick when taxed or ascertained.

16. All of the aforementioned orders were ultimately stayed pending the hearing of this appeal.

17. This judgment relates solely to Mr. Fitzpatrick's appeal against the orders set out at (i) – (iii) in para.15 above in circumstances where the Court decided to postpone its adjudication on his appeal against the High Court order of 27th October, 2015. In his notice of expedited appeal dated 30th July, 2015, as later amended, Mr. Fitzpatrick challenges the lawfulness of his removal as liquidator and seeks an order that he be re-instated and be permitted to complete the liquidation on such terms as the Court might consider just.

The judgment of the High Court of 21st July, 2015

18. The High Court judge in her judgment (*Revenue Commissioners v. Fitzpatrick* [2015] IEHC 477) concluded that the Revenue had raised multiple issues of genuine concern relating to the manner in which Mr. Fitzpatrick had conducted the liquidation. While she considered some ten separate complaints made concerning his conduct of the liquidation and expressed herself disquieted in respect of almost all of them she ultimately expressed herself satisfied that he had not conducted the liquidation in an efficient and cost-effective manner. In coming to that conclusion she was particularly critical of his conduct in relation to three particular matters.

(i) He had engaged Mr. Tobin on a "time" basis and had failed to request that he issue a s. 68 letter outlining his anticipated conveyancing fees regarding the sale of the hotel. In circumstances where he might have agreed a set fee or a fee based on a percentage of the purchase price, the agreement struck with Mr. Tobin was one which was not cost-effective and exposed the liquidation to a claim for legal expenses higher than was necessary.

(ii) He had delayed the liquidation by instituting and maintaining the proceedings against Mr. Phibbs for non performance of the contract for sale of the hotel which had been agreed in May, 2011. While he was not obliged as a matter of law to consult with the Committee of Inspection or obtain its consent prior to the issue of such proceedings, it would have been prudent for him to have done so. He had obtained no written legal advice concerning the risks, if any, to the liquidation given that the claim was in respect of a post contractual liquidation debt and the distributable funds in the liquidation would be used to fund the litigation. Further, he had made no assessment as to the likelihood of his recovering any judgment that might be obtained against Mr. Phibbs. His conduct in relation to these proceedings could not be considered efficient and cost-effective.

(iii) In his four and a half years as liquidator Mr. Fitzpatrick had not produced an itemised account of his fees which would have enabled their proper consideration by the Committee of Inspection. Accordingly, on each occasion when he had sought approval for his fees, the Committee had refused his request. Further, he had given contradictory accounts as to the circumstances in which he had paid himself €50,000 on account of his remuneration. He had initially maintained that his remuneration in the sum of €79,693.70 had been approved of at the company's AGM held on 12th July, 2013. He later advised that his fees had not been sanctioned at that meeting but that a payment on account in the sum of €50,000 had been approved.

Submissions

19. In support of their respective positions adopted on this appeal the parties have delivered extensive written submissions which have been of significant assistance. However, it may assist the reader if I set out in skeletal format the principal submissions advanced in the course of this appeal.

20. On Mr. Fitzpatrick's behalf, Mr. Forde S.C. and Mr. Gibbons S.C. made the following submissions:

1. That the High Court judge was not entitled to reach the conclusions she did given that the application was heard in a summary manner and there was a clear conflict of evidence on the affidavits. The Revenue had chosen not to serve a notice seeking to cross examine Mr. Fitzpatrick on his affidavits. Neither had they sought a plenary hearing in the course of which they might have challenged the veracity of his evidence. That being so, counsel submitted that the Revenue's evidence was "inadmissible" and argued that that the Court was bound to accept Mr. Fitzpatrick's account of events on "all matters in controversy" with the result that this Court must conclude that the trial judge's findings are flawed.

2. The basis upon which the proceedings were commenced was completely misconceived. Other than a letter requesting that Mr. Fitzpatrick call a meeting of the Committee of Inspection in June, 2012 and a complaint later made in February, 2014 that he appeared intent on commencing proceedings against Mr. Phibbs against the wishes of the Committee of Inspection and without obtaining legal advice concerning the risks involved in such proceedings, no other criticisms had been voiced.

3. As to the Revenue's concerns regarding the advisability of instituting such proceedings without counsel's prior written opinion, the claim was, counsel submitted, so straightforward that such a complaint was untenable. Further, Mr. Fitzpatrick did not require the consent of the Committee of Inspection to pursue that claim. Insofar as those proceedings were delayed, that was due to the misfortune that the first three solicitors who had carriage of the case had either been suspended or struck from the Roll of Solicitors by the Incorporated Law Society. Consequently, culpability for that delay should not have been visited upon the liquidator.

4. Such complaints as the Revenue may have had concerning the fees due to Mr. Tobin ought to have been dealt with in the first instance in correspondence with the liquidator. Thereafter, if agreement could not be reached, the proper procedure was an application for directions under s. 280 rather than an application to remove the liquidator under s. 277 of the 1963 Act. The reasons why the fees paid to Mr. Tobin were so high had been explained by Mr. Fitzpatrick in his affidavit. Further, Mr. Michael Ryan, cost accountant, had carried out a root and branch analysis of Mr. Tobin's files and had deemed his fees appropriate. Further, those fees were currently awaiting taxation. That evidence was to be contrasted with Mr. Dorgan's opinion on behalf of the Revenue which went no further than to speculate as to what might have been contained in a s. 68 letter had it been issued.

5. The payment of €50,000 to Mr. Fitzpatrick on account of his remuneration had been sanctioned at the company's AGM on 12th July, 2013.

6. That in making the order under s. 277 of the 1963 Act the High Court judge had failed to have regard to the fact that the debt due from the company to the Revenue amounted to only 11.25% of its total outstanding liabilities. There was no evidence to suggest that the other 88.75% of creditors supported the Revenue's application.

7. On the facts as found, the conduct of Mr. Fitzpatrick was not sufficiently egregious to warrant his removal as liquidator. The trial judge ought more properly to have made an order giving such directions as she considered appropriate.

under section 280.

8. The High Court judge had acted in excess of jurisdiction in making the consequential orders which she made under s. 638(2) of the 2014 Act. That was a jurisdiction she did not enjoy given that she had not removed Mr. Fitzpatrick under the provisions of section 638(1).

21. On behalf of the Revenue, Mr. Binchy B.L. submitted:

1. There was no conflict on the facts deposed to in the affidavits that needed to be resolved by oral evidence in order for the trial judge to reach the conclusions she did. The dispute was as to the inferences to be drawn from the facts deposed to. The Revenue had, in accordance with O. 74 of the Rules of the Superior Courts, 1986 brought its application by originating notice of motion. No application was made for a plenary hearing nor was any notice to cross-examine served upon Ms. Considine. Further, this submission on the part of Mr. Fitzpatrick formed no part of his grounds of appeal.

2. Contrary to the submissions made on behalf of Mr. Fitzpatrick, the Revenue had not simply sought an order removing Mr. Fitzpatrick under s. 277. In addition and/or in the alternative it had sought the Court's directions under section 280.

3. The High Court judge had applied the correct legal principles and on the facts before her was justified in removing Mr. Fitzpatrick under section 277. It was not necessary to prove misconduct. It was sufficient to establish, as the Revenue had done, that the liquidation was not being carried out in an efficient and cost-effective manner.

4. The grounds relied upon by the High Court judge for Mr. Fitzpatrick's removal were substantial. He had failed to procure a s. 68 letter from Mr. Tobin concerning his likely conveyancing fees in respect of the hotel and had agreed his remuneration by reference to an hourly rate. He had delayed the liquidation by several years by issuing proceedings against Mr. Phibbs, which he then failed to prosecute with any diligence and had done so in circumstances where he had made no assessment as to the possible risks or benefit of those proceedings to the creditors. Further he had offered two contradictory explanations as to what had happened concerning his fees at the company's AGM of 12th July, 2013. Regardless of which account was correct, he had procured a payment to himself without the approval of the Committee of Inspection as required by s. 269 and in a manner such that the Revenue was given no notice of his intentions in that regard.

5. That the High Court judge, having made her order on 24th July, 2015, removing the liquidator under s. 277 of the 1963 Act, was entitled as a matter of law to make the consequential orders for directions under s. 638(2) of the 2014 Act. In this regard he relied upon s. 27 of the Interpretation Act 2005 and on the "Further Savings And Transitional Provisions" in schedule 6 to the 2014 Act.

Statutory provisions and relevant legal principles

22. Core to this appeal are the provisions of ss. 277, 280 and 281 of the 1963 Act and s. 638 of the 2014 Act. The relevant sections and subsections are as follows:

1963 Act

277(1) If from any cause whatever there is no liquidator acting, the court may appoint a liquidator.

(2) The court may, on cause shown, remove a liquidator and appoint another liquidator.

280(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of the power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

281. All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

2014 Act

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 whatsoever 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.

Discussion

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.

24. While there is no legal authority in this jurisdiction to assist this Court as to the type of circumstances that might be considered sufficient to justify the removal of a liquidator under s. 277 of the 1963 Act or s. 638(1) of the 2014 Act, helpful guidance is to be found in a number of UK decisions which were opened to the Court in the course of the hearing.

25. Of particular assistance is the judgment of Neuberger J. in *AMP Music Box Enterprises Ltd v. Hoffman* [2003] 1 BCLC 319, a case in which the Court considered its power under s. 108(2) of the 1986 Insolvency Act to remove a liquidator and appoint another "on cause [being] shown". While the following is a lengthy passage from that judgment, I believe it is particularly instructive concerning the proper approach to be adopted by a court when faced with such an application. Neuberger J. stated at p. 325:-

"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 Ltd* [2000] 1 BCLC 751, especially at paragraph 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* Millet J emphasised 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 section 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 was 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."

26. The same section of the Insolvency Act 1986 was considered by the English Court of Appeal in *Finnerty v. Clark* [2012] 1 BCLC 286 with reference to the circumstances in which the Court might exercise its discretion to remove an administrator from office. At para.16 of his decision Mummery L.J. advised that an applicant need not prove misconduct, personal unfitness, or lack of integrity on the part of the administrator. Of some significance in the context of this appeal is that he went on to emphasise 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. This is an important statement in the context of the present appeal in that it makes clear that 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 at first instance can be justified. That being so, many of the arguments advanced on behalf of Mr. Fitzpatrick fall away.

27. Having considered the jurisprudence earlier referred to and other helpful decisions cited by counsel in their written submissions it appears to me that the following principles can be stated to apply on an application to remove a liquidator namely:-

(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 dependant on proof by the applicant of misconduct, personal unfitness or any particular breach 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, amongst 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 the 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.

Decision

Decision to remove Mr. Fitzpatrick under s. 277 of the 1963 Act

28. It is clear from the decision of the trial judge that she made her order removing Mr. Fitzpatrick as liquidator based upon her conclusion that he had not conducted the liquidation in an efficient and cost-effective manner. That being so, the first question to be answered by this Court is whether, as a matter of law, she was correct in concluding that such a finding might reasonably support the making of an order under s. 277. The second is whether there was evidence sufficient to support her finding that the liquidation had not been carried out in an efficient and cost-effective manner.

29. In the absence of any authority in this jurisdiction as to the proper principles to be applied by the Court on an application to remove a liquidator under s. 277 of the 1963 Act or s. 638 of the 2014 Act, I am happy to endorse the list of principles to which I have referred, the greater number of which are to be found in the judgment of Neuberger J. in *AMP Music Box Enterprises Limited* but also from the other authorities to which the Court was referred. That being so I have no hesitation coming to the conclusion that the High Court judge applied the correct legal principles when considering the merits of the Revenue's application to remove Mr. Fitzpatrick. She concluded that he ought to be removed because he failed to conduct the liquidation in an efficient and cost-effective manner and such a conclusion has been held to constitute good cause for the making of such an order.

30. While counsel argued that the conduct complained of by the Revenue was not sufficiently egregious to warrant Mr. Fitzgerald's removal as liquidator, an issue to which I will later return, it is important to note that the relevant principles do not require that the applicant prove misconduct, personal unfitness or lack of integrity on the part of the liquidator. A lesser threshold and different considerations apply. It is sufficient for the Court to base its decision on proof that the liquidation has not been carried out in a cost-effective and efficient manner.

Was there evidence and/or sufficient evidence of lack of efficiency and cost-effectiveness to justify the removal of the liquidator?

31. The first point that needs to be addressed is Mr. Forde's argument that, having regard to the disputed facts deposed to by the parties in their respective affidavits, the High Court judge was not entitled to make the findings of fact which she did in the absence of hearing oral evidence from Mr. Fitzpatrick either on a plenary hearing or as a result of the service upon him of a notice to cross-examine

32. I have no difficulty in accepting the general principle that if there is a serious conflict of primary fact material to a court's intended conclusions, that dispute will usually, although not universally, have to be resolved in the course of an oral hearing between the parties. However, this is not such a case. The primary facts were not in dispute with the exception of internal inconsistencies in Mr. Fitzpatrick's own affidavits to which I will later refer. The High Court judge did not reach her conclusions by resolving any conflicts of primary fact in favour of the Revenue. Rather, her conclusions were based on the inferences which she drew from the primary facts.

33. I will now deal with the two "headline" issues which informed the Court's conclusion that Mr. Fitzpatrick had not conducted the liquidation in an efficient and cost-effective manner. The first of these is Mr. Fitzpatrick's decision to commence proceedings against Mr. Phibbs and the manner in which those proceedings once commenced were conducted and secondly his agreement with Mr. Tobin concerning his conveyancing fees in respect of the sale of the hotel.

34. When considering the evidence that was before the High Court it is, I believe, important to reflect upon the fact that Mr. Fitzpatrick was appointed as liquidator because of his professional qualifications. He is a chartered accountant and a personal insolvency practitioner with particular qualifications in insolvency and forensic accounting. That being so he was obliged to make a professional assessment as to the likely cost and outcome of those proceedings and if successful the prospects of recovering the amount of any judgment so obtained.

35. Regrettably, no such professional analysis was carried out in the present case. That lack of analysis is even more concerning in circumstances where the proceedings were instituted against the express wishes of the Revenue and without his decision to commence those proceedings being placed before the Committee of Inspection for its approval. Further, when the Committee of Inspection objected to the continuance of the proceedings its concerns were ignored.

36. It is of course correct that by reason of the provisions of s. 276(1)(b) of the 1963 Act Mr. Fitzpatrick did not need the approval of the Committee of Inspection which might, had it been afforded the opportunity, agitated the advisability of litigation against Mr. Phibbs. However, he was only entitled to commence those proceedings if he could be satisfied that they were in the interests of the liquidation and he could not have been so satisfied absent a proper assessment of the likely impact of those proceedings upon the liquidation. Having sidestepped scrutiny by the Committee of Inspection and having decided to ignore the wishes of the Revenue, he commenced the proceedings without obtaining any evidence as to the likely costs of those proceedings. Neither did he obtain any written opinion from counsel as to the strength of the case, as was evidenced by his letter of 7th October, 2013. Worse still, Mr. Fitzpatrick commenced the proceedings at a time when he had no positive information to suggest that Mr. Phibbs would be a mark for any judgment that might be obtained against him. The High Court judge referred to the fact that while the liquidator had made enquiries concerning Mr. Phibbs's financial standing, the report which he had received had not disclosed any information from which a decision could be made as to whether or not it was worthwhile proceeding against him. She went on to conclude that in circumstances where Mr. Phibbs had failed to complete the purchase of the hotel due to a lack of finance, any proper assessment as to whether such proceedings would likely benefit the creditors could only be made if he could be satisfied that any judgment obtained against Mr. Phibbs would likely be recovered.

37. Having regard to the potential costs implications for the liquidation of these proceedings, I am satisfied that the High Court judge had good grounds to conclude that Mr. Fitzpatrick's conduct in relation to the commencement of these proceedings could not be

considered to be cost-effective. The outcome of the liquidation was dependent upon the result of those proceedings. It may well be factually correct, as was deposed to by Mr. Fitzpatrick that the proceedings were *bona fide* commenced for the benefit of the creditors. However, he made no assessment as to whether they were likely to benefit therefrom.

38. Apart altogether from Mr. Fitzpatrick's decision to issue the proceedings in the circumstances last outlined, once he had decided to do so, it was his obligation to prosecute them in an efficient and diligent manner. Those proceedings were commenced in January, 2012. As he acknowledged in his progress report of 25th February, 2013, at para. 17, the liquidation could not be finalised until they had been brought to a conclusion.

"The eventual outcome of the Liquidation will be determined by the tangible result of this litigation, the legal costs arising and whether or not these costs will be recovered from the defendant. My next report is expected to be conclusive on this matter."

39. However, at the time of the hearing before the High Court some three and a half years later no defence to those proceedings had been delivered. That was still the position at the time of the hearing of the within appeal in the course of which the Court was advised that a motion for judgment in default of defence would be for hearing before the Court in early course.

40. The result of the delay in the conduct of the Phibbs proceedings is that the liquidation has been prolonged with the effect of potentially increasing the liquidator's costs and remuneration and the legal costs in the liquidation. The trial judge quite correctly in my view concluded that this delay demonstrated inefficiency on the part of the liquidator. As she stated in her judgment, the liquidator had been appointed in November, 2010. The company essentially had only one asset, the hotel. Three and a half years later the liquidation was still trundling along with no end in sight to the detriment of the creditors. Approximately €166,000 had been paid to the credit of the liquidation following the sale of the hotel and this sum had reduced to €73,460 by the time the proceedings came before the High Court.

41. I agree with the conclusion of the trial judge that it is no answer for Mr. Fitzpatrick to seek to distance himself from responsibility for the delay in the aforementioned proceedings on the grounds that two of the solicitors to whom he had entrusted this litigation were suspended and a third disqualified from practice by the Incorporated Law Society subsequent to the commencement of the proceedings, although these facts of themselves might raise significant concerns about Mr. Fitzpatrick's professional judgment regarding his choices of legal advisers.

42. Mr. Fitzpatrick is not in the same position as the ordinary litigant who finds their litigation delayed by inaction on the part of their solicitor. He is a professional who is presumed to be capable of carrying out his obligations as liquidator in a vigorous, efficient and professional manner. He is experienced when it comes to the institution and pursuit of legal proceedings. He knows that he must pursue those proceedings with diligence. Having commenced the proceedings he was obliged to monitor their progress and take whatever action he considered necessary to make sure that they were prosecuted with diligence because litigation of this nature has both timing and costs implications for the liquidation in general. Accordingly, in the absence of appropriate progress he should have removed the file to a firm of established solicitors so as to ensure those proceedings might be brought to an early conclusion. It is also relevant to note in light of the Revenue's complaints concerning the consequences of the delay for the liquidation, that Mr. Fitzpatrick put no evidence before the Court to demonstrate that he was actively pressing any of the solicitors concerned to bring the proceedings to a speedy conclusion.

43. The inefficiency of Mr. Fitzpatrick in relation to the Phibbs proceedings is all the more stark in circumstances where he has maintained in the course of this appeal that the legal issues involved in that litigation were so straightforward and the prospects of success so obvious that there was no need to obtain counsel's opinion on the legal issues involved before deciding to pursue such a course of action.

Mr. Tobin's conveyancing fees

44. In coming to her conclusion that Mr. Fitzgerald had not conducted the liquidation in a cost-effective manner the trial judge also relied upon the nature of the agreement he had reached with Mr. Tobin concerning his fees for the conveyancing work relating to the sale of the hotel. That agreement provided that Mr. Tobin would be paid an hourly rate for his services with the result that the liquidator incurred €40,238 in legal costs in respect of the two conveyances. Indeed at para. 39 of her judgment the High Court judge expressed herself unable to ascertain with certainty the precise level of fees which had been paid to Mr. Tobin out of the liquidation funds but was satisfied that they were somewhere between €46,000 and €51,000.

45. Concerning the aforementioned arrangement, the Revenue had exhibited advices it had received concerning this arrangement from Mr. Patrick Dorgan, solicitor and former chairperson of the Conveyancing Committee of the Law Society, to the effect that it was standard practice that the conveyancing fee would either be an agreed professional fee or one based upon a percentage of the purchase price. Based upon his report the argument advanced by the Revenue to the High Court was that a liquidator carrying out his duties in a cost-effective manner would have secured a competent conveyancing solicitor to carry out this work for no more than €7,500 plus VAT plus outlay.

46. In response Mr. Fitzpatrick exhibited a report from Mr. Michael Ryan, legal cost accountant, who, at his request, had inspected Mr. Tobin's conveyancing file and had concluded that the fees charged by Mr. Tobin were appropriate having regard to the terms upon which he had been retained.

47. It is very clear from the judgment of the trial judge that she was not concerned about the amount of work actually carried out by Mr. Tobin. What she was concerned about was the nature of the agreement which had been entered into with Mr. Tobin whereby he was to be paid an hourly rate. She was satisfied that such an agreement was not consistent with the liquidator's duties to act in a cost-effective manner, a conclusion with which I wholeheartedly agree.

48. While not central to her conclusion, the High Court judge was clearly concerned by the manner of Mr. Fitzpatrick's response to the Revenue's objection to the fees paid to Mr. Tobin. The judge described his conduct as a *volte face*. He had paid those fees without objection in 2012. He later retained a legal cost accountant whose report he relied upon to assert to the Court that the fees charged by Mr. Tobin had not been excessive and yet, following the commencement of these proceedings, had referred those fees which he had paid willingly to taxation.

49. Having regard to the submissions made on Mr. Fitzpatrick's behalf it is important to note that the High Court judge did not reject the content of Mr. Ryan's report which had justified Mr. Tobin's fees by reference to the hourly rate agreed. Neither did she accept that the appropriate conveyancing fee for his work was, as advised by Mr. Dorgan, on the Revenue's behalf. She made it clear that she did not have the evidence before her to enable her reach such a determination. What she was able to determine, however, was

that as an experienced liquidator, Mr. Fitzpatrick ought to have known that the engagement of Mr. Tobin on the aforementioned basis was inimical to the interests of the liquidation. To have agreed to pay him an hourly rate, particularly in circumstances where he had not procured a s. 68 letter to indicate the anticipated level of his fees, was inconsistent with his obligations to pursue a cost-effective approach to the liquidation.

50. While it is true to say that any single moderate act of inefficiency or lack of cost-effectiveness might generally be forgiven by a court on any application to remove a liquidator, in my view, this is not such a case. The evidence of his failure to manage the liquidation in a cost-effective manner was not confined to one or two minor episodes of inefficiency or lapses of judgment on the part of Mr. Fitzpatrick. The defaults relied upon by the High Court judge, were in my view significant in the overall context of this liquidation.

51. The Court must, of course, adopt a balanced approach to any application made to remove a liquidator and the authorities make clear that even if satisfied that a liquidator has failed to live up to his obligations to carry out his work in an efficient, cost-effective and vigorous manner, it may nonetheless refuse the relief sought if satisfied that he will live up to those requirements in the future. As the decision in *AMP Music Box Enterprises Limited* makes clear, the liquidator should be removed if the Court is satisfied that they have not performed their duties in the manner earlier described, unless confident that their errors would not be repeated in the future. Regrettably, it is abundantly clear from the decision of the trial judge that she was not confident that Mr. Fitzpatrick had demonstrated himself willing or capable of completing this liquidation in a manner consistent with his obligations. That this is so is clear from the conclusions she reached concerning not only the matters to which I have already referred but also from her expression of concern as to the manner of his approach to his own remuneration.

52. In the course of the affidavits exchanged between the parties, it became clear that at the first meeting of the Committee of Inspection Mr. Fitzpatrick had maintained that he was due a sum of €91,618 in respect of his remuneration and that the Committee had been unwilling to approve that. At para. 20 of his affidavit dated 10th November, 2014, he maintained that he was due fees of €79,693.70. He supported the appropriateness of those fees by exhibiting a report from Mr. James Jennings of James Jennings & Co, chartered accountants, dated 7th November, 2014, who advised that his fees were reasonable for the work that had been carried out and that the charges imposed were in line with professional norms for insolvency work. At para. 40 of his affidavit Mr. Fitzpatrick stated as follows:-

"I say my remuneration and report in the sum of €79,693.70 was approved at that meeting [AGM 12th July, 2013] by the creditors and an interim payment in the sum of €50,000 was approved. I say on the morning of the AGM meeting on 12th July 2013 the Revenue emailed to say they would not be attending. I say if the Revenue wished to bring the application challenging my fees, they should have done so within the time frame after that AGM."

53. In response, the Revenue advised that until such time as it received Mr. Fitzpatrick's affidavit it had been unaware that his remuneration had been agreed in the sum of €79,693.70 at the AGM held on 12th July, 2013, or that the meeting had sanctioned an interim payment of €50,000.

54. Contrary to what had been asserted by Mr. Fitzpatrick in his first affidavit, at para. 49 of his affidavit sworn on 16th January, 2015, he averred as follows:-

"For further clarification the fee of €79,693.70 has not been discharged as it was not approved. A payment of €50,000 plus Vat, that being a payment on account, was sanctioned at the AGM at 12th of July 2013. For the record €40,650 plus Vat was actually drawn down on November 2013."

55. Arising from this alternative account of events, Ms. Considine, in her affidavit of 23rd January, 2015, stated that the Committee of Inspection had met on 11th July, 2013, and that at that meeting Mr. Fitzgerald had sought approval for an interim payment of €50,000 in respect of his remuneration but the creditors present had refused to approve such a payment. Accordingly, the Revenue considered the issue concerning an interim payment of fees was closed. She also advised that Mr. Fitzpatrick's notice of the meeting of 12th July, 2013, failed to disclose that he would be raising the matter of a payment on account of his remuneration at that meeting and that had the Revenue had notice that he intended to do so it would have attended to oppose such a payment due to the fact that it had serious concerns regarding his remuneration and costs.

56. The upshot of these contradictory statements is that if Mr. Fitzpatrick's first account is correct he procured the unlawful sanction of his remuneration at the AGM on 12th July, 2013. If his latter account is true, the position he initially outlined to the Court in which he stated it was no longer open to the Revenue to challenge his remuneration which was agreed in the sum of €79,693.70 was to mislead the Court.

57. While it was argued by Mr. Forde in the course of the appeal that the creditors in a general meeting have the power to approve of a liquidator's remuneration, that is clearly not the case having regard to the provisions of s. 269(1) of the 1963 Act which provides as follows:-

"The Committee of Inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators."

58. Not only was the High Court judge concerned as to the manner in which Mr. Fitzpatrick had sought to obtain approval of his fees and a payment on account of those fees as outlined above, she also expressed herself concerned that he had not produced for the Court a detailed set of accounts or a plan to demonstrate how he might steward the liquidation to a timely conclusion. Instead, he had chosen to invoke his legal right to act as he had done throughout. He had, she concluded demonstrated a flawed understanding of the role and duties of a liquidator thus leading her to conclude that the loss of confidence expressed by the Revenue was genuine and warranted.

59. It follows that in seeking to have his remuneration approved by the general body of creditors not only did Mr. Fitzpatrick ignore the statutory code governing his conduct, but he did so in a manner which deprived the Revenue of any opportunity to object to his remuneration and did so in the full knowledge of the objections made the previous day by those creditors in attendance at the meeting of the Committee of Inspection.

60. The High Court judge instanced the fact that in November, 2014, Mr. Fitzpatrick had procured the report from Mr. Jennings in order to provide a second opinion in relation to his own fees in the liquidation. She noted that his report contained no detail as to the amount of work carried out by the liquidator, the time expended thereon or the fees charged. Neither was this information annexed to his report. Further, he had proved himself not to be amenable to the supervision of the Committee of Inspection.

Conclusion on removal issue

61. I fully accept that the removal of a liquidator is a serious matter for any court and the relief should not to be granted lightly. In particular, I would endorse the sentiments expressed by Neuberger J. in *AMP Music Box Enterprises Ltd* that the Court should not remove a liquidator merely because it can be shown that in one or possibly more than one respect his conduct has fallen short of the ideal.

62. It is also undoubtedly the case, as was submitted by Mr. Forde, that the making of such an order is likely to have reputational consequences for a liquidator which may have an impact on his/her professional standing and reputation (see *Re Edenote Ltd* [1996] 2 BCLC 389). However, while such a consideration is relevant it is very much subsidiary to the interests of the creditors if good cause has been shown to justify their removal. As Bowen L.J. stated in *Re Adam Eyton Ltd. (Ex Parte) Charles work* (1887) 36, Ch. D. 299 at p.306:-

"Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation."

63. However, as Millett J. stated in *Keypack* and as endorsed by Neuberger J. in *AMP Music Box Enterprises Ltd.*, any such considerations cannot trump the rights of creditors to have a liquidation conducted by the liquidator in a vigorous, effective and independent manner and the Court, regardless of the fact that such a removal will likely discredit the liquidator, should not shy away from its responsibilities to ensure that the interests of the creditors are protected.

64. For the reasons above stated, I am quite satisfied that the High Court judge identified the correct legal principles to be applied on the Revenue's application to remove Mr. Fitzpatrick as liquidator. Her decision was principally based upon her conclusion that he had not conducted the liquidation in an efficient and cost-effective manner and those provided good grounds for granting the relief sought. The evidence concerning the liquidator's conduct in relation to the Phibbs proceedings and the agreement made with Mr. Tobin as to how he was to be remunerated in respect of his conveyancing fees, were more than sufficient, in my view, to justify her conclusion.

65. I am further fortified in my view that the High Court judge was entitled to make the order which she did in circumstances where, having regard to the additional concerns of the Court as to his conduct in respect of his own remuneration, it could not confidently be concluded that if left *in situ* Mr. Fitzpatrick would live up to the requirement that he complete the liquidation in an efficient, vigorous and cost-effective manner.

Consequential orders

66. The parties are agreed that the High Court judge made her order removing Mr. Fitzpatrick as liquidator on 24th July, 2015, that she did so by exercising her jurisdiction under s. 277(2) of the 1963 Act and not under s. 638(1)(b) of the 2014 Act. That she did so is not surprising in circumstances where, at the date of the hearing before her (in May 2015) the 2014 Act had not been commenced. The relevant provisions of the 2014 Act were commenced by ministerial order on 1st June 2015.

67. The parties are also agreed that the consequential orders which she made concerning the three sums of money earlier referred to were made pursuant to the jurisdiction conferred on the Court under s. 638(2) of the 2014 Act. Again, it is conceded that the High Court judge might have chosen to make her consequential orders pursuant to s. 280 of the 1963 Act, but chose not to do so.

68. The question that therefore calls for consideration is whether the consequential orders made on 24th July 2014, were properly made in circumstances where the liquidator was not removed pursuant to the Court's powers under s. 638(1) of the 2014 Act and a new liquidator appointed to replace him under the same section.

69. While the wording of s. 638 of the 2014 Act has been set out earlier, I will repeat it here for ease of reference. It provides as follows:-

"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."

70. It is common case that the High Court judge did not, as per the provisions of s. 638(1)(b), "on cause shown, remove the liquidator and appoint another liquidator" on the day in question. While she was in a position on 24th July 2015, to make an order removing the liquidator under that section. she was not in a position to appoint another liquidator under the same section because the Revenue were required to give notice to the creditors of its intention to seek to have Mr. Maloney appointed to the role of liquidator. This was the reason why she adjourned the proceedings until 30th July, 2015. Accordingly, on 24th July, 2015, she was not in a position to "remove the liquidator and appoint another liquidator" as provided for in s. 638(1)(b) with the result that she was not entitled to make an order giving consequential directions under s. 638(2) thereof as of the day she purported to make the order.

71. While Mr. Binchy argues that the validity of the consequential orders made under s. 638(2) can be upheld by reference to s. 27(2) of the Interpretation Act 2005 ("the 2005 Act") and schedule 6 to the 2014 Act, I cannot accept his argument. The extracts he relies upon are as follows:-

"27(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out as if the enactment had not been repealed.

Schedule 6 [of the 2014 Act]

Further Savings and Transitional Provisions

Section 5

1. The continuity of the operation of the law relating to companies shall not be affected by the substitution of this Act for the prior Companies Acts.”

72. I am not satisfied that these transitional provisions can benefit the Revenue in seeking to advance its argument that the consequential orders were properly made under s. 638(2) of the 2014 Act. Section 27 of the 2005 Act does no more than protect proceedings which are in being at the time when an enactment is repealed from any resulting prejudice. Such proceedings may be continued and brought to a conclusion in precisely the same manner and subject to the same legislative provisions as existed immediately prior to such repeal. In relation to the application to remove Mr. Fitzpatrick, the effect of s. 27 of the 2005 Act is to confirm the jurisdiction of the High Court judge, notwithstanding the commencement of the 2014 Act, to make an order removing Mr. Fitzpatrick under s. 277 of the 1963 Act and such consequential orders as she might deem appropriate under s. 280 of the same Act.

73. For these reasons I have come to the conclusion that the High Court judge was in error when she decided to make the consequential orders, not as she might have done under s. 280 of the 1963 Act, but based upon the provisions of s. 638(2) of the 2014 Act. On 24th July, 2015, she had not made an order under s. 638(1)(b) removing the liquidator and appointing another in his stead, a pre-requisite to the entitlement to make consequential orders under section 638(2).

74. For the sake of completeness, I should perhaps state that even if I had come to the conclusion that the consequential orders were valid, notwithstanding the statutory provisions to which I have referred, I would in any event have acceded to Mr. Fitzpatrick's appeal to have the first of such consequential orders set aside. The order in question was the order directing him to hand over to the new liquidator the sum of €51,000 paid over and/or retained by Mr. Tobin on account of his legal fees.

75. While the Revenue had sought to have the High Court judge declare that the total legal fees to be borne by the liquidation for Mr. Tobin's conveyancing work should be €9,598 or some lesser sum, the High Court judge specifically declined to grant that relief. While she was clearly perturbed at the sum which had been paid to him on account of his fees, particularly in light of the fact that the secured creditor had paid the liquidator a sum of €7,500 in respect of the cost of the realisation of its security, a figure she considered might give some indication as to what the appropriate fees ought to be, she expressed herself satisfied that such a determination could not be made absent a full and detailed itemised account. All she was in a position to conclude was that the agreement which Mr. Fitzpatrick had entered into with Mr. Tobin was one which could not be considered cost-effective or in the interests of creditors.

76. Whether the legal costs paid to Mr. Tobin will ultimately be deemed to have been properly incurred by the liquidator has yet to be decided. The payment which he has received has been made “on account” of his fees. Accordingly, should it later be decided that those fees were not reasonably incurred the same will have to be refunded to the liquidator. That being so, until such time as the determination is reached on the issue in my view it would not be appropriate to direct the return of such funds to the liquidator.

77. It follows, accordingly, that the issue as to whether there had, in fact, been an over-payment to Mr. Tobin could not properly be regarded as a consequential order in this sense. It was rather a substantive issue to be determined, if necessary, in the course of the proceedings. Put another way: it was not a matter which directly flowed from the removal of Mr. Fitzpatrick as liquidator and the appointment of Mr. Maloney in his stead in the way that, for example, an order providing that the former hand over to the latter all the books and records of the company necessarily would.

78. I should also state that had the High Court judge not erred in making her consequential orders under s. 638(2) of the 2014 Act I would indeed have upheld her consequential order concerning the return of the sum of €2,752.00 having regard to her conclusion that this cost had been incurred by Mr Fitzpatrick solely for the purpose of seeking to justify his own actions in relation to the payment of Mr Tobin's fees.

79. Likewise, had it not been for the error made by the High Court judge as to jurisdiction I would have been satisfied to dismiss Mr. Fitzpatrick's appeal against her order directing him to pay to the new liquidator the sum of €50,000 which he had received on account of his remuneration having regard to the fact that that payment was not approved of by the Committee of Inspection as is required by the provisions of s. 269 of the 1963 Act.

Conclusions regarding the consequential orders

80. For the reasons already stated I am satisfied that the High Court judge erred in law insofar as she made the consequential orders which she did on 24th July, 2015, pursuant to the provisions of s. 638(2) of the 2014 Act. She had no jurisdiction to do so in circumstances where she had not, as required, removed the liquidator, for cause shown, under s. 638(1) thereof and appointed a new liquidator in his stead.

81. In these circumstances I would refuse Mr. Fitzpatrick's appeal against the order of the High Court judge made under s. 277 of the 1963 Act but I would allow his appeal against the consequential orders invalidly made by the High Court judge under s. 638(2) of the 2014 Act.

82. For the sake of completeness it is important to note that, while not so stated on the face of the order of 24th July, 2015, it is agreed that the High Court judge ordered Mr. Fitzpatrick to transfer to the new liquidator, when appointed, all the books and records of the company and the papers relating to the liquidation and the sum of €73,460, being the monies then standing to the credit of the liquidation. Counsel for Mr Fitzpatrick indicated that he accepts that he must comply with that order, from which he did not appeal, if the decision removing him is upheld.

Appeal against the appointment of Mr. Maloney

83. The only grounds advanced on behalf of Mr. Fitzpatrick to support his appeal against the validity of the appointment of Mr. Maloney are those which he advanced on his own behalf when seeking to appeal against his removal. That this is so is clear from ground (iv) and ground (xiv) of the merged notice of appeal which reads as follows:

“The learned judge erred in law and in fact in the appointment of Mr. Maloney as a Respondent Liquidator to the Appellant Respondent for the reasons set out in the Appeal dated 30th July 2015”.

84. That this was the sole basis of Mr. Fitzpatrick's appeal against Mr. Maloney's appointment was clarified to the Court in the course of a very brief supplemental hearing, which took place on 7th July, 2016, in the course of which Mr. Gibbons, S.C., on Mr. Fitzpatrick's behalf accepted that should the Court find against Mr. Fitzpatrick on his removal that no issue was being taken with the validity of Mr. Maloney's appointment.

85. In the circumstances, for the reasons already advised, I am entirely satisfied as to the validity of Mr. Fitzpatrick's removal as

liquidator. It follows that Mr. Fitzpatrick's appeal against Mr. Maloney's appointment as liquidator must fail.