THE HIGH COURT

[2018 No. 239 COS]

IN THE MATTER OF CHAMBURY INVESTMENTS COMPANY LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

EX TEMPORE JUDGMENT of Mr. Justice McDonald delivered on the 21st day of September, 2018

1. This is a winding up petition in which the Petitioner, Balark Investments Limited ("Balark) essentially seeks to unseat a liquidator previously appointed at a meeting of creditors of Chambury Investments Company Limited (the "Company") which took place on 11th June 2018.

2. The Company is indebted in an as yet unascertained sum to Balark on foot of a number of costs orders that were made against the Company in the course of proceedings taken by Balark against the Company in which Balark, as holder of the relevant leasehold interest, sought to compulsorily acquire the freehold interest owned by the Company in two plots adjacent to Sir John Rogerson's Quay, which have been referred to in the proceedings as Plot number 3 and Plot number 5. The intention of Balark is to develop these plots in conjunction with a number of adjoining plots in respect of which it is the owner of the relevant leasehold interests.

3. It is unnecessary to describe those proceedings in detail. It is sufficient to note at this point that Balark's claim was successful before the County Registrar, in turn her decision was appealed by the Company to the Circuit Court and His Honour Judge Quinn also held that Balark was entitled to succeed, although he increased the price to be paid to the Company for the freehold interests. Thereafter, the Company appealed the decision of Judge Quinn to the High Court, where it was admitted, together with two further sets of proceedings between the parties, into the Commercial list. Those other proceedings essentially related to whether Balark was entitled to carry out redevelopment works on the land.

4. A concurrent hearing of the proceedings took place before Haughton J. over six days commencing on 15 December 2017 and concluding on 12 January 2018. Balark succeeded on all fronts and Haughton J., in a judgment delivered on 13 March 2018, held that it is entitled to acquire the freehold in Lot 3 for €30,000 and Lot 5 for €10,000. Balark secured orders for costs against the Company in respect of all three hearings before the County Registrar, the Circuit Court and the High Court and, understandably, is now aggrieved that the Company has gone into liquidation, leaving Balark with no realistic prospect of ever recovering any part of those costs, save to the extent that it can effect a setoff of the sums it owes to the Company of €10,000 and €30,000 respectively. I note in that context that there has already been an order made by Haughton J. that it is entitled to recover €40,000 pending taxation.

5. At this point it should be noted that besides Plot 3, which has been held definitively on appeal to be worth €30,000 and Plot 5, which has been held definitively on appeal to be worth €10,000, the only other asset ever owned by the Company was the freehold to Plot number 7, which is also occupied by Balark under lease but which was not the subject of the freehold acquisition proceedings that I have just mentioned.

6. It emerged during the course of the hearing before Haughton J. that Plot number 7 had been transferred to another company controlled by what I might call the Ronan interests. That transfer took place in December 2017, in close proximity to the hearing of the proceedings before Haughton J. The price for the transfer was €70,000 and this sum was then used to pay legal fees. There is some dispute as to whether this was to pay the fees of counsel for the December hearing or to pay legal fees more generally, but in my view that is a complete side issue and not one which I should or indeed could resolve on the basis of the conflicting affidavit evidence.

7. At the time of the transfer, the directors of the Company did not have the benefit of the judgment of Haughton J. They were still maintaining in the proceedings before Haughton J. that the value of the freehold interest of Plots 3 and 5 was of the order of €20 million, a contention which had failed before the County Registrar and the Circuit Court.

8. As mentioned earlier, Haughton J. gave his decision in March 2018. In the meantime, Balark had served a summons to tax and a bill of costs in relation to the Circuit Court proceedings and the bill claimed €646,751.82 on a party and party basis. There were dealings between the costs accountants on both sides, during which an arrangement was discussed which envisaged that the Circuit Court costs would be agreed at €200,000. Balark maintain that this was never finally agreed and that there are many reasons why someone in Balark's position might agree to take a reduced figure for costs, including early payment and the fact that they were dealing with what by now was an asset-less company.

9. Nonetheless, in a letter from Behan & Associates of 11 May 2018, which has been exhibited, it does appear to be clear from what is said in that letter that the bill which had been presented claiming €646,751.82 did contain a solicitor and client element, and I think that is clear from what is said in the third last paragraph of the letter, where, when commenting on what were described as unnecessarily inflammatory remarks describing the bill that had been presented on the part of the solicitors acting on behalf of the Company, Behan & Co., acting on behalf of Balark, said:

> "I think you will agree it is unnecessarily inflammatory to maintain that the costs were 'patently grossly inflated'. The simple fact is that my clients are entitled to party/party costs only, which is a very imperfect indemnity and I am sure you will explain to your solicitors that there is an obligation to seek the entire solicitor/client costs."

10. It does appear to be clear from that paragraph that it recognises that at least part of the costs that were claimed in the bill of costs were solicitor and client costs and that, accordingly, the party and party costs were somewhat less than that.

11. In any event, Balark's case is that the taxation before the County Registrar was adjourned to enable instructions to be obtained from the Company as to whether it would proceed to settle on the terms recommended by the legal costs accountants. The matter came before the County Registrar on 31 May 2018 and was adjourned further in circumstances where those instructions were not forthcoming and on the following day, 1 June 2018, a notice convening the creditors' meeting was circulated, and that came without any prior warning or notice to Balark.

12. The creditors' meeting then took place on 11 June 2018, it was chaired by Mr. John Savage, a director of the Company and the deponent of the affidavits filed on behalf of the directors in this case. Only four parties attended that meeting in the capacity of

creditors. They were Eversheds Sutherland, solicitors to the Company, who had acted in the litigation and are still acting for the directors and their claim was admitted by the Chairman in the sum of €309,000. Now, I should note at this point that no documentary material has been put before the court to substantiate that sum, but that was the sum that was accepted by the Chairman at the meeting. The next creditor who attended was Castle Cove, which is a company also controlled by the Ronan interests, and it was admitted in respect of monies advanced to the Company apparently to fund the litigation in the sum of €447,000. The third creditor, Cooney Carey, were the auditors to the Company and they were admitted in a sum of €1,200. Then Balark attended, and their claim was for a total sum of €1,150,000, made up of the Circuit Court costs figure I mentioned earlier, together with €550,000 for High Court costs. But no documents, again, have been put before the court in relation to the High Court costs and I have never seen any bill of costs or any invoice for costs in respect of that figure of €550,000.

13. The Chairman ruled that he would allow, in respect of Balark's claim, €200,000 in respect of the Circuit Court costs and €150,000 in respect of the High Court costs. When credit was given for the €40,000 due by Balark to the Company pursuant to the orders made by Haughton J., that left a net balance of €310,000, which was as much as the Chairman was prepared to allow for voting purposes.

14. The vote then took place on who should be appointed liquidator. The Company proposed a well-known and well respected liquidator, Mr. Miles Kirby. Balark proposed an equally well-known and well respected liquidator, Mr. Declan McDonald. Castle Cove, Cooney Carey and Eversheds Sutherland all voted in favour of Mr. Kirby and he was, therefore, appointed on the basis of the figures that I have mentioned earlier. There was a majority in number and a majority in value in favour of Mr. Kirby.

15. The petition was then presented by Balark with commendable speed to the court on 21st June 2018 and it seeks, as I said earlier, a winding up by the court and this is on the just and equitable ground and on the basis that the Company is unable to pay its debts as they fall due. But it is of some importance to note that the locus standi relied upon for the purposes of presenting the petition is that Balark is a creditor of the Company, and this is made clear in paragraph 12 of the petition.

16. That petition came on for hearing before me on 31st July. Unfortunately, it was not possible to conclude the hearing on that day and the hearing resumed yesterday.

17. I have to say that it is clear from everything I have heard and read that there is a deep level of animus between the parties which does neither party credit. While it may be naive to think that businesspeople could conduct their affairs in a more civilised way, it is unedifying to see the level of animus that exists here. However, as I have already indicated in the course of the hearing yesterday, I do not believe that it is appropriate for me to allow the animus that exists between the parties to affect the decision which I make, which must be made by reference to the applicable legal principles, which are now well known and well established and it is to those principles that I now turn.

18. I should say that having identified the principles, which I will do in a moment, I will then consider the case made by Balark as to why it contends that the court should intervene in this case.

19. As I said, the legal principles are well established and have been articulated in a series of judgments over the years, particularly in a number of judgments of Laffoy J. and it is clear from the authorities that the court has a discretion. The outcome of the exercise of the discretion will depend on the facts and circumstances of an individual case. This is something that was made clear by Laffoy J. in *Balbradagh Developments Limited* [2009] 1 IR 597. And she makes that clear at page 603 of the report, where she says:

> "However, each application to convert a creditors' voluntary liquidation into a compulsory liquidation must be adjudicated on its own facts and circumstances."

And obviously that, in turn, depends on the evidence which is placed before the court.

20. The established case law identifies the factors that are relevant to the exercise of the court's discretion and I turn, in that context, to another judgment of Laffoy J. in *Larkin Partnership Limited* [2010] IEHC 163, where, at page 13 of her judgment, she very usefully summarises the factors which are taken into account by the court in the exercise of its discretion in cases of this kind. And she identifies in paragraph 26 of her judgment the factors that were identified:

> (a) "the wishes of the majority of the company's creditors;
>
> (b) whether the petitioner has a 'justifiable sense of grievance';
>
> (c) the cost and time involved in a compulsory liquidation as compared with a voluntary liquidation, having regard to the assets and liabilities of the company;
>
> (d) the complexity or conflict which may be involved in the investigation of alleged wrongdoing of the directors of the company;
>
> (e) the entitlement of the petitioner to apply to the Court to determine any question arising in the winding up;
>
> (f) the integrity, independence and capacity of the liquidator in situ;
>
> (g) the supervisory role of the office of the Director of Corporate Enforcement; and
>
> (h) the expedition of the petitioner in presenting the petition."

21. If I may just interpose there, clearly here Balark has not delayed in any way in presenting the petition. And that factor obviously weighs in its favour in this case.

22. But in her judgment in the *Larkin Partnership* case, Laffoy J. goes on to consider what is meant by a justifiable sense of grievance, and she deals with is this in paragraph 27 of her judgment, where she says:

> "In submitting that the 'justifiable sense of grievance' factor is a factor to be considered in these proceedings, counsel for the petitioner submitted that it is important to consider the nature of the wrongdoing alleged to give rise to the justifiable sense of grievance, quoting the following passage from the judgment of O'Neill J. in Re *Hayes Homes*."

Then she quotes from O'Neill J., who said:

> "In my view this court should be disposed to intervene if the circumstances deposed to on affidavit show that the assets of the company, such as the goodwill of its business, have gone to an associated company without any payment and the liquidation is in the hands of the nominee of the person or persons who had control over the company and the connected or associated companies, and where the nominee of the majority of the creditors who stand to lose substantial monies has been rejected."

23. It was also submitted that, in formulating that test, O'Neill J. had not imposed a requirement that a standard of proof be met in relation to alleged wrongdoing. Rather his decision was founded on an inference that –

> "... the petitioner would undoubtedly have a strong sense of suspicion and grievance arising from the fact that the petitioner is the only party to whom any substantial debt was owed by the company and also the fact that the only potentially realisable asset of the company i.e. its goodwill, would appear to have [been] transferred to an associated company without any recompense. It may of course be the case having regard to the trading of the company which had resulted in a substantial loss, and the market conditions prevailing in the market in which it is operated that the goodwill might have had little realisable value. That is beside the point, which is, that from the point of view of the petition this aspect of the affairs of the company create justifiable suspicion and would require rigorous investigation'."

24. While Laffoy J. does not say that she is expressly adopting all of that as her judgment, I think it is clear that she proceeds on the basis that all of what I have just read out from her judgment represents the principles that should be applied.

25. One sees in a subsequent judgment delivered by Laffoy J. in *Fencore Services Limited* [2010] IEHC 358 that she again applies very similar principles and again cites the *Hayes Homes* decision as the basis for identifying in what circumstances the court will intervene and will conclude that there is a justifiable sense of grievance on the part of the Petitioner.

26. Now, I am conscious that it was also submitted to me by counsel for Balark that the court should bear in mind the principles set out in an English decision, Re *Zirceram Limited* [2000] 1 BCLC 751, a decision of Lawrence Collins QC (as he then was) and it is true that in the *Permanent Formwork Systems* case Laffoy J. did draw attention to the reliance that was placed by counsel in that case on the *Zirceram* case, but I do not ultimately think it is necessary to rely on *Zirceram*. It seems to me that the principles outlined in *Zirceram* are not significantly inconsistent with the principles relied on by Laffoy J. in the two judgments to which I have just referred, which are later in point of time to her judgment in the *Permanent Formwork Systems* case. I am also conscious of the observation made by Laffoy J. on page eight of her judgment in the *Permanent Formwork Systems* case where she says:

> "It would seem that the English courts are more inclined to accede to a creditor's petition than are the courts in this jurisdiction."

27. In those circumstances, I prefer to rest my judgment on the factors which are outlined by Laffoy J. in the two judgments which I mentioned earlier and which it seems to me deal very fully, in any event, with circumstances where a petitioning creditor has a justifiable sense of grievance. Therefore, I do not believe that I am doing any discredit to the Petitioner in adopting this course.

28. Before leaving the legal principles, I should say that I cannot see anything in the case law which envisages that the court should approach the matter in the manner suggested by Mr. Fanning yesterday by asking what prejudice could any creditor assert or identify in opposition to the petition. In my view, the effect of the case law is clear, the onus lies on the petitioner to establish, by appropriate evidence, that there is an issue of such concern that it requires to be investigated by a liquidator who is not only independent but is seen to be independent. The petitioner does not, of course, have to prove the case, but it has to place sufficient evidence before the court to raise an issue of concern. And when one looks at the cases, those in which the petitioner has succeeded are those in which the petitioner has established on the evidence that there is an issue of some gravity which requires such an independent investigation.

29. In the present case I do, however, entirely accept Mr. Fanning's submission that no creditor has come to court to articulate any concerns as to why the voluntary liquidation should continue. Eversheds Sutherland did attend in July to say they opposed the petition, but I have heard no submissions from them and Mr. Dunleavy, who appears for the directors, cannot speak for the creditors.

30. Nonetheless, it does seem to me that Balark, as Petitioner, has the onus of demonstrating that there are factors here of such gravity that they require the court to intervene to supplant the voluntary liquidation with a court liquidation, notwithstanding that a voluntary liquidation is a statutory process subject to supervision by the Director of Corporate Enforcement and which is currently being undertaken by a liquidator whose credentials, experience and expertise have not been called into question.

31. For completeness, I should say that I do not think that I can safely conclude that Eversheds Sutherland or Cooney Carey are connected creditors of the Company. I think it is clear from the judgment of Laffoy J. in the *Balbradagh* case at page 601 of the report that she regarded the company solicitors and auditors there as unconnected creditors and no authority has been cited to me where it was held the solicitors acting for the company or for its directors should be held as so regarded.

32. I fully appreciate that Mr. Fanning has strongly argued that they should be so regarded, particularly where Eversheds Sutherland continue to act for the directors, but in my view Eversheds Sutherland are not connected in the sense in which Castle Cove is connected and I therefore believe that it would be unsafe to hold that they are connected.

33. Ultimately it does not seem to me to make any difference to the outcome of the exercise of my discretion, because when I discount Castle Cove, as I believe I must for the purposes of this hearing as they are clearly a connected creditor, there is more or less equality between those creditors who voted in favour and those who voted against Mr. Kirby's appointment. Moreover, even if a significant majority of creditors favour the continuation of the voluntary liquidation, that would not of itself prevent the court from acceding to the petition if the court was satisfied that there was, on the evidence, an issue of such gravity that it cried out for an investigation by someone who was seen to be independent.

34. So, bearing the principles that I have just outlined in mind, I now turn to the basis on which Balark here contends that there are matters which require the intervention of the court. In Ms. Sweeney's first affidavit sworn on behalf of Balark, in paragraph 45 she very conveniently sets out the reasons why the Petitioner says it wishes to have an independent court appointed liquidator appointed.

35. There are essentially three reasons. One relates to the transfer of Lot no. 7 to an associated company on the eve of the High Court hearing, and it is suggested that Balark believes that the disposal of Lot 7 for €70,000 represents a sale in the Commercial Court proceedings at an undervalue or an attempt by the Company to put its assets beyond the reach of its creditors, which requires

to be fully investigated by an independent liquidator. The second concern is that the conduct of the directors in respect of the incurring of expense associated with the litigation and the transfer of Lot 7 at a time while the company was insolvent is something which should be independently investigated. And the third, which is actually dealt with in paragraph 47 of her affidavit, is that it is entirely possible that Mr. Ronan Senior, who has had a significant involvement in the company at various times in its history, may have acted as a shadow director, and Balark believes that Mr. Kirby may not be in a position to challenge Mr. Ronan Senior with all due vigour, in circumstances where it appears that the Ronan Group or some entity connected to it is paying Mr. Ronan's fees. And I propose to deal with those three issues, but not necessarily in the order in which Ms. Sweeney sets them out there.

36. The first issue I propose to address is the conduct of the litigation. Undoubtedly the conduct of litigation involves the risk of exposure to costs of the successful party. This is an important consideration for a company with no assets of its own or no significant assets of its own. If a company of that kind were to recklessly pursue an appeal and expose the respondent to the costs of that appeal, with no prospect of the respondent ever recovering those costs, I can see that this would be a very serious issue. That is something that a liquidator should certainly investigate. But at present there is no evidence that the appeal was pursued in that way. No attempt has been made in the evidence before the court to demonstrate that there are grounds to think that the litigation might have been pursued on that basis.

37. I must bear in mind that three hearings have already taken place between the parties in relation to Plots 3 and 5. If there was any evidence in the course of those hearings to suggest that the matter was pursued in that way by the Company, I have no doubt that I would have been referred to it.

38. Moreover, it seems to me that the investigation of this issue by any liquidator is a straightforward matter. It will be recalled that, as Laffoy J. indicated in the Larkin Partnership case, one of the factors that I must bear in mind is the complexity that might be involved in any investigation of alleged wrongdoing. In cases where an elaborate web of transactions have been put in place, there is obvious scope for investigations to become bogged down, whether by accident or design, and in such circumstances there is an elevated need for an investigation that is not only independent, but is seen to be independent.

39. But the task of investigation facing the liquidator here in relation to this issue is straightforward. What he has to examine is what was the advice available to the Company here in relation to the appeals taken by the Company; was there advice that the Company had arguable grounds to proceed? If such advice exists, it may well be difficult to see how the directors could be said to have acted recklessly, since it is clear from the exchanges that took place in the hearing before Haughton J. to which I have been referred that if the Company had succeeded in the appeals, the value of the freehold interest would have been very significant and would have made the Company an asset rich company. If the advice does not exist, the case against the directors may be altogether different.

40. That investigation by the liquidator is simple and straightforward. Not only is it simple and straightforward, but the quality and result of the investigation can be readily audited and assessed both by the Director of Corporate Enforcement or by any creditor.

41. I am impressed by the way in which the liquidator here has said that he will investigate these matters. He has said that not only in his correspondence with Balark, but more importantly, in his report to the court. And in circumstances where that is said in a report to the court, I believe that everyone, including Balark, is entitled to expect and to believe that such an investigation will be carried out and it is a commitment which the liquidator has made now to the court itself. In these circumstances, I do not believe that the issue of the conduct of the investigation is one which, on the evidence currently before the court, would of itself justify the intervention of the court.

42. Nonetheless, that is an issue that I should bear in mind when I come to look at the overall picture, which I will do at the end of this judgment.

43. The next matter is the disposal of the freehold interest of plot 7 on the eve of the December hearing. On its face that might appear to be an obvious reason why the court would intervene, as happened, for example, in the *Hayes Homes* case. But in my view, one needs to consider the evidence in relation to this issue. When the evidence is considered, there is in fact no evidence before the court that points to the possibility that the interest was sold at an undervalue. Curiously, the evidence points the other way and suggests that the transfer was at an overvalue. And in this regard, I draw attention to what is said in very simple and clear terms by Ms. Sweeney in paragraph 42 of her affidavit, where she says:

> "In respect of the litigation, it is accepted that Lot 7 would have a value similar to Lot 3 and/or Lot 5."

44. Haughton J., in March 2018, held that between them the freehold interest in those plots was €40,000. And that has the result that €70,000, as it transpires, was more than full value on the basis of the accepted position by Balark as set out there in paragraph 42 of Ms. Sweeney's affidavit.

45. It is, of course, true that at the time of the transfer in December 2017 the directors were contending in the proceedings before Haughton J. that the value of the company's interest in Plots 3 and 5 was of the order of €20 million. But even allowing for that, if in fact €70,000 transpired to be more than the full value of the interest, no creditor qua creditor can be said to have suffered as a consequence of the price paid. The real concern would, in those circumstances, appear to be that the €70,000 had thereafter been spent on legal fees.

46. It was suggested in argument yesterday, but not said on affidavit, that an action could still lie on the part of a liquidator if the liquidator felt that a better price was obtainable from a different party than a connected party. Now, I have to bear in mind that, as I said earlier, the onus of proof is on the Petitioner here to raise an issue, it does not have to go so far as to prove the issue, but it does have to put sufficient evidence before the court to raise an issue that the sale here was at an undervalue. And Balark, despite its intimate knowledge of the site in question, and despite having just been through several hearings dealing with valuation of adjoining plots, Balark has not placed any evidence before the court to suggest that a price of greater than €70,000 could have been achieved.

47. On the basis of the evidence before the court, I found it difficult to understand why Balark should be so agitated about the transfer of the freehold of Plot number 7. But the reason why it is so agitated about the transfer only became clear to me in the submissions yesterday. And in those submissions yesterday, it was said very frankly by counsel for Balark that in respect of Plot number 7, Balark could not make a statutory application in respect of that plot because there weren't, in effect, any buildings on that plot, so the ground rents procedure would not have been capable of being invoked, but it would always have had an interest in Lot 7 given that it owned the leasehold interest in the land and was developing the land. It was also said by counsel on behalf of Balark yesterday that Plot number 7 had a strategic value to Balark significantly in excess of €70,000 and he said that that is something that a liquidator may be entitled to litigate about.

48. Although this has not been expressly said on affidavit or in the argument, I infer from the submission that has been made to me that what is causing concern, if not outrage, to Balark is that by reason of the transfer, Balark has lost the opportunity to register a judgment mortgage in respect of its costs orders against the Company's freehold interest in Plot no. 7 and thereby essentially take title itself to the freehold in well charging proceedings and prevent anyone else from taking clear title to Plot no. 7 and in that way to secure for itself an ability to obtain the freehold, notwithstanding that it has no right to compulsorily acquire the freehold under the landlord and tenant legislation. The freehold interest in Plot 7, therefore, clearly has a strategic value to Balark which is peculiar to it in those circumstances.

49. The difficulty is that the present petition is presented on the basis that Balark is a creditor of the Company on foot of the orders for costs. The court's concern, in my view, is with Balark's capacity as creditor in respect of the debt due to it by the Company in respect of the costs. No authority has been cited to me and I know of no authority that permits the court to take into account, on a petition of this kind, any strategic interest of a creditor; the court is solely concerned with the position of the Petitioner as creditor and it is not concerned with any other form of claim which Balark might have or might possibly have against the company.

50. On the basis of the evidence currently before the court, therefore, I cannot see that Balark, in its capacity as creditor, has raised an issue that it has been exposed to loss as a consequence of the transfer. That is not to say, and I stress this, that the transfer and subsequent application of the proceeds of sale are not matters that must be investigated by a liquidator; they clearly are matters that should be investigated by the liquidator but I am not satisfied on the basis of the current evidence that Balark has raised an issue of such gravity that the court should intervene on basis of this issue only, although again I bear in mind that this is a factor that I should weigh in the ultimate exercise of my discretion. But certainly on an individual basis, I do not believe that Balark has established a sufficient basis for the court to intervene in relation to this issue.

51. Again I stress, as I did in relation to the last issue, that I am relying in this judgment, and Balark must likewise be entitled to rely in this judgment on the statement made by the liquidator in his report to the court that he will investigate this issue, along with the other issues that Balark wishes to have investigated.

52. I should also say that it seems to me again that the investigation in relation to this single transfer and single payment seem to me to be relatively straightforward and, therefore, it raises similar issues to those which I have addressed when dealing with the previous issue in relation to the conduct of the litigation. We are not here dealing with a complex web of transactions that one so often encounters, but with a single transaction. Therefore, this is not an investigation of any great complexity, it is one which the liquidator should be able to carry out relatively straightforwardly and it is an investigation that can equally straightforwardly be audited and assessed by any person looking over the shoulders of the liquidator, such as the Office of the Director of Corporate Enforcement or any creditor.

53. The third concern identified by Ms. Sweeney in her affidavit is that the Ronan interests are funding the liquidation and the concern is that how could an investigation as to whether Mr. Ronan is a shadow director of the company be carried out by a liquidator who is funded by the Ronan interests?

54. It seems to me that the concern here can be readily overcome; as Mr. Kirby has already said, he is prepared to take funds from any source and it does seem to me that the €20,000 already paid is unlikely, in my view, to cover the cost of more than an initial investigation and, therefore, Balark will be free, if it wishes to fund the liquidation going forward, it will be free to be the party providing funding for further investigations, including any investigations in relation to Mr. Ronan's position potentially as a shadow director of the company. And therefore, again taking that issue on its own, I do not believe that Balark have raised a significant issue of such gravity that would require the court to intervene.

55. The next issue, which is not addressed in that affidavit of Ms. Sweeney but is mentioned in her second affidavit and is relied upon to some extent by Balark is the conduct of the creditors' meeting. It is not at the forefront of the concerns expressed by Balark, but it is put forward, not as a grievance that has to be investigated by the liquidator, but as in some way elevating the sense of grievance which Balark holds and Balark would submit it is entitled to hold.

56. The suggestion is that the votes at the meeting were gerrymandered in a way to ensure that the Company's nominee, Mr. Kirby, would be appointed. And the way in which they were gerrymandered, it is suggested, is in reducing the claim of Balark to €310,000 in the manner which I described at an earlier point in this judgment and then adding Cooney Carey to Eversheds Sutherland's claim to ensure that, even on the basis that the Castle Cove claim would be discounted, there would still be a majority of creditors in favour of Mr. Kirby.

57. But insofar as Balark's claim is concerned, there was a real difficulty, in my view, facing the Chairman in this case having regard, firstly, to the admittedly incomplete or inchoate negotiations that had taken place between the legal costs accountants, where there appeared to be a readiness to accept a figure of €200,000 in respect of the Circuit Court costs, and more particularly in circumstances where there was nothing to substantiate the claim in relation to the High Court costs.

58. The Chairman is given significant scope in this regard by Section 698 (5) of the Companies Act 2014 to estimate the minimum value of a claim of this kind and, in circumstances where there is no appeal from the decision of the Chairman in this case and in circumstances where there was certainly an arguable basis to allow €200,000 in relation to the Circuit Court costs and where there was no significant information available to the Chairman in relation to the High Court costs, I do not believe that it would be safe for me to conclude that the approach taken by the Chairman in relation to Balark's costs was of the standard of gerrymandering or anything of that kind.

59. Insofar as Eversheds and Cooney Carey costs are concerned, I cannot, for the reasons already dealt with by reference to the *Balbradagh* judgment, conclude that they were connected creditors and, therefore, I cannot find that the sums attributed to those creditors could be said to have involved any form of gerrymandering. In those circumstances, I do not believe that that is an issue that I can take into any significant account in my consideration of the exercise of my discretion and the factors that should influence the exercise of my discretion.

60. So I go back now, in light of everything that I have said so far, to consider again the factors that were identified by Laffoy J. in the case at paragraph 26. The first thing is the wishes of the majority of the Company's creditors. Here, for the reasons I have already identified, I do not take any account of Castle Cove, they are clearly a connected creditor. Insofar as the other creditors are concerned, there seems to me to be an equality between Eversheds Sutherland on the one hand and the Petitioner, Balark, on the other and, therefore, one could not say that there is a majority of creditors in favour of one liquidator or the other and, therefore, that factor does not seem to me to have any significant resonance in this case.

61. The next issue is whether the Petitioner has a justifiable sense of grievance. I have dealt with the various concerns expressed by Ms. Sweeney in the affidavit evidence and elaborated on by Balark's counsel and, for the reasons which I have previously identified, I cannot see, taking any one of those issues individually, that Balark has placed before the court sufficient evidence to justify the intervention of the court in relation to any of those issues individually. I will, at the end of this judgment, consider the position in the round.

62. The next issue to be borne in mind is the cost and time involved in a compulsorily liquidation as compared with a voluntary liquidation having regard to the assets and liabilities of the Company. And that, I agree with Mr. Fanning, is not an issue that has any significant resonance in the present case in circumstances where, firstly, the law has changed since this judgment was delivered by Laffoy J. Under the 2014 Act, a liquidator in a court liquidation is not subject to the constant supervision by the Examiner of the High Court and the court itself and, therefore, the likelihood, is-well, certainly the hope is that the costs of a court liquidation will not be significantly greater than a voluntary liquidation. But more particularly, it seems to me that that is not an issue of any significance in the present case in circumstances where, on the basis of the evidence before the court, the Company has no assets in any event and any liquidator is, therefore, dependant on funding.

63. The next issue is the complexity or conflict which may be involved in the investigation of alleged wrongdoing of the directors of the Company. In my view, that is a very relevant factor in the present case and, for reasons which I have already identified, I do not believe that the investigation that will require to be carried out here is one that involves any great complexity. This is a company that was not involved in any significant amount of trading, the only activity in which the Company was involved was the defence of the litigation and the subsequent appeals and the subsequent transfer of Plot number 7. Those are matters which, in my view, can be readily investigated by a liquidator and, therefore, that is not a factor which, in my view, has any signigicance in support of an intervention by the court in the present case.

64. The next issue is the entitlement of the Petitioner to apply to the court to determine any question arising in the winding up. In my view, that is a significant factor to be taken into account in any application of this kind. Under Section 631 of the 2014 Act, any creditor, including Balark in this case, has a right to apply to the court in any liquidation to have any question in the liquidation determined by the court. Therefore, Balark will not be without remedy if I refuse the order sought in the petition in this case. Balark will be in a position to bring questions before the court and in that way to second guess the approach which has been taken by the liquidator. Therefore, Balark will have the opportunity to have an independent view formed in relation to any particular issue that it has with the way in which the liquidator proposes to deal with any question that arises in the liquidation.

65. The next matter to be taken into account is the integrity, independence and capacity of the liquidator in situ. I have been very greatly impressed by the way in which Mr. Kirby has dealt with this matter. He has been very forthright in his dealings with Balark, he has offered to meet with Balark. I appreciate fully why Balark could not take up that invitation while this petition was pending, but the fact is that Mr. Kirby has offered to meet with them and he has confirmed, both in his correspondence with Balark and, more particularly, in his report to this court that he will carry out these investigations. Therefore, the matters in respect of which Balark has expressed concern will be investigated by a person of great integrity. There is no question about his integrity of independence also because he has shown, by the way in which he has acted to date that he is acting in an independent way.

66. Moreover, his independence is something that can be monitored by the Director of Corporate Enforcement, which is the next issue to be borne in mind, which is, I think, an important issue also, the supervisory role of the Office of Director of Corporate Enforcement. And I draw attention again to the view which I have formed that the investigation to be carried out here is not a hugely complex investigation, it is a straightforward investigation and, therefore, the Director of Corporate Enforcement will not have to expend very great effort or resources in reviewing the work undertaken by the liquidator here. And that seems to me to make the supervisory role of the Office of Director of Corporate Enforcement more relevant in the context of the factors that I must take into account in the exercise of my discretion.

67. The last issue that is identified is the expedition of the Petitioner. And as I have said already, Balark has shown commendable expedition in the manner in which it has presented its petition in this case.

68. I said I would come back and consider the position in the round, and it is clear that Balark has concerns and I fully appreciate it has concerns, but I have gone through each of the specific concerns which it has raised in Ms. Sweeney's affidavit and I have explained why, in my view, the evidence which Balark presents does not, in relation to any of those issues, satisfy me on an individual basis that the court's intervention is required. Likewise it seems to me, taking them all in the round, I cannot be satisfied that this is an appropriate case in which to exercise my discretion in favour of Balark.

69. As I have already said, there is a liquidator of great skill already in place, he has shown himself to be independent, he can be funded by Balark himself if Balark have any concerns about his appetite to investigate anything concerned with the Ronan interests in this company, and moreover, Balark will be in a position to make application to the court under Section 631 if Balark have any outstanding concerns. In all of those circumstances, it seems to me that I must exercise my discretion against the relief sought by the Petitioner and I therefore propose to make an order dismissing the petition.