THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 254

Record Number: 2018/106

Record Number: 2018/107

Record Number: 2020/209

High Court Record Number: 2017/225 COS

In the Matter of Decobake Limited (in Liquidation)
and in the Matter of the Companies Act, 2014

Haughton J.
Power J.
Collins J.

BETWEEN/

PAUL COYLE

APPELLANT

- AND -

DECLAN DE LACY

RESPONDENT

- AND -

DENIS MCHUGH

NOTICE PARTY

- AND -

THE REVENUE COMMISSIONERS

NOTICE PARTY

JUDGMENT of Mr. Justice Haughton delivered on the 13th day of October, 2021

Introduction

1. These three closely related appeals are from orders made in liquidation proceedings by O'Regan J. on 5 March 2018 as follows: -

(1) (a) An order pursuant to s. 645(1) of the Companies Act, 2014 ("the Act of 2014") fixing the amount of remuneration payable to the respondent as provisional liquidator of Decobake Limited (in Liquidation) ("the Company") in respect of his work in the period 29 June 2017 and 24 July 2017, being the period of the provisional liquidation, in the sum of €79,308.91 inclusive of outlays and VAT ("the Fee Approval Order/Application", a late appeal to which the assigned record number is 2020/209);

(b) an order that the legal costs of the respondent for the period of his appointment as provisional liquidator are to be taxed;

(c) and, pending taxation and certification of such costs, an order granting the respondent liberty to pay to his solicitors out of the assets of the Company the sum of €38,092.40 (inclusive of outlays and VAT) on account of such costs on the undertaking of his said solicitors to account for the said sum and to reimburse any differential in the event that the said costs are taxed to a lesser amount than shall have been paid on account;

(d) an order that the respondent be entitled to his costs of taxation of the said costs as costs in the winding up of the Company; and

(e) a stay on the said orders up to and including 20 April 2018.

(2) On foot of the appellant's Notice of Motion dated 23 February 2018 seeking discovery of thirty-one categories of documents in the context of the Fee Approval Application ("the Discovery Motion"), an order refusing the reliefs sought in the Discovery Motion and awarding the respondent his costs of the Discovery Motion as costs in the winding up, and, in the event that the respondent is unable to recover the costs in the winding up, an order that the respondent do recover his costs against the appellant;

(3) On foot of the appellant's application by Notice of Motion dated 24 January 2018 to dismiss the respondent's Fee Approval Application pending the outcome of certain related proceedings ("the Dismissal Motion"), an order refusing to grant the reliefs sought and an order that the respondent be entitled to his costs of and incidental to the Dismissal Motion and order as costs in the winding up of the Company and, in the event that the respondent is unable to recover his said costs in the winding up, an order that the respondent do recover the said costs as against the appellant.

Background

2. The appellant is a former director of the Company, and he appeared without legal representation in the High Court, and in this court. The Company was incorporated on 5 May 2000 as a private company limited by shares. The Company's trading activities included: -

- the operation of a retail outlet selling baking ingredients and equipment, and a cafeteria at Clane Business Park;

- the operation of a retail outlet selling baking ingredients and equipment at 3/4 Bachelors Walk, Dublin 1;

- the operation of a retail outlet offering confectionary/desserts trading under the name "Sweet Republic" at 26 Bachelors Walk, Dublin 1;

- the manufacture of a "ready-to-roll icing", printer cartridges with edible ink, and sugar paper from premises at Clane Business Park; and

- the wholesale distribution of baking ingredients and equipment.

3. The Company was at the date of the Petition (which was issued on 29 June 2018), indebted to Dublin City Council in respect of rates for the years 2012 through to 2017, in the total amount of €101,894. A number of decrees/warrants for execution had been obtained by Dublin City Council in respect of this indebtedness up to and including 2015. These warrants for execution were passed to the Dublin City Sheriff, and on 14 December 2016 the Sheriff's attempts to enter onto the premises 3/4 Bachelors Walk were met with physical force by those present and he was unable to execute the warrants. The Company then applied to the Dublin Metropolitan District Court for an order setting aside the said warrants for execution, which application was heard and determined on 27 June 2017. The District Court dismissed the application to set aside the warrants.

4. A notice pursuant to s. 570 of the Act of 2014 demanding the rates debt was delivered to the Company's registered office on behalf of Dublin City Council on 4 May 2017 (although the receipt of this was later disputed), and the petition to wind up the Company was filed on behalf of Dublin City Council on 29 June 2017. The application for the appointment of a provisional liquidator was made on the same date by Mr. Denis McHugh, the first notice party, as Collector of Rates. By order dated 29 June 2017 (Gilligan J.), the respondent was appointed provisional liquidator to the Company. On the following day, an application was made by Mr. Maher, a solicitor acting for the Company and/or its directors, to set aside the order of Gilligan J., but that application was unsuccessful. While objection was taken to the making of the order by Gilligan J., no appeal was lodged against it.

5. By order dated 24 July 2017 (Keane J.), the respondent was appointed official liquidator to the Company. An appeal was lodged by the Company and Mr. Paul Coyle and Ms. Margaret Coyle, directors, against the order of Keane J., but this court affirmed the order appointing the respondent as official liquidator of the Company: *In the matter of Decobake Ltd. and in the matter of The Companies Act 2014* [2019] IECA 169. Costello J., in delivering the judgment of the court, rejected arguments *inter alia* that Keane J. erred in deeming good the service of the s.570 notice, that he erred in deeming the Company to be insolvent in all the circumstances, that he erred in relying on the report of the provisional liquidator, or that he failed to take cognisance of the wishes of creditors and contributories.

6. The parties to these appeals are also parties to plenary proceedings bearing Record No. 2017/7252P: *Declan De Lacy v Paul Coyle, Margaret Coyle, Emily Coyle and Amy Coyle* ("the plenary proceedings"). In those proceedings, the respondent as plaintiff seeks to address the question of ownership of the intellectual property and certain products marketed and sold by the Company, the publication of damaging and defamatory material concerning the Company and the liquidation, and acts of interference in the liquidation by

the defendants. The defendants for their part have filed a Defence and Counterclaim, which has been supplemented over time, although not by way of formal amendment. Discovery was sought by both the respondent as plaintiff and the defendants in those proceedings and judgment was delivered by McDonald J. on 18 July 2018, with neutral citation [2018] IEHC 428, with orders for discovery to be made by both sides. A further order as to the manner in which the parties were to make discovery was made by McDonald J. on 7 March 2019.

7. The liquidation of the Company has also involved *inter alia* a series of applications under the Act of 2014 by the respondent as liquidator and by the appellant, which are recorded in the judgment of Allen J. of 18 February 2020 (*De Lacy v Coyle & Ors* [2020] IEHC 57). These included an application by the appellant to remove the respondent as liquidator for cause shown and/or to annul the liquidation. In the context of those applications, the appellant applied to Allen J. for the release of discovered documents, discovery of which was ordered by McDonald J. in the plenary proceedings. Permission to deploy the discovery documents was refused by Allen J., who noted that the same application had earlier been made to and refused by McDonald J. himself.

The relevant statutory provisions

8. Before referring to the affidavit evidence it is appropriate to refer to the relevant provisions of the Act of 2014. Section 645 provides –

> "645. (1) A provisional liquidator is entitled to receive such remuneration as is fixed by the court.
>
> (2) *Section 648* applies with respect to the fixing of such remuneration and otherwise supplements this section."

9. The relevant part of s. 648 is ss.(9) which sets out the criteria that the court should consider. It provides –

> "(9) In—
>
> (a) fixing the amount of a provisional liquidator's remuneration under section 645; or
>
> (b) […]
>
> the following shall be taken into account by the court, […]
>
> (i) the time properly required to be given by the person as liquidator and by his or her assistants in attending to the company's affairs;
>
> (ii) the complexity (or otherwise) of the case;
>
> (iii) any respects in which, in connection with the company's affairs, there falls on the liquidator any responsibility of an exceptional kind or degree;
>
> (iv) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his or her duties; and
>
> (v) the value and nature of the property with which the liquidator has to deal."

The Respondent's principal affidavit

10. The respondent swore an affidavit on 8 December 2017 to ground the Fee Approval Application. Having referred to his appointment, in para. 5, he refers to "features of the present case which are particularly complex and which required to be urgently addressed", as detailed in his exhibited Provisional Liquidators Report dated 24 July 2017 ("the PL Report") which was prepared for the purpose of the respondent reporting to the court at the close of the provisional liquidation. He summarises these features as follows:-

    "(i) The limited extent of the co-operation provided by the Company's directors, and the omission by the directors to prepare and file a statement as to the Company's affairs during the period of [the respondent's] appointment as Provisional Liquidator;

    (ii) Claims made by the company's directors and others that a floating charge over the Company's assets registered in their favour had crystallised shortly before [the respondent's] appointment and that all of the Company's assets had transferred to them;

    (iii) Ongoing litigation between the Company and its landlord in respect of premises at 26 Bachelors Walk, in the Circuit Court Record No. 2016/8023 Dublin Circuit Court Targeted Investment Opportunities IPAV v Paul Coyle and Decobake Limited;

    (iv) Ongoing litigation between the Company and its landlord in respect of premises at Clane, in the High Court Record No. 2016/1468 Decobake Limited v O'Mahony and Another, including interlocutory Applications before the Court;

    (v) the necessity to resume the Company's trade for the purpose of preserving the value thereof in circumstances where attempts were made by the directors and others to prevent [the respondent] so doing by *inter-alia* interfering with the Company's employees and others;

    (vi) The necessity of commencing proceedings for the purpose [of] seeking to recover funds transferred to the personal account of [Ms. Margaret Coyle] a director of the Company on the day following [the respondent's] appointment."

11. Further detail on some of these features is given in the PL Report. Of note at section 2.5 is that the respondent "was advised by Mr. Paul Coyle that the Company did not prepare management accounts". In section 3, the respondent outlines the debt due to Dublin City Council in respect of rates for the period 2012 – 2017, in the amount of €101,894.00, and he sets out the difficulties faced by the Sheriff in attempting to seize goods at 3/4 Bachelors Walk on 14 December 2016, as reported to him. In section 4.3, the respondent sets out the steps taken by him to secure possession of the Company's premises at Clane, including using security personnel employed by KTech, and having an Garda Síochána in attendance. The respondent reports that shortly after taking possession the appellant arrived, accompanied by Mr. Terry O'Flaherty, an individual known to be associated with an organisation describing itself as the "Land League", and a short time after messages appeared on a Facebook website associated with the "Land League" –

> "Please help… Paul Coyle is under attack in Clane Business Park with KTech", and "Paul Coyle is being attacked by KTech in Clane Business Park help needed now".

In section 5.1, the respondent details the limited cooperation given by the appellant and his wife, co-director Ms. Margaret Coyle, with questionnaires only partially completed and meetings/interviews with the respondent cancelled. At section 5.2, he records that the company accountants had only prepared accounts for the periods ended 30 November 2014 and 30 November 2015, and that they had only limited financial information for subsequent periods. Under "Bankers" at section 5.3, the respondent reports initially writing to Allied Irish Banks plc, but –

> "Upon entering into the premises occupied by the company [on 30 June 2017] it became apparent that the company had more recently banked with Ulster Bank Ireland DAC. In order to secure the balance of those accounts the provisional liquidator personally attended at the relevant branch of Ulster Bank at 12.30 p.m. on 30 June 2017 to advise of his appointment and that no transactions should take place on the accounts without his consent. Upon doing so the provisional liquidator became aware that the balance of the company's accounts had been transferred earlier the same day to an account held by Margaret Coyle, a director of the company."

This balance was €49,491.00. The respondent adds, at section 9.3:-

> "The company's bank accounts were accessed using online banking at about 08.30 on 30 June 2017 using the login credentials provided by the bank to Ms Margaret Coyle. The sum of €49,491.00 representing substantially the entire balance of the accounts was then immediately transferred to an account held personally by Ms Margaret Coyle.
>
> The provisional liquidator became aware of the transfer later the same morning and sought to have the funds in question returned immediately, which did not occur. Correspondence was exchanged with the directors and various solicitors acting on their behalf over a period of several days. When this did not result in the return of funds, counsel was instructed on behalf of the provisional liquidator to prepare an application for urgent injunctive relief as against the directors.
>
> Proceedings were issued out of the High Court (Record Number 2017 No 6105P), and an application for an interim injunction [was] prepared. The provisional liquidator's solicitor advised the solicitor for the directors that the provisional liquidator would be applying to the Court for orders requiring the return of the funds at 14:00 on 7 July 2017. The funds were ultimately returned by bank draft delivered to the provisional liquidator's solicitor at approximately 13:00 on 7 July 2017."

12. The PL Report at section 6.5 refers to the provision, after repeated requests, by the appellant of passwords required to access a limited number of the email accounts used by the Company, on 17 July 2017, but his continued refusal to provide the master password. The respondent records that the Company did not maintain records from which it was

possible to establish the cost or current value of stock held by the Company, and that the Company did not maintain a register of fixed assets, and that the TAS Books Accounting System used by the Company did not produce accurate or complete records of the Company's indebtedness. As per Appendix I, the respondent established up to the date of that Report that the Company's liabilities were in the amount of €527,983 with further liabilities in the amount of €237,816 appearing from the TAS books. The respondent reported that the Company's total debt to the Collector General was in the amount of €98,491 (in respect of PAYE and VAT), and that €101,894 was due to Dublin City Council in respect of rates with a further €28,500 or thereabouts due by way of rates to Kildare, Galway, Limerick and Westmeath County Council, putting preferential creditors at a total of approximately €228,000.

13. The PL Report at section 9.2 is headed "Purported Crystallisation of "Floating Charge"", and states:

> "The directors filed a notice in the Companies Registration Office on 2 November 2016, which purported to record the creation of a floating charge in securing a debt of €1,350,000.00 owed to Ms Margaret Coyle, Mr Paul Coyle, Ms Amy Coyle and Ms Emily Coyle (collectively the "Coyle Family"). The provisional liquidator was unable to find an[y] record of the existence of a debt of comparable quantum to the Coyle Family. Shortly after the provisional liquidator entered into the premises occupied by the company he was presented with a document by Mr Paul Coyle, which he was advised had been executed several days earlier, and which Mr Coyle represented as having the effect of transferring all of the company's assets to the Coyle Family."

14. The PL Report also records the respondent encountering "significant difficulties" in making arrangements with a number of company staff to attend work; he records being advised by those staff willing to attend that they were subject to pressure and intimidation from members of the directors and others who sought to persuade them not to cooperate with the respondent. At section 9.6, the respondent also records that on his appointment the computer and telephone systems were inaccessible; he arranged for the Company's employee who managed the systems to attend and make them accessible again, which he did, but a short time afterwards they again became inaccessible, and although restored again, on two further occasions they became inaccessible after a short time. The respondent was also advised by customers of the Company that they had been contacted by the appellant who sought to persuade them that the respondent was not properly appointed and to discourage them from cooperating with him.

15. At paras. 7 – 11 of his affidavit, the respondent sets out that 568 hours were worked during the period of the provisional liquidation by himself and his staff, and he exhibits a computer generated document headed "Time cost for provisional liquidation" which provides supporting detail. At para.8, he states that he delegated the work involved to the persons having appropriate skills to deal with same. In para. 9, the respondent sets out a schedule indicating "the normal and reduced rates for each grade of personnel":

Grade of Personnel:	Normal Rates	Proposed Rates
Partner/Director	€340.00	€272.00
Manager	€210.00	€176.00
Senior Trainee/Newly Qualified	€80.00	€64.00
Junior Trainee	€70.00	€56.00
Secretarial/Support Staff	€55.00	€44.00

In this table the "normal rates" for 'Partner/Director' and 'Manager' reflect "the *Missford* Rates", for an interim examiner and 'Supervisor' accountant, set by Kelly J in *Re Missford Limited* [2010] IEHC 240. The *Missford* Rates were adopted to reflect the economic climate after the economic collapse in 2008. They have, over most of the intervening years, been recognised as appropriate for examiners and have also been used as a guide for liquidators. The lower "normal rates" for 'Senior Trainee' and 'Junior Trainee' in this table are well below the *Missford* Rate of €155.40 for a 'semi-senior' and just below the *Missford* Rate for a 'junior' of €84.

It will be evident from this that the rates charged by the respondent in respect of the provisional liquidation are well below the *Missford* Rates.

16. In para. 11 of his affidavit, the respondent sought fees and outlays for the period of the provisional liquidation amounting to €69,706.80 plus VAT in the sum of €16,032.64, making in total €85,739.36.

17. The second exhibit in the respondent's affidavit is the "Time cost for provisional liquidation" schedule, which sets out in columns the date on which work was done, the person, be it the respondent or one of his staff, who carried out the work, a detailed narrative setting out the work done, and columns setting out the hours worked, the rate and the charge referable to that work. This document runs to some 12 pages, and records a total of 445.4 hours worked. This difference from the 568 hours referred to in the body of the affidavit was the subject of comment in the appellant's replying affidavit and is addressed in the respondent's second affidavit.

18. At paras. 13 – 16 of his affidavit, the respondent sets out that he engaged O'Shea Barry Solicitors to provide legal services during the course of the provisional liquidation, and he sets out the fees and VAT invoiced by them and by counsel engaged on his behalf. He exhibits a 'Memorandum as to Costs' of O'Shea Barry Solicitors dated 7 December 2017 which sets out the work done by that firm and the fees charged, and also a copy of Counsel's fee letter also dated 7 December 2017, related to drafting and briefing in respect of the application for an interim injunction (which did not have to proceed), and attendance at the winding up petition. The first seven pages of the Memorandum as to Costs set out all the

work done by O'Shea Barry Solicitors at the respondent's request, and consists of a narrative commencing with the respondent's first contact on 23 June 2017 advising of Dublin City Council's proposal to appoint him as provisional and then full liquidator, and then setting out chronologically the work done by them over a four week period. The Memorandum then sets out a fee of €21,429.15 in respect of the "Very extensive time […] spent in attending to these matters. In accordance with the engagement letter, the aggregate time expended is in the sum of €21,429.15". What follows then are figures in respect of outlay (€525), counsel's fees (€11,250), court fees – Stamp Duty (€190), Commissioner for Oaths fees (€48) and parking fees (€27.95) giving a total of €33,470.10 to which is added VAT of €7,636.95, giving a total of €41,107.05.

19. The respondent, in the Fee Approval Application and in his affidavit, sought liberty to make a payment on account out of the assets of the Company to O'Shea Barry Solicitors in the sum of €41,107.05, and an order dispensing with the necessity for such fees to be taxed, but the latter order was not pursued.

20. At para. 17, the respondent states that during his period as provisional liquidator he realised proceeds of asset realisations and trading receipts in the aggregate amount of €698,353.49 and made payments for expenses, including trading costs, in the amount of €597,175.44, and that "the funds presently available at the end of that period to meet the costs in the winding-up are in the amount of €101,178.00". In para. 18, the respondent averred that the Company's trade was continuing with rising trading receipts each week, and that he anticipated a further substantial realisation on the ultimate sale of the Company's trade and assets as a going concern.

21. Before the Fee Approval Application came on for hearing in the High Court, negotiation had taken place between the respondent and the representatives of the petitioner (Dublin City Council) and the Collector General, as a result of which agreement was reached, subject to the court, for sanction of the fees sought, and the payment of legal fees, subject to a reduction across the board of 7.5%. That agreement ultimately resulted in the trial judge approving the figures, duly discounted, which are set out at the start of this judgment, and referring the legal costs for taxation. As a result of that agreement, neither of the notice parties took any active role in the High Court or before this court on the appeal.

The Appellant's Replying Affidavit

22. The appellant swore a replying affidavit on 18 December 2017. In para. 3, he takes issue with the six features referred to by the respondent as giving rise to particular complexity in the provisional liquidation. He denies that he and his co-director failed to cooperate with the respondent, and states that the respondent failed to respond to his request for accountants to assist in the preparation of the necessary Statements of Company's Affairs. He denies any allegation of impropriety in relation to floating charges over the Company's assets. He characterises the ongoing litigation in respect of the Bachelors Walk premises as "a simple landlord and tenant dispute, whereby the landlord had forfeited the lease". He refers to litigation between the Company and the lessor of the premises at Clane which had been ongoing for two years and was being conducted by the Company's solicitor Herbert Kilcline. His averment is unclear but suggests that the litigation concerns a purported

forfeiture of the lease and attempted repossession of the property. The appellant denies the respondent's averments in respect of conduct by the company directors and staff during their re-entry to the premises. He contests the respondent's assertions as to "the necessity to resume trade", and denies any assertion of interference with the Company's employees. He also denies the respondent's averments to the effect that proceedings were necessary to recover the funds "properly withdrawn from the Company's Bank Account by the Directors to meet a very urgent Creditor[']s Demand" on 30 June 2017. The appellant avers that "the Company may have been illiquid at the time but was not insolvent and could legitimately pay the creditor, and it was in the interests of all the Creditors of the Company that this payment was made […]" (para.3(6)). In making these averments, the appellant did not address the other Company's liabilities, in particular liabilities to pay rates, PAYE and VAT, although he does later aver in para. 8(17) that "the Company was not Insolvent and could have traded and met all its debt obligations within a short period of time".

23. In para. 4, the appellant points out that while at para. 7 the respondent averred that he and his staff had worked a total of 568 hours, the exhibited "time cost for provisional liquidation" schedule shows a total of 445.4 hours worked, for fees of €69,706.80 plus VAT. He complained that the respondent had not exhibited "a valid Invoice as required under the said Acts", and that the Timesheet made no claim in respect of outlays".

24. At para. 5, the appellant refers to O'Shea Barry's Memorandum as to Costs dated 7 December 2017, and he takes issue with the first seven pages which he suggests contained "scandalous accusations in respect of the Directors of the Company" and had no relevance to the preparation of a Bill of Account. He suggests that O'Shea Barry have not submitted "a valid Value Added Tax invoice". He also avers that counsel has not submitted a valid VAT invoice – this seems to be a reference to Counsel's Fee Note which beneath its heading includes in parenthesis the words "This is not a VAT invoice". In para. 6, the appellant asserts that the respondent "has not presented documents to this Court which legally evidence the entitlement to be paid fees which are liable for VAT and that the Court should not sanction such payments".

25. From para. 7 on, the appellant addresses the PL Report. He draws attention to section 12.1 where the provisional liquidator stated –

> "The provisional liquidator and his staff have worked on the company's affairs on a continuous basis since the date of his appointment. The provisional liquidator and his staff's time cost is estimated at this time to be to the order of €47,000.00, exclusive of VAT. A detailed record of the time incurred in connection with the provisional liquidation and the [sic] will be prepared and exhibited with an application for approval of the provisional liquidator's remuneration in due course."

The appellant points out that the figure of €47,000 is a considerable difference from the final bill presented in the respondent's affidavit. This becomes the subject of clarification by the respondent in his second affidavit.

26. The appellant then refers to section 12.3 of the PL Report where the respondent referred to a sum of €11,089.00 plus VAT spent on valuation of the Company's Assets, and he points out that this was not included in the application for approval before the court. He makes a similar point in respect of a figure of €37,314.96 plus VAT paid by the appellant in respect of Security Costs, and a sum of €1,366.00 plus VAT paid to IT Consultants, referred to in sections 12.4 and 12.5 of the PL Report respectively.

27. In para. 8, the appellant challenges the accuracy and veracity of the PL Report in some eighteen respects. I do not propose to go through these fully. By way of example, the appellant denies that any physical force was used in preventing the Sheriff seizing goods at Bachelors Walk; he asserts it was in the interests of the Company to appeal the dismissal in the District Court of the application to set aside the warrants; he denies receipt of the Notice of Petition; he denies not cooperating with the liquidator, or that the accounting system was deficient, or that he failed to cooperate in regard to access to the Company computers. He also challenges the values placed on stock and fixed assets. He challenges the respondent's position in relation to directors' loans. He denies that the directors misappropriated Company funds, and he raises issues as to certain creditors, and the Company's (alleged) entitlement to a new lease in the Clane premises.

28. In para. 10, the appellant says that the respondent's affidavit was not properly sworn (this is a reference to a wrong year being given in the jurat) and is inadmissible, and in para. 11, he avers in the alternative that for the reasons advanced the respondent and his solicitors/counsel are not entitled to fees.

The Dismissal Motion and the appellant's affidavit of 24 January 2018

29. The appellant issued the Dismissal Motion on 24 January 2018, seeking an order dismissing the respondent's application for his fees as provisional liquidator pending the outcome of four proceedings, namely: -

    (a) In the matter of Denis McHugh Rate Collector on behalf of Dublin City Council, Petitioner, and in the matter of Decobake Limited and in the matter of the Companies Act: 2017/367COS.

    (b) *Declan de Lacy v Paul Coyle, Margaret Coyle, Emily Coyle & Amy Coyle*: 2017/7252P.

    (c) "The Criminal case against Conor Byrne in relation to the alleged unlawful service of the alleged 21 day notice, of which, the Summons has been approved by Judge O'Sullivan of the Circuit Court, Naas, Co Kildare on 17th January 2018"

    (d) "The Criminal cases against Declan De Lacy and eight other individuals who are alleged co-conspirators in relation to the defrauding of Paul Coyle, Margaret Coyle and the Creditors of Decobake Ltd, matters of which are lodged in the Criminal Courts of Justice on 23rd January 2018."

    The matter referred to at (a) above is the Petition on foot of which, on 24 July 2017, Keane J. made an order that the Company be wound up, and appointed Mr. De Lacy as official liquidator. Keane J. refused a stay on that order, and Mr. Paul Coyle and Ms. Margaret

Coyle appealed to this court. That appeal was dismissed by this court (judgment of Costello J.) on 25 June 2019.

The proceedings at (b) are the plenary proceedings in which the respondent as plaintiff seeks to address a question of ownership of intellectual property and certain products marketed and sold by the Company.

30. The appellant's grounding affidavit sworn on 24 January 2018 refers to other "grave reservations" regarding the respondent's justification and application for his fees for his period as a provisional liquidator. At para. 4, he raises disputes about the content of the stocktake and valuation undertaken on the respondent's behalf. In paras. 5 and 6, he raises issues in relation to the validity of the petition to put the Company into liquidation, and the 21 day notice upon which the petition was grounded, and he questions the lawfulness of the purpose behind the petition. In para. 7, he raises the issue of the Company's intellectual property, and the respondent's alleged failure to make provision for legitimate royalty fees due to the appellant; this is the subject matter of the plenary proceedings 2017/7252P.

31. In para. 8, the appellant refers to the affidavit already sworn by him in relation to the fee application on 18 December 2017. At 8(a), he repeats observations previously made in relation to discrepancies between the respondent's averments as to his estimated fees of €47,000 and the final presented figure of €69,706.80. At 8(b), he refers to the Company as being "relatively small" and he contests the case made by the respondent for complexity. He avers that the respondent failed to engage with the directors, and he alleges discrimination against their two daughters who failed to continue their employment with the Company. At 8(c), the appellant challenges the effectiveness with which the respondent "appears to be carrying out his duties" and alleges incompetence, and that this has led to the loss of business.

32. At para. 8(c), the appellant further alleges that the respondent "has fraudulently brought injunctive proceedings against the Coyle family with great costs burdened on the Company and has failed to provide provision for Royalty Fees that may become due to Paul Coyle for his Intellectual property". This is a scandalous averment because by the time this affidavit was sworn by the appellant, the respondent's injunction applications in the plenary proceedings had been successful at interim and interlocutory stages before Barton J. and O'Connor J. respectively. It also appears that these allegations have no bearing on the determination of the Fee Approval Application related, as it is, to the period of the provisional liquidation only.

33. In para. 8(c), the appellant further alleges that the respondent failed within time to appeal a District Court decision of 27 June 2017, and that he has obstructed the directors in their request for proper access to the books and records of the Company.

34. The appellant further alleges that the directors can prove solvency of the Company and that therefore the fixing of fees is a matter for the Committee of Inspection and not for the court, and he relies on s.648(8) of the Act of 2014 which provides:

> "(8) Where a company is ordered to be wound up by the court upon grounds other than those specified in section 569(1)(d) (company unable to pay its debts) then, upon it being established to the satisfaction of the court that the company is not insolvent, the provision of sections 646 and 647 and this section that are applicable to a members' voluntary winding up shall, where the court so directs, apply to that company."

This point is now spent because, in the appeal that the appellant and his wife brought against the appointment of the respondent as official liquidator, this court (Costello J.) on 25 June 2019 found that Dublin City Council's 21 day letter of demand was duly served and that Keane J. –

> "34. […] was correct to conclude that the company must be deemed to be unable to pay its debts within the meaning of s.570 of the Act of 2014. He did not and was not required to conclude more than that because under s.569 of the Act of 2014 a company may be wound up by the court if the company is unable to pay its debts."

35. In para. 9, the appellant alleges that the respondent acted negligently and forfeited the "alleged lease of 26 Bachelors Walk". In para. 10, the appellant refers to the "as yet unresolved proceedings, the Criminal Cases pending, the as yet to be determined Royalty fees, the suspect computation of Fees, the undervaluing of the Stock and Assets, [the] lack of provision for further Fees as well as legal fees, the Liquidator[']s [alleged] negligence in the management of the Company, and the fact that [the respondent] has not engaged a *legitimus contradictor* in any form to show balance" are reasons why the court should grant his motion to dismiss the fee application pending the outcome of the listed proceedings.

The respondent's second affidavit

36. The respondent swore his second affidavit on 9 February 2018, in response to the affidavits sworn by the appellant on 18 December 2017 and 24 January 2018. He addresses the issue of complexity, by providing more detail as to the work that was undertaken. At para. 12, he avers that as a result of non-cooperation it ultimately became necessary for him to apply for injunctive relief in the plenary proceedings, and orders were obtained on 8 August 2017, and continued on 12 October 2017 with the consent of the directors. Those plenary proceedings are fully defended by the Company directors. In para. 14, he refutes the appellant's excuse for the failure to provide a statement of affairs as his inability to engage accountants, and he points out in para. 15 that following receipt of a copy of the Company's electronic accounting records from the respondent, the appellant engaged a firm of accountants to assist him in preparing a balance sheet which he exhibited in an affidavit sworn by him on 20 July 2017 in opposition to the winding up petition. As to the appellant's denial of any allegation of impropriety in the registration or creation of a floating charge over the Company's assets in favour of the directors and their children, which occurred some months before the winding up commenced, in para. 17, the respondent avers that the appellant presented him with a document on 30 June 2017 which he asserted as the basis for the transfer of the Company's assets to the directors and their children pursuant to crystallisation of the floating charge. In ensuing paragraphs, the respondent addresses the appellant's averments in relation to the landlord and tenant proceedings concerning

Bachelors Walk, and in relation to the Company property at Clane, and sets out the difficulties not least arising from the fact that the Company had not instructed solicitors or, in the case of the Clane property, had disengaged with its solicitor Mr. Kilcline. The respondent's averments point to the complexity of these proceedings, and in particular the Clane proceedings.

37. At para. 30, the respondent points to inconsistencies on the part of the appellant/his solicitors as to the provisional liquidator maintaining and continuing the trading activities of the Company, pointing to a letter sent by the appellant's solicitor on 4 July 2017 indicating that "it is imperative that the Company recommence trading as soon as possible". The respondent points out at para. 33 that "a decision to preserve a business such as that of the Company will inevitably add to the complexity and effort involved in any provisional liquidation". At paras. 34 – 36, the respondent addresses the transfer from the Company bank account to the personal account of the directors and justifies his decision to issue proceedings on an urgent basis. At para. 37, the respondent avers that the appellant has "significantly added to the complexity of the liquidation through his use and non-use of solicitors and counsel" and instances the retention and subsequent discharge of Mr. Kilcline as solicitor on a number of occasions, and contact made by three different firms of solicitors with the respondent's solicitors in the course of the first week. As he points out in para. 38, this caused a significant difficulty in relation to the service of documents.

38. At paras. 39 – 46, the respondent addresses the discrepancy between the figure of €47,000, exclusive of VAT given as the estimated cost of the provisional liquidation in section 12. 1 of the PL Report, and the figure ultimately sought before the High Court. He states –

> "41. As a matter of necessity, provisional liquidator's reports are prepared with considerable haste because of the requirement to include detail on matters arising up to the date on which the winding-up petition is heard. My approach to the preparation of provisional liquidator's reports is to prepare an outline report as "*work in progress*" and to add and finalise details as matters arise.
>
> 42. As can be seen from the time record exhibited as "DDL 2" to my first affidavit that work was first commenced on the preparation of the PL Report on Wednesday 19 July 2017, and that the aggregate time cost up to the preceding Friday was €47,798.00, exclusive of VAT. My office operates a computerised time recording system into which timesheets are entered on a weekly basis, and it is our practice that time for the preceding week should be entered by the following Monday.
>
> 43. Accordingly, time records for this assignment extracted from the time recording system on either Wednesday 19 July 2017, Thursday 20 July 2017, or Friday 21 July 2017 would not have included time records for the week ended Friday 21 July 2017 as same would not have been processed. I believe that whilst preparing section 12.1 of the PL Report, only the time processed in the time recording system was considered and that I accidentally omitted to include an estimate of time for which time records had not yet processed. This was an entirely innocent oversight, and resulted in the estimate specified in the PL Report being inaccurate."

39. The respondent in paras. 44 – 46 explains how the ultimate fees claimed were reduced by 7.5%. He avers to canvassing the views of the Members of Committee of Inspection in the winding up, by email dated 14 December 2017. Three of the members, including Dublin City Council's nominee, confirmed by email their agreement to the fees claimed. A fourth member of the Committee acknowledged the email but expressed no view. The Collector General's representative, Susan Woods, discussed the respondent's fee claim verbally, and requested a reduction which was agreed at 7.5%. The respondent exhibited this email correspondence and averred –

> "In the circumstances I say that explicit approval of the fees proposed to be fixed has been received from four of the five members of the committee of inspection appointed by the creditors of the company."

In para. 46, he states –

> "I did not receive any response to my email regarding fees in the provisional liquidation from Mr. Coyle or from any of the other members of the committee of inspection appointed by the Company's members. Had Mr. Coyle enquired regarding the aforementioned discrepancy, I would have responded by providing the explanation detailed in this affidavit."

40. At para. 47, the respondent addresses the appellant's concern about the absence of VAT invoices and says –

> "VAT invoices in the amount of the remuneration sought to be fixed by the High Court have not been raised for the obvious reason that no liability for same exists until such time as the remuneration is so fixed."

41. As to alleged criminal matters, the respondent states –

> "49. At paragraph 4 of the Second Coyle affidavit, Mr. Coyle also avers that the PL Report lacked detail and accuracy for the purpose of defrauding the [*sic*] Mr. Coyle and the Company's creditors, and that this matter is the subject of proceedings before the criminal courts. I believe that these averments are scandalous and completely untrue.
>
> 50. I have no knowledge of any investigation by an Garda Síochána into my conduct or that of any party connected to me, much less any proceedings being taken arising from such an investigation.
>
> 51. I believe and am advised that the High Court is entitled to have regard to the calumnious and baseless allegations made by Mr. Coyle in considering the Fees Application and the Dismissal Application as a whole."

42. The respondent then addresses the appellant's averments in his later affidavit as to the falling Company turnover during the period of the provisional liquidation. He explains the significant obstacles that he encountered to continuing trading where the Company's

directors, notwithstanding the demand that he should resume trading, sought to obstruct the respondent from doing so. At para. 54, he avers that "on the 8th August 2017 this Honourable Court made orders restraining the directors from obstructing me and interfering in the conduct of the Company's business and since then the Company's turnover has improved". The respondent then sets out monetary details which support his contention of an increase in turnover. At para. 55 – 58, the respondent addresses the reliefs sought by the appellant for unfettered access to the books and records of the Company. He asserts that there is no basis in fact or in law for the granting of such relief, and that it would run directly contrary to the terms of the orders made in the plenary proceedings by facilitating the interference by the directors and parties associated with them in the affairs of the Company, and that it would "enormously hamper the conduct of the liquidation as a whole" (para. 58).

43. At para. 60, the respondent refers to the fees due and owing to his solicitors and counsel. He avers that Mr. Alan Murphy of Cyril O'Neill Legal Costs Accountants has analysed the work undertaken and the fees involved and expressed the view that those fees are entirely proper and reasonable, and this appears from the exhibited copy letter from Mr. Murphy, and he exhibits a letter from Mr. Murphy to these effect.

44. At para. 63, the respondent expresses his belief that "the opposition of Mr. Coyle to the Fees Application and his decision to issue the Dismissal Application form an aspect of a broader strategy on his part to obstruct every possible aspect of the orderly liquidation of the Company."

The Discovery Motion

45. By letter dated 15 February 2018, the appellant requested voluntary discovery from the respondent of 31 categories of documents in support of his opposition to the Fee Approval Application. Having sent a reminder on 20 February 2018, and received no response, the appellant applied for and obtained leave from the High Court (Baker J.) on 23 February 2018 to bring an application for Discovery. That application was grounded on an affidavit sworn by the appellant on 23 February 2018.

46. The categories sought by the appellant extend to every aspect of the provisional liquidation, including every aspect of the P.L. Report. For instance, Category 15 seeks –

> "Copy of the excel sheet named 'bank items not posted to TAS' as detailed in paragraph 8.7 of the Liquidator[']s Report. A report of all unallocated payments to Margaret Coyle, Meta Coyle or Paul Coyle from 30 November 2015 up to and including June 30th 2017.
>
> Reasons
>
> This evidence is required for the Directors of the Company to prove that they did not take funds from the Company for their own use. Also this evidence is required for the Directors of the Company to ascertain indebtedness of the Company to them."

Another example is Category 1 which seeks all documentation relating to the engagement of "KTech Security" in the context of the payment to them of €37,314.96 during the period of the provisional liquidation.

47. Category 3 is deserving of mention. It seeks –

> "Daily worksheets for [the provisional liquidator] and his staff and/or agents in the management of Decobake Ltd in the provisional Liquidation period. The work sheets already submitted to the Court are merely proforma type work sheets., [*sic*] Original detailed work sheets for each individual occupied with Decobake tasks submitted with sign off signatures and the dates they were submitted with the appropriate proofs, *i.e.* email, fax or date stamps are required. Errors have already been identified in the Stock Sheets supplied and further evidence is required to fully ascertain the level of inaccuracies.
>
> Reasons
>
> This documentation is required to validate the Provisional Liquidators Fees as there are gross inaccuracies in the Provisional Liquidator[']s Report of the 24th July 2017, the Liquidator stated his fees to be estimated at €47,000.00 excluding VAT. In the Liquidator[']s application to the Court on 18th December 2017 for his Fees for the Provisional period, he stated his fees to be €69,706.80 excluding VAT. When this inaccuracy was pointed out to the Liquidator he admitted he had made an error."

Category 6 seeks:

> "Detailed original reports and documents of the legal costs for the Provisional Liquidation Period, outlying [*sic*] time spent, detailed time sheets, hours billed and tasks performed. Detailed documents outlying [*sic*] the communications between the Solicitor Kevin Barry and the landlord of 26 Bachelors Walk. Detailed documents outlying [*sic*] communications between the Solicitor and the Landlord of Clane Business Park."

48. The respondent's solicitors O'Shea & Barry replied by letter dated 28 February 2018 advising that –

> "[…] Your motion for discovery is entirely misconceived, in that it has not been brought in the context of any *lis inter partes* (*i.e.* legal suit between parties) before the High Court.

In our view, you have no entitlement to discovery for the purposes of either: -

(a) the application concerning the fees, costs and expenses of the provisional liquidation made by Notice of Motion dated 8 December 2017; or
(b) the application to dismiss the aforesaid application made by Notice of Motion dated 24 January 2018. It is unheard of for a party to be granted discovery

for the purposes of an interlocutory application and, in particular, applications of this nature."

Further replying affidavit of the appellant

49. On the eve of the hearing in the High Court on 5 March 2018, the appellant delivered a further unsworn affidavit, a copy of which sworn on 5 March 2018 was considered by the High Court. It is not necessary to go into this in any great detail because for the most part it joins issue with what is stated by the respondent in his second affidavit sworn on 9 February 2018. It also refers to the discovery application and indicates the appellant's intention to rely on the documentation that will emerge from that process. The appellant also refers to and relies on the Dismissal Motion, averring that the Fee Approval Application should be dismissed until the resolution of the various proceedings mentioned in that motion. The appellant again denies the suggested complexity of the provisional liquidation, and denies that he was uncooperative. In para. 13, he denies that he or his co-director Margaret Coyle did not cooperate with the respondent in the preparation of the Company Statement of Affairs, and states that he requested pursuant to s. 594(6) of the Act of 2014 assistance from the respondent in the preparation of same. He refers to the injunctive relief obtained following the hearing before O'Connor J. on 19/20 October 2017. Regrettably, he repeats his assertion that the injunctive relief obtained by the respondent initially *ex parte* against the appellant and members of his family "was fraudulently presented to the court". The appellant again joins issue in relation to the Floating Charge upon which he sought to place reliance, and in relation to the landlord and tenant disputes in relation to 26 Bachelors Walk and the Clane business premises. He renews his criticism of the respondent in respect of the Company trading during the provisional liquidation period. He repeats his denials in relation to the transfer of funds from the Company accounts to the account of the director Margaret Coyle. He denies that his engagement and/or discharge of solicitors caused the respondent any difficulty.

50. At para. 24, the appellant returns to the discrepancy already pointed out between the estimated cost/fees in the provisional liquidation appearing from the PL Report and the Fees Application and takes issue with the respondent's explanation in his affidavit. He then refers to the respondent's engagement with members of the Committee of Inspection, and challenges the suggestion that the majority of that Committee agreed to the Fee Approval Application. At para. 27, he mentions "alleged criminal matters" which seem to have no relevance to the Fee Approval Application. At paras. 28 and 29, he addresses the Trading Results referred to by the respondent in his affidavit, and again suggests there has been mismanagement. At paras. 30 and 31, he returns to his complaint that he has not been afforded access to the books, records, and accounts of the Company, and that this is a further reason why he requires the discovery sought.

51. At para. 32, he asserts that he is the party "[…] most concerned with regard to the Fees, costs and expenses pertaining to the Provisional Liquidation as the single largest Creditor […]". This does not accord with the figures in respect of director's loans identified by the respondent at section 8.7 of the PL Report, which suggest that the Collector General and Dublin City Council are larger creditors, and of course they are preferential creditors, whereas the appellant is an unsecured creditor.

52. At para. 33, the appellant criticises the engagement of Mr. Alan Murphy Legal Costs Accountant to express a view in relation to the legal fees claimed.

The High Court

53. The transcript of the hearing on 5 March 2018 discloses that when the matter came on for hearing it was briefly introduced by counsel, and the trial judge confirmed that she had a copy of the appellant's affidavit sworn on 5 March 2018. A representative of Dublin City Council confirmed on its behalf that it had no objection to the Fees Application, and the Revenue Commissioners' agreement to the fees as sought subject to the agreed reduction of the respondent's fees of 7.5%, was communicated to the court. The trial judge then rose to consider the affidavits. The Transcript shows that when the trial judge sat again counsel for the respondent outlined the background including the related proceedings, and addressed the three motions that were before the court. The appellant, who was unrepresented, early on indicated his attitude. At page 8 line 22, he stated to the judge:-

> "MR. COYLE: We are not, *per se*, arguing the value of the costs that Mr. [De Lacy] is seeking. We're saying there should be no costs.
>
> JUDGE: No costs is your case?
>
> MR. COYLE: No costs at all."

54. The appellant went on to state that he was pursuing discovery because "[…] we don't have all the details in order to proceed [with] our case and bringing the matter forward before the Court, and we need that discovery in order to do that." (p. 8, L. 30 – 31; emphasis added).

The appellant then addressed the trial judge at some length.

55. The *ex tempore* judgment of the trial judge is recorded in the Transcript from p. 14 onwards. She rejected the Discovery Motion as follows: -

> "There is a further application by Mr. Coyle looking for discovery of several documents. I'll deal with the discovery matter first. It does appear to me that the discovery application is more to do with the ongoing proceedings against the liquidator than in these proceedings. There was one element of the discovery application, which I thought touched on these proceedings but I no longer see that as the case because Mr. Coyle comes here saying: 'Look, the liquidator shouldn't get any fees.' In his discovery he was looking for timesheets and not generic ones but the actual timesheets that were filled out, but in his position today he's saying: 'Look, no fee at all to the liquidator', so I can't see how the timesheets would advance the business undertaken by the Court at this stage." (p. 14, L. 29 – p. 15, L. 4).

56. The trial judge then addressed the Fee Approval Application, and noted that sections 645 and 648 of the Act of 2014 referred to the matters to be taken into account "and the liquidator has said this is a complicated matter" (p. 15, L. 7). The trial judge then referred to the existence of several sets of proceedings, and the fact that injunctions were obtained

against directors in relation to access to the property, and that a floating charge was claimed by the appellant, although noting that "he has admitted that in some respects that floating charge is void" (p. 15, L. 10/11). The trial judge noted ongoing proceedings in respect of the Dublin and Kildare properties, involving Circuit Court and High Court proceedings, and the continued trading of the Company, and the appellant's apparent inconsistent position on whether it should or shouldn't have continued to trade. The trial judge next noted the issue of monies taken from the company account, and that it was subsequently returned, observing "nevertheless, the liquidator is obliged to protect the company assets. He instituted the proceedings. The money was in fact returned, I understand, one hour before the hearing of those proceedings and that suggests to me that those proceedings were realistically instituted by the provisional liquidator" (p. 15, L. 22 – 26).

57. The trial judge noted the issue raised by the appellant to the effect that some timesheets had not been included in the P.L. Report appendix, but noted that "[…] this was resolved in a subsequent affidavit by the liquidator" (p. 15, L. 26 – 28). The trial judge did not see any issue with the employment by the respondent of costs accountants, nor with any technical issue over the jurat in the respondent's first affidavit (which contained a typographical error in respect of the year which was explained in his second affidavit). The trial judge at pp. 15/16 rejects points made by the appellant in relation to the presentation of an invoice by the respondent, and the estimate of €47,000 in the PL Report. The trial judge recognised that at the time the appellant had lodged an appeal to the Court of Appeal in respect of the appointment of the respondent as Official Liquidator, but stated –

> "[…] there is nothing I can do about that and I can't assume that that will be successful" (p. 16, L. 10/11).

The trial judge then concluded: -

> "So, in the light of all of that, not least in the light of the fact that the Coyles come here today to say: 'No costs at all', is claimed rather than the value of the costs being sought disputed, I am prepared to make an order, pursuant to s. 645(1) of the Companies Act 2014, fixing the liquidator's costs in the total sum, inclusive of VAT, at €79,308.91" (p. 16, L. 15 – 19).

The trial judge went on to grant liberty to the respondent to pay out the sum of €38,092.40 in respect of legal/counsel's fees inclusive of VAT, on the basis that those bills would go to taxation, and if there was a shortfall the balance would be repaid to the liquidator on foot of an undertaking from the respondent's solicitors.

58. The trial judge struck out the Discovery Motion with costs in the liquidation and a costs over order against the appellant. The trial judge also struck out the Dismissal Motion with costs in the liquidation and a costs over order against the appellant. The costs of the Fee Approval Application were simply ordered to be costs in the liquidation. The trial judge granted a stay on her orders (including the costs orders) until 20 April 2018.

The appeals

59. The appellant lodged an appeal in respect of the dismissal of the Discovery Motion within time. The sole ground is that: -

> "Justice O'Regan erred in her decision, failing to take into account that discovery requested was required in defence of my case".

The "*case*" being referred to here is not identified further.

60. The Respondent's Notice disputes this ground, and the principle ground of opposition is: -

> "(c) The learned High Court judge was entirely correct to conclude that it was neither necessary nor appropriate for her to direct any form of discovery by the Respondent in the context of the Provisional Liquidation Application. None of the 31 categories of discovery sought by the Appellant were relevant to, or necessary for, the determination of any issue arising in the Provisional Liquidation Application."

It was also pleaded that the affidavit sworn by the appellant on 23 February 2018 to ground the Discovery Motion was replete with references to matters that were irrelevant, scandalous or demonstrably incorrect, and that the trial judge was correct to note that both the appellant and the respondent were parties to the separate plenary proceedings Record Number 2017/7252P in which the appellant was entitled to seek such discovery as was relevant and/or necessary as between the parties.

61. The appellant also appealed the dismissal of the Dismissal Motion within time. The two grounds of appeal state –

> "(1) Justice O'Regan erred in her decision, failing to take into account the numerous ongoing proceedings in relation to the liquidation of Decobake Ltd.
>
> (2) Justice O'Regan erred in her decision, failing to take into account how the Company has been damaged since the appointment of Declan De Lacy."

62. In the Respondent's notice the grounds of appeal are traversed. It is said that the affidavits sworn by the appellant were replete with references to matters that were irrelevant, scandalous and demonstrably incorrect. As to Ground 2, it is said that the respondent's application was a discrete one pursuant to s. 645(1) of the Act of 2014 and that it was not necessary or appropriate for the High Court judge to reach any conclusions regarding –

> "(a) the background to, and conduct of, the Petition pursuant to which Decobake Limited was wound up;
>
> (b) the conduct of the liquidation in the period since the Respondent was appointed as official liquidator of Decobake Limited; and
>
> (c) other applications or proceedings as between the respondent, Decobake Limited, the Appellant, Ms. Margaret Coyle, Mr. Denis McHugh and/or any other party."

It was further pleaded that there was no cogent or credible evidence to support the proposition that the Company had been damaged by the appointment of the respondent as either provisional liquidator or official liquidator.

63. The appellant did not appeal the Fee Approval Order within the period allowed by law. Written 'Outline Skeleton Submissions' which were lodged by the appellant suggested that he believed he had appealed all matters, including the Fee Approval Order. Outline legal submissions lodged on behalf of the respondent on 2 September 2020 stated that "the appellant does not appeal the result of the Payment Out Application itself", and this may have alerted the appellant to his mistake.

64. By direction of this court made on 23 July 2020, the appeals – in respect of the Discovery Motion and the Dismissal Motion – came before this court for a remote hearing on 14 September 2020. Unfortunately, due to connectivity issues, that hearing could not proceed on that date and the appeals were relisted for 9 October 2020. In the intervening period, with leave of the court, the appellant brought an application returnable to 7 October 2020 seeking firstly to adjourn the remote hearing[1] and have the appeals listed for a physical hearing. This was sought on the basis that the appellant suffered from a condition such that it would be difficult, if not impossible, for him to cope with a remote hearing. Secondly, the appellant sought an extension of time within which to appeal the Fee Approval Order.

65. Having heard the appellant's application, this court refused to adjourn the appeals but the court was able to accommodate the appellant by granting a physical hearing in conditions complying with then current government rules and guidelines, and Courts Service regulations, arising from the COVID-19 pandemic, and by further allowing him to be attended by McKenzie Friends to assist him with his papers.

66. The court also ordered an extension of time and directed the filing of a Notice of Appeal in respect of the Fee Approval Order, and also listed that appeal for hearing (appeal no. 2020/209) on the same day. This was possible because the appellant's existing written submissions already addressed the Fee Approval Order, so it was not necessary for there to be further written submissions on that issue.

67. The appellant duly lodged a Notice of Appeal in respect of the Fee Approval Order, and this raises some five grounds which may be summarised as follows: -

    (1) The trial judge erred in failing to scrutinise with particularity and specificity the fees proposed by the respondent.

---

[1]The court has the power under s.11(2) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 to direct such a hearing.

(2) When payments set out in the PL Report to third parties for services allegedly provided to the respondent are included with/added to the fees in respect of which approval was sought (€117,401.31, being the respondent's fees plus the legal fees), then "the said fee was in excess of €199,000 and was grossly in excess of what actual services were needed in order to provide a Provisional Report for the Court to assess the solvency of Decobake Limited".

(3) The trial judge failed to scrutinise the fees application in the manner set out in *Re. Coombe Importers Limited* (Unreported, Supreme Court, Hamilton J., 22nd June 1995)) by Hamilton J. and endorsed by Kelly J. in *Missford* at p. 1 where he quotes:-

> "There is no doubt that the court has jurisdiction to review and disallow the remuneration, costs and expenses of the Examiner and in view of the priority given to such remuneration, costs and expenses there is an obligation on the Court to be vigilant in scrutinising an Examiner's application for sanction of payment."

(4) The trial judge erred in not recognising the appellant as *legitimus contradictor* in respect of the Fee Approval application, in accordance with recent *dicta* of Whelan J. in *Re Mouldpro International Limited* [2018] IECA 88, at para. 7.

(5) This appears to be a repeat of the appellant's contention that he had the right to challenge the Fee Approval Application as *legitimus contradictor*, and that his Dismissal Motion was not required.

68. In the Respondent's Notice delivered on 8 October 2020, the respondent joins issue with the appeal and asserts that –

> "2. The appellant has failed to identify with clarity, in some instances, the findings of the learned High Court judge which are the subject of a particular ground of appeal".

It is denied that the trial judge erred at all, and each of the five grounds are addressed:

- Ground 1: This asserts that the High Court judge properly scrutinised the respondent's application in line with applicable authority, and that her conclusions were appropriately made in light of that careful scrutiny. It is pleaded that –

> "The appellant's submissions to the High Court did not concern scrutiny of the quantum of sums claimed; they were directed towards refusal of payments of any sum, on grounds entirely unrelated to the applicable statutory or jurisprudential criteria".

- Ground 2: This denies that the trial judge erred, and it is pleaded that the assertions in Ground 2 are unsupported by evidence, were not made in the High Court, and are inconsistent with the submission to the High Court where the appellant's submissions did not concern scrutiny of the quantum of the sums claimed but were directed towards refusal of payment of any sum on grounds unrelated to the applicable statutory or jurisprudential criteria.

- Ground 3: This is denied and it is again asserted that the High Court judge properly scrutinised the respondent's application in line with applicable authority, that her conclusions were appropriate, and that the appellant's submissions to the High Court did not concern scrutiny of the quantum of sums claimed, but were directed towards refusal of payment of any sum.

- Ground 4: It is pleaded that the High Court judge did not err, and that the appellant made substantial submissions concerning the payment out application, notwithstanding that his status as a creditor in the liquidation had not been established. Without prejudice it is pleaded that the interests of the general body of creditors were represented by the Petitioning Creditor, Mr. McHugh (as collector of rates for Dublin City Council), and the Revenue Commissioners, and that in truth the appellant represented only his own interests.

- Ground 5: It is pleaded that the High Court judge did not err, and that she did not invite or direct the appellant as to the manner in which to proceed, but rather leave was given for applications which the appellant wished to bring including the Dismissal Motion.

The appellant's submissions

69. The appellant lodged a written "Outline Skeleton Argument and Legal Submissions". In addition, at the hearing of the appeal, the appellant made oral submissions based on a speaking document headed "Oral Submissions of Paul Coyle".

70. The Outline Skeleton Argument addresses the proceedings in the District Court in respect of rates due to Dublin City Council, and the Council's ensuing application for the appointment of the respondent as provisional liquidator. Complaint is made about Dublin City Council whose conduct it is suggested was unnecessary and unconstitutional. These submissions seem to have no real relevance to the Fee Approval Application.

71. The appellant also addresses the extraction of monies from the Company account, which prompted the respondent to prepare to apply for injunctive relief. The appellant inappropriately attempts to introduce new facts, but the thrust of his submission repeats matters raised by him on affidavit in which he contests that there was any wrongdoing by himself or Ms. Margaret Coyle.

72. In relation to the Discovery Motion, the submission made is that this was "inextricably linked to the entire matter surrounding this liquidation" and is "not unreasonable or

disproportionate". He asserts that the respondent was seeking "summary reliefs" in the High Court and that there was non-disclosure of material facts.

73. In his Oral Submissions the appellant argues that he is a *legitimus contradictor*. He argues that the respondent should not be entitled to fees in excess of the estimated figure of €47,000 appearing in the Provisional Liquidator's Report. The appellant relies on the additional payment to third parties evident from the PL Report to suggest that the actual figure in respect of which approval is sought by the respondent is €199,182.73. The appellant further seeks to rely on Form E4 filings in the Company's Registration Office on 15 January 2020 to support his argument that the respondent did not make full disclosure to the court. These filings post-date the High Court hearing, but were never exhibited on affidavit.

74. The appellant cites in support of his contentions the judgment of Whelan J. in *Re Mouldpro International Limited* [2018] IECA 88in this court to the effect that: -

- Liquidators are office holders who are fiduciaries with fundamental obligations to account in the way they exercise their powers and for the property with which they deal.

- Time spent is only one of a number of relevant factors in assessing remuneration, and the court fixing remuneration needs to be supplied with full information.

The appellant argues that in the absence of a "significant creditor, shareholder and contributory" he, as a creditor, is the appropriate *legitimus contradictor*, and the trial judge failed to recognise his standing and take cognisance of his objections.

He submits that the respondent's duty as liquidator was to provide assistance to the court by way of full disclosure so that the court could undertake the "vigilant scrutiny" referred to by Kelly J. in *Re. Missford*.

As to the respondent's estimate in the PL Report, the appellant refers to the judgment of Whelan J. *Re Mouldpro International Limited* at para. 184 where she confirmed that "[…] the burden of proof rests with the liquidator in regard to justifying the remuneration claimed […] and it is for the official liquidator who seeks to be remunerated in the manner which he does and in particular in a manner and to an extent which exceeds substantially the estimates originally submitted and approved by the Court to justify his claim".

The appellant also cites *Hughes v The Revenue Commissioners* [2016] IEHC 750 where the court was concerned with fixing the remuneration of an official liquidator. Keane J. acceded to an application by the Revenue Commissioners for the provision of additional information, and directed that the liquidator furnish a breakdown of his fees. While the respondent's legal submissions refers to paras. 16 – 21 of the decision, the appellant chose to highlight para. 28 where Keane J. stated –

"[28] However, in each case the court must strike a balance between, on the one hand, requiring the provision of a level of information or documentation sufficient to permit

a representative creditor (such as the Revenue) and, ultimately, the court to form a view on what is reasonable remuneration and, on the other, not imposing unnecessary requirements that will result in extra work and expense in the liquidation without any, or any proportionate, benefit for creditors or contributories."

75. The thrust of the appellant's argument is therefore that this court should order discovery, and delay approving the provisional liquidator's fees until all relevant information is before the court.

76. In response to questions from the court, the appellant sought to resile from the statement which he had made in the High Court to the effect that he had nothing to say in relation to the issue of quantum or amount of the fees claimed by the respondent. He claimed he had been "put on the spot", and that his dyslexia (of which there was no medical evidence before the High Court, or indeed this court) was taken into account. He sought to argue that the High Court did not have the necessary information to make a decision as to amount, and that all of the costs claimed were "outrageous", and that he had no opportunity to interrogate them. While accepting that a liquidator is entitled to be paid, he asserted that he had not been afforded an opportunity to contest the claim. He emphasised what he claimed was owed to him by the Company, and the "enormous connectivity" between the plenary proceedings and the present appeals. He asserted that the respondent and the appellant were competing for the remaining assets, and that the returns in the CRO indicated that there was no surplus money left in the Company. In his reply submissions, the appellant sought to persuade the court that because of his dyslexia his reading skills were very poor and his experience in the High Court was "traumatic", and that his approach that the respondent should be entitled to "no costs at all" was impetuous. He explained that his Dismissal Motion was intended to stall matters pending the outcome of the plenary proceedings, and he again insisted on his entitlement to all the discovery sought.

Respondent's submissions

77. Counsel on behalf of the respondent made oral submissions to supplement written submissions dated 2 September 2020 (the latter were filed before the appellant was given leave to appeal the Fees Approval Order). Counsel emphasised the respondent's entitlement to have his remuneration approved by the court pursuant to s. 645(1) of the Act of 2014, and that the criteria for assessing the remuneration were those set out in s. 648(9). It was submitted that the estimate in the PL Report as to the fees for undertaking the provisional liquidation was no more than an estimate in anticipation of the work to be done, and that the respondent had a duty to secure the assets, investigate the books and records, and produce a detailed report, and in this instance to continue the Company's trading.

78. Counsel submitted that the respondent and the trial judge were entitled to rely on the appellant stating as his position that the respondent was not entitled to any fees at all. This was not just said to the trial judge, but was also expressly stated in paras. 9, 10 and 11 of the affidavit sworn by the appellant on 18 December 2017 in response to the Fee Approval Application. Counsel argued that the payments to third parties (other than the respondent's

solicitors) referred to in the PL Report fell outside the scope of the Fee Approval application, but were in any event addressed in the respondent's affidavits and were justified.

79. With regard to discovery, counsel argued that the documentation sought was not relevant or necessary, and that the appellant's lack of engagement with quantum was such that the discovery of detailed timesheets and similar vouching documentation sought in Category 6 should not be ordered.

80. With regard to the appellant's Dismissal Motion, Counsel argued that this also contradicted any suggestion that the appellant was contesting quantum.

81. Counsel argued that the evidence appropriate to the Fee Approval Application was set forth in the respondent's affidavits, and in the PL Report exhibited by him. It was evident from the Transcript of the Ruling in the High Court that the trial judge was fully aware of the relevant statutory provisions, and that she had considered the affidavit evidence. In so far as quantum could be disputed, it was submitted that nothing put in evidence by the appellant showed the P.L. Report to be wrong. Counsel characterised the appellant's Grounds of Appeal as being very general in nature, and wrong insofar as they criticise the trial judge or suggest that there was any failure to scrutinise the respondent's Fee Approval Application.

82. Counsel pointed to Dublin City Council and/or the Revenue Commissioners as being the appropriate *legitimus contradictor*, and disputed that the appellant was such, although accepting that he had filed replying affidavits.

83. In response to questions from the court, Counsel submitted that the respondent did not require approval from the court in relation to the sums discharged to KTech Security, and likewise in relation to other sums discharged by the respondent while undertaking trading during the period of the provisional liquidation.

The law in relation to liquidator's remuneration

84. There was no real dispute between the parties as to the relevant law. The factors that the court must consider are now set out in s.648(9), and these broadly reflect the principles developed by the courts relating to the fixing of the remuneration for liquidators under s.228(d) of the Companies Act, 1963 (which did not set out any statutory criteria).

85. In *Re Sharmane Limited (No. 1)* [2009] 4 I.R. 285, where the court was concerned with remuneration of an examiner, Finlay Geoghegan J. stated –

> "[35] It is common case that the remuneration sanctioned by the court […] must be reasonable remuneration in the sense that it must be reasonable both for the Examiner and for the companies to which he was appointed. The remuneration sought to be sanctioned is exclusively based upon the time spent by the Examiner and his colleagues working on the examinerships, each being costed out at the hourly rate applicable to them in the firm […]. Those hourly rates, I assume, in accordance with normal practice, include a profit element for the accountants.

[36] There are no statutory criteria according to which the Court should determine what constitutes reasonable remuneration for the purpose of s. 29. It does not appear to me that this can be determined by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates for the Examiner and those working with him. This may, of course, comprise one element to be taken into account in determining what reasonable remuneration is. However, in my view, it should not be the only element, and in determining what is reasonable remuneration the Court must also have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client. These would be common elements taken into account by professionals charging or seeking to agree fees with clients."

86. In *Re Missford Limited* [2010] 3 I.R. 756, in a passage relied on by the appellant, Kelly J. quoted Hamilton C.J. in *Re. Coombe Importers Limited* (Unreported, Supreme Court, Hamilton J., 22nd June 1995) where he said:

> "There is no doubt that the court has jurisdiction to review and disallow the remuneration, costs and expenses of the examiner and in view of the priority given to such remuneration, costs and expenses there is an obligation on the court to be vigilant in scrutinising an examiner's application for sanction of payment."

Kelly J. added:

> "That vigilant scrutiny can only be carried out effectively if all the necessary information is placed before the court. Thus, it is not surprising […] that an examiner seeking an order such as this is obliged to place affidavit evidence before the court setting forth "*a full account of the work carried out by him to the date of the application and a full account of the costs and expenses incurred by him*". That rule obliges him to vouch the costs and expenses and to set out the basis for the proposed remuneration which he seeks."

Kelly J. also agreed with the views expressed by Finlay Geoghegan J. in *Re Sharmane*, quoted earlier. In *Re Missford*, Kelly J. reduced the interim examiner's hourly rate to €357 per hour, the supervisor's rate to €176.40 per hour, a senior accountant's rate to €155.40 per hour, a semi-senior accountant's rate to €126 per hour and a junior's rate to €84 per hour – "the *Missford* rates" which I have mentioned earlier in this judgment.

87. In *Re Mouldpro International Limited* (in Liquidation) [2012] IEHC 418, Finlay Geoghegan J. applied similar principles to the remuneration of an official liquidator. As to the level of detail of the evidence that should be put before the court, Finlay Geoghegan J. stated: -

> "15. Current practice does not expressly require an official liquidator to break down in any precise way the time spent on different elements of the work conducted by him and his staff in the course of the winding up. Order 74, r. 46 of the Superior Court Rules does require an official liquidator to support a fee application with 'such evidence as the Court shall require'. Some official liquidators, in my experience, have provided

schedules with a breakdown of time per topic. There may be time-recording systems which permit this to be simply done. However, it is not the norm.

16. It is important to try and keep an appropriate balance between requiring a liquidator to put sufficient information before the Court that it (and any creditor acting as *legitimus contradictor*) can form a view on what is reasonable remuneration, having regard to the above elements, and not imposing such detailed requirements as will involve extra work and expense to the liquidation […]".

Finlay Geoghegan J. approved the following dicta of Ferris J. in the Chancery Division of the High Court in England in *Mirror Group Newspapers Plc v Maxwell & Ors* [1998] 1 BCLC 638, at p. 648:

> "First, office-holders must expect to give full particulars in order to justify the amount of any claim for remuneration. If they seek to be remunerated upon, or partly upon, the basis of time spent in the performance of their duties they must do significantly more than list the total number of hours spent by them or other fee-earning members of their staff and multiply this total by a sum claimed to be the charging rate of the individual whose time was spent. They must explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task proved more difficult or expensive to perform than at first expected, to persevere in it. The time spent needs to be linked to this explanation, so that it can be seen what time was devoted to each task. The amount of detail which needs to be provided will, however, be proportionate to the case."

And, at p. 649: -

> "Second, office-holders must keep proper records of what they have done and why they have done it. Without contemporaneous records of this kind they will be in difficulty in discharging their duty to account. While a retrospective construction of what has happened may have to be looked at if there is no better source of information, it is unlikely to be as reliable as contemporaneous records. Office-holders whose records are inadequate are liable to find that doubts are resolved against them because they are unable to fulfil their duty to account for what they have received and to justify their claim to retain part of it for themselves by way of remuneration".

These principles were restated and followed by Keane J. in the case of *Hughes v The Revenue Commissioners* [2016] IEHC 750 relied on by the appellant in his submissions – see paras. [21] – [26].

88. In delivering the decision of this court in the appeal in *Re Mouldpro International Limited (in Liquidation)* [2018] IECA 88, these principles were endorsed by Whelan J. who confirmed that they apply to liquidators as well as examiners. She stated at para. 103:

> "It is clear from the jurisprudence that s.228(d) confers on the court a supervisory function in regard to liquidators' remuneration and fees."

Whelan J. confirmed that the burden of proof is on the liquidator to satisfy the court that the remuneration sought is reasonable. She confirmed that what is reasonable remuneration is based not only on the hours worked and charge out rates, but must also have regard to the nature of the work carried out, the complexity of the work, and the importance or value of the work carried out.

89. These criteria are now enshrined in s.648(9) of the 2014 Act, which lists the time required to be given by the liquidator/his or her assistants, the complexity of the case, any responsibility of an exceptional kind falling on the liquidator, the effectiveness with which the liquidator's duties were carried out, and the value and nature of the property concerned. Although the wording used is somewhat different to that endorsed in *Re Mouldpro*, in my view nothing turns on this in the present appeal. The consideration of these factors, where they are relevant, is now mandated by statute, and to that extent what Murphy J. described in *Re Car Replacements Limited* (Unreported, High Court 15 December 1999) as the "wide discretion" enjoyed by the court in approving remuneration may have been modified, although that is not an issue that the court is required to consider in this appeal.

90. As to the position of *legitimus contradictor*, in *Re Mouldpro* in the High Court, Finlay Geoghegan J. explained:

> "It has also been the practice to put a creditor likely to be affected by the determination of the remuneration on notice and to request that person to act as a *legitimus contradictor*. In many cases, this is the Revenue Commissioners as preferential creditor. In instances where the preferential creditors may be paid in full, normally the largest unsecured creditor will be put on notice. There may be particular reasons in some instances why a different creditor may be chosen."

In this court in *Re Mouldpro International Limited* Whelan J. stated –

"127. The likelihood that any objections at all could be made is dependent on the *legitimus contradictor* who is on notice and appearing at the Court application being a creditor who stands in a position likely to be directly affected by the determination with regard to remuneration. This reinforces all the more the desirability in the public interest of ensuring that the *legitimus contradictor* is, in general, the largest or a significant unsecured creditor."

In a later passage that is relied on by the appellant Whelan J. stated: -

"134. […]The court is charged with the obligation of being vigilant in scrutinising the application. The *legitimus contradictor* performs an important function in assisting the court in ensuring that a liquidator is held to account in regard to remuneration. Therefore, it is incumbent on the liquidator to ensure, in the interests of transparency, that the limited resilience which is afforded to the process and to assist

the court in having a proper *legitimus contradictor* is not unduly diminished and that significant creditors are not excluded from being appointed as *legitimus contradictor* for reasons predominantly dictated by the official liquidator's personal convenience."

Discussion and decision

91. The appellant's opposition to the Fee Approval Application in the High Court, in his affidavits and in his submissions, and in his appeal to this court, is fundamentally misconceived at a number of levels.

Legitimus contradictor

92. Firstly, it should be emphasised that this was not an *lis inter partes*. The role of the *legitimus contradictor* is important, and it is intended to assist the High Court in carrying out its supervisory function. It is not intended to provide disgruntled shareholders or directors with another forum for pursuing grievances or a vendetta against a liquidator.

93. Secondly, on the basis of the respondent's evidence in his first affidavit that the funds then available to meet the costs in the winding-up were limited to €101,178, and on the basis that two preferential creditors – the Collector General and the Dublin City Council – were each owed in excess of €100,000 (section 8.2 and 8.3 of the PL Report), it was apparent that there was at least a significant risk of a shortfall. Accordingly, the trial judge was entitled to treat either or both of those preferential creditors as *legitimus contradictor*.

94. Significantly, the solicitors for Dublin City Council were served with the Fee Approval Application, and there was therefore transparency on the face of the process, and the trial judge was entitled to assume that, as Notice Party, Dublin City Council had every opportunity to object to the remuneration sought.

95. Further, the respondent did in fact canvass the views of these two preferential creditors, and his engagement with the Collector General led to a reduction across the board of 7.5%. It further appears that both of these preferential creditors had representatives in court when the Fee Approval Application was moved by counsel, and raised no objection.

96. But the respondent went further than that. He canvassed the views of the largest unsecured creditor, Lee O'Mahony, Clane, a landlord whom the respondent verified was owed €95,572 by the Company; and he also canvassed the views of two other substantial creditors, Targeted Investment Opportunities ICAV, landlord of 26 Bachelors Walk, owed €35,979, and Eugene Sheehan & Co, the Company accountants, owed €14,400. These creditors acknowledged the engagement, all but Eugene Sheehan & Co expressed agreement to the remuneration sought, and Eugene Sheehan & Co. had "no queries".

97. Four further points can be made. Firstly, while the appellant claimed to be the largest unsecured creditor by virtue of his director's loan, this is not borne out by the PL Report. At the point in time at which the PL Report was prepared the respondent's investigations in relation to director's loans were ongoing, but in section. 8.7 he does refer to "a balance of €177,913.00 being due to Mr. Paul Coyle", and then refers to what appeared to be records of payments in reduction of the directors' loan balance, with one payment recorded of

€52,260 on 13 November 2015 and Excel spreadsheets showing transactions from 13 November 2015 to 7 February 2017 indicating withdrawals totalling €66,993.55 in the name of "Margaret Coyle" or Meta Coyle, and lodgements totalling €30,000. This limited material would suggest that there may have been directors' loans owing to the appellant, but if there were they did not make him the largest unsecured creditor.

98. Secondly, the respondent's hourly charges for himself and his assistants fell well below the *Missford* Rates, and were further reduced by the 7.5% discount. This rendered the role of any *legitimus contradictor* far less significant than it might otherwise have been.

99. Thirdly, the appellant did not in fact dispute the work actually undertaken, the hours worked, the level of assistant carrying out the work, or the charge out rate.

100. Fourthly, I am far from satisfied that the trial judge refused to recognise the appellant as a *legitimus contradictor* or as having *locus standi* as a creditor of the Company to address the court on the Fee Approval Application. The appellant was given an opportunity to put before the High Court any evidence relevant to the Fee Approval Application. Nothing in the evidence that he presented to the court undermined the application. In fact, the trial judge considered the appellant's affidavits and as the Transcript shows she heard his submissions at some length before delivering her decisions.

101. Ground 4, and Ground 5, which also raises this issue, must therefore fail.

The nature of the appellant's opposition to the Fee Approval Application

102. The approach taken by the appellant in his replying affidavit, and in the affidavits which he swore in support of the Discovery application and the Dismissal application, attempted to suggest that there was no proper basis for the appointment of a provisional liquidator, and that this in some way amounted to a breach of his constitutional or other rights. There are fundamental difficulties with his approach.

103. If the appellant considered that there was no factual or legal basis for the appointment of a provisional liquidator, the appropriate step to take was to seek to set aside that appointment, or appeal the order of Gilligan J. made on 29 June 2017 appointing the respondent provisional liquidator. Mr. Maher solicitor, acting on behalf of the Company and, it seems, the directors – including the appellant - did apply to the High Court on 30 June 2017 to set aside the appointment, on the basis of non-service of the s.570 Notice, but that application was refused. The appellant did not see fit to make any further application to set aside the appointment. Nor did he appeal the order of Gilligan J. to this court. He did later appeal the appointment of the respondent as Official Liquidator, and that appeal was wholly unsuccessful. The appellant cannot now raise issues concerning the validity of the debt owed to Dublin City Council or the Company's failure to discharge the Notice demanding payment, or otherwise contend that the appointment was invalid. Such issues in any event have no relevance to the consideration by the High Court of a Fee Approval Application under s. 645(1).

104. Secondly, the appellant in his affidavits attacks the accuracy and validity of much of the contents of the PL Report exhibited by the respondent, and the respondent's supporting averments in his principal grounding affidavit. He disputes the respondent's statements and inferences in relation to a lack of cooperation on the part of the appellant and Ms. Margaret Coyle as directors and the appellant's involvement in obstructive protests, influencing customers, and hampering the continued trading of the Company by the appellant. Other examples of this approach are the appellant defending his position in relation to the floating charge upon which he appeared to place reliance, and the extraction of monies from the Company accounts on the day after the respondent was appointed.

105. This approach is misconceived. Admittedly, many of these matters are raised in the first instance by the respondent for the purpose of demonstrating the complexity of the provisional liquidation, but beyond a debate as to whether or not there was some complexity, which in turn may be relevant to the quantum of remuneration sought, they have little relevance to the Fee Approval Application.

106. Further the appellant's attack on the respondent personally, and on his integrity, was an abuse of the process. Regrettably, the appellant abused the opportunity given to him to rehearse many issues in dispute between him and his family on the one hand and the respondent on the other hand and to make serious allegations of criminality and other wrongdoing on the part of the respondent, without any basis in evidence, and having no relevance to the substance of the Fee Approval Application.

Non-engagement with critical evidence

107. One piece of evidence that is not disputed, and which is critical to the Fee Approval Application, is exhibit "DDL 2" which is the respondent's computer generated Schedule which sets out in detail the work done, the date on which it was done, the person by whom it was done, the hours worked charged, and which cumulatively gives rise to time charges of €69,706.60 exclusive of VAT. Nowhere in his affidavits does the appellant contest the content of this Schedule, save in one respect which I address in the next paragraph. He does not dispute that the work was done, that the time was spent by the particular individuals, that they were assistants at an appropriate level for such work, that they attended at certain places or to certain matters as it claims they did, and that they dealt with the paperwork detailed in the narrative. In my view, this Schedule is exemplary in its detail, and supports the respondent's averments as to the relative complexity of this provisional liquidation.

108. The only limited engagement by the appellant with this Schedule is his point that the estimated cost for the provisional liquidation at section 12.1 of the PL Report at €47,000 exclusive of VAT appears to be a lot less than in the Schedule. A full explanation for this is provided by the respondent in his second affidavit sworn on 9 February 2018, at paras. 39 – 43. He explains that entirely due to "innocent oversight" time records for 19, 20 and 21 July 2017 were not taken into account whilst preparing section 12.1 because his office enters the timesheets into their computerised time recording system on a weekly basis,

and he commenced preparation of the PL Report on 19 July 2017, and completed it on 24 July 2017 (the 22 and 23 July being the weekend).

109. This was an entirely plausible explanation. The trial judge was also entitled to accept, as she did, that the figure of €47,000, exclusive of VAT, as set out in the PL Report was merely an estimate, a point well made by counsel for the respondent in her submissions.

The appellant's opposition to 'any fees', and not contesting quantum

110. The extent of the appellant's misconception about the nature of the respondent's application, and the role of a *legitimus contradictor* in such an application, is most apparent when one considers the appellant's repeated statement on affidavit and to the High Court of his position that the respondent is not entitled to *any* fees. In his replying affidavit sworn on 18 December 2017, the appellant states in para. 10 and again in para. 11 that the respondent and his solicitors/counsel are not entitled to any fees. In his Dismissal Motion, he asks the court to simply dismiss the Fee Approval Application, pending the outcome of other proceedings in respect of these averments.

111. Also the appellant was very clear in his statements to the trial judge that he was not contesting the quantum of the fees in respect of which approval was sought. The Transcript at p. 8 records the trial judge asking the appellant why he was seeking discovery and why this would be relevant, and the following exchange bears repeating: -

> "MR. COYLE: We are not, *per se*, arguing the value of the costs that Mr. de Lacy is seeking. We're saying there should be no costs.
>
> JUDGE: No costs is your case?
>
> MR. COYLE: No costs at all.
>
> JUDGE: Okay."

Accordingly, the appellant simply cannot assert that this was an "impetuous act", or resulted from the pressure of a court hearing.

112. The appellant now attempts to attribute this to his medical condition, and suggests that because of that he gave a wrong answer to the trial judge. Without wishing to seem harsh, the appellant has never put before the High Court or this court any medical evidence to back up his asserted condition or to show that this condition affected his responses in the High Court, or that in some way he was not afforded due process or a fair opportunity to address the court. Notwithstanding that there was no medical evidence, out of an abundance of caution and having regard to the difficulties that can be experienced in remote hearings, this court was prepared to give the appellant some latitude, and in particular granted him an adjournment, and arranged for a physical hearing of his appeals. However that latitude does not extend to accepting his submission that he should now be entitled to resile from a concession clearly made and repeated on affidavit and in the High Court on the issue of quantum that is central to any fee approval determination.

113. The intent behind the appellant's inappropriate approach to his opposition becomes clearer from the Transcript at p. 13 where he is recorded stating, at line 21:-

> "Mr. de Lacey has been less than honest and we want to bring that evidence to the Court to show he's not entitled to any fees in relation to this matter, because […] he was part from one end to the other [*sic*] with eight other people in defrauding the creditors of the company."

From this it is apparent that the appellant's real intent and purpose at the outset, and during the course of the hearing before the High Court, was not to act as a responsible *legitimus contradictor* assisting the court in its supervisory function and in undertaking vigilant scrutiny, and so doing for the benefit of all creditors, but was to prevent the respondent receiving *any* remuneration in respect of his work, or any payment for his legal advisors.

114. Moreover, the respondent met the appellant's opposition on a certain basis in the High Court, and the trial judge decided the Fee Approval Application on that basis. It is not apparent on what basis the appellant might have contested the quantum, or any of the other detail in the respondent's Schedule, had he chosen to do so before he High Court. If he had contested quantum before that court, then the respondent would have had an opportunity to address his arguments. It would be unfair on the respondent to now allow the appellant, at least without due notice, to address any particular aspect of quantum.

115. Even if the appellant had indicated that he was contesting quantum, the outcome would have been same. As I indicate later in this judgment, the Fee Approval Application was supported by appropriate evidence, and there was no material before the High Court that would have justified a different outcome.

The Discovery Motion

116. The appellant's Discovery Motion was also misconceived. If, as the appellant claims in his grounding affidavit, the trial judge suggested that he file a Motion for Discovery, then she erred in so doing.

117. Discovery may be ordered pursuant to O. 31, r. 12 of the Rules of the Superior Courts, 1986 (as amended) to a "party" against "any other party to a cause or matter". It is well established that it will only be ordered where the documents are relevant and necessary, and it will not be ordered where it is not necessary for fairly disposing of the cause or matter or for saving costs, or where such discovery would be disproportionate.

118. It may be questioned whether a Fee Approval Application under s.645 is a "cause or matter" to which O.31 r.12 applies, or, indeed, whether the appellant is a "party" who can seek discovery, save perhaps in exceptional circumstances. Even if a provisional liquidator might be ordered under O.31 r.12, or possibly pursuant to an inherent jurisdiction of the court, to make discovery of documents to a *legitimus contradictor*, this is not something that happens in practice. The reason is that such an application is not truly a *lis inter partes*

rather the obligation is on the liquidator to bring the application and present appropriate proof to the High Court judge whose supervisory task it is to undertake 'vigilant scrutiny' and approve the remuneration at the appropriate level. If there are shortcomings in proof, this will be to the disadvantage of the liquidator. Of course, there are some cases in which the High Court judge may be dissatisfied with the level of proof and the documentation provided, in which case further disclosure may be ordered. In such cases, the High Court should look at the evidence adduced, and if it is considered to be deficient, or that some further breakdown or additional supporting material is required, then the court should give appropriate directions to enable it to properly adjudicate on the application.

119. An example where this happened is *Hughes v the Revenue Commissioners* [2016] IEHC 750, but even there Keane J.'s direction was that the liquidator furnish a breakdown of the fees, and he did not order discovery or even the disclosure of time sheets sought by the Revenue. Keane J. quoted from the judgment of Finlay Geoghegan J. in *Re. Mouldpro International Limited* [2012] IEHC 418 where she stated:

> "[16] It is important to try and keep an appropriate balance between requiring a liquidator to put sufficient information before the Court that it (and any creditor acting as *legitimus contradictor*) can form a view on what is reasonable remuneration, having regard to the above elements, and not imposing such detailed requirements as will involve extra work and expense to the liquidation. [...]"

Keane J. then stated –

> "[23] In *Re. Haydon Private Clients Limited t/a Haydon Investments (in Liquidation)* [2012] IEHC 505 (at para. 10), Finlay Geoghegan J. noted that the liquidator's application for the measurement of his remuneration in that case was consistent with current practice with being based upon his reports and the inclusion in certain appendices to them of a breakdown of the time spent by him and those in his firm working on the liquidation with their relevant hourly charge-out rates. The judgment goes on to record that the liquidator, in his grounding affidavit, had also set out in some detail the work done in the liquidation."

120. Keane J. went on to approve the *dicta* of Ferris J. in the *Mirror Group Newspaper plc.* case to which I have referred earlier, which established the principle that it is incumbent on the liquidator as an office holder to explain the nature of each main task undertaken, the considerations which led them to embark upon that task, and if the task proved more difficult or expensive to perform than at first expected, to persevere in it – and the time spent needs to be linked to that explanation; and the principle that such office holders must keep proper records, and that a retrospective reconstruction of what happened is unlikely to be as reliable as a contemporaneous record. In adopting these principles, in a passage drawn to this court's attention by the appellant in his submissions, Keane J. stated –

> "[28] However, in each case the court must strike a balance between, on the one hand, requiring the provision of a level of information or documentation sufficient to permit a representative creditor (such as the Revenue) and, ultimately, the court to form a

view on what is reasonable remuneration and, on the other, not imposing unnecessary requirements that will result in extra work and expense in the liquidation without any, or any proportionate, benefit for creditors or contributories."

121. In the present appeal, I can see no legal or factual basis for ordering discovery, or any further breakdown or disclosure. There would be no benefit, let alone a proportionate benefit, for creditors – be they preferential or otherwise – or contributories, to the discovery sought by the appellant. Apart from Categories 3 and 6, the remaining categories seem to be more appropriate to a full blown dispute in relation to every single step taken by the respondent in the course of the provisional liquidation, from communications with the Company's bank to sales reports from the Clane shop, and including all documentation that the provisional liquidator has within his possession or within his procurement relating to stocktakes, credit card payments, dealings with landlords, events at the Clane business premises and at 26 Bachelors Walk, all audio and video records kept by KTech Security and so forth. None of these categories of documents are relevant or necessary to the Fee Approval Application.

122. Category 3 cannot be relevant having regard to the fact that the appellant did not contest quantum. Even if he were contesting quantum, a case of relevance is not made out having regard to the failure to raise any specific issues in respect of remuneration on the detail given by the respondent in his computer generated Schedule. It is no more than a fishing exercise. To order discovery in such circumstances would be to fail to strike the balance referred to by Finlay Geoghegan J. and Keane J. between the level of information required to permit a *legitimus contradictor* to form a view on the remuneration claim, and the imposition of an unnecessary requirement, as well as additional work and expense, with no apparent benefit for creditors or contributaries.

123. As to Category 6, it will be recalled that this relates to the legal costs incurred by the respondent, and seeks documents such as detailed timesheets, hours billed and tasks performed. The fact that the appellant was not contesting quantum also rendered discovery of this category irrelevant and unnecessary. Further having regard to the fact that the trial judge, at the request of the respondent and with the agreement of the notice parties, referred the respondent's solicitor's fees claim, as set out in the 'Memorandum as to Costs', for taxation, there could be no justification for ordering discovery of this category. Referral of legal costs for taxation is a common practice and it has the advantage that the legal costs are independently and expertly assessed and taxed by a Taxing Master (now a Legal Costs Adjudicator) with appropriate expertise, although it has the obvious disadvantage of further depleting the assets of the company otherwise available for distribution. The trial judge did grant the respondent liberty to pay the sum of €38,092.40 (inclusive of outlays and VAT) to his solicitors on account of those costs, but that was on the undertaking of O'Shea Barry to account for that sum and to reimburse any differential in the event that the costs were taxed at a lesser amount. That of course is a binding undertaking that the respondent can enforce for the benefit of the Company.

124. It follows that the appellant has failed to show any error of law or fact in the trial judge's refusal to grant the Discovery Motion.

Grounds 1 and 3 - Trial judge did not err in Fee Approval Order

125. I have earlier in this judgment carefully gone through the evidence adduced by the respondent in support of his Fee Approval Application. It is quite clear that that application was properly brought pursuant to s. 645(1), and that his evidence enabled the High Court to have regard to the factors set out in s. 648(9). The "Time Cost for Provisional Liquidation" Schedule which he exhibits, and which was generated from the computerised time recording system that was used by his firm, clearly identifies the time that was devoted to the different tasks, described in the narrative, carried out by him or by his staff, and indeed each member of staff concerned is identified by reference to initials. It is clear from para. 9 of the respondent's principal affidavit that the rates charged and recorded in the computerised system for different members of staff, be they partner, manager, junior trainee etc., are significantly less than the "normal rates" or the rates that could be described as the *Missford* Rates. The respondent at para. 8 of his principal affidavit confirms that he delegated the work involved to those persons having the appropriate skills to deal with same, and he avers that every member of staff engaged in connection with the matter was "necessary and properly so engaged".

126. Furthermore, it is a significant fact that the respondent engaged with members of the Committee of Inspection, and in particular the notice parties, including the Collector General, in relation to his remuneration claim. Most commonly it is the Collector General, as a preferential creditor, who takes on the burden of acting as *legitimus contradictor*, as he/she generally has most to gain by a reduction in the fees charged. This case proved no different in that respect, in that the Collector General succeeded in negotiating a 7.5% reduction in respect of the claimed remuneration, and also the legal fees. This meant that the sums ultimately claimed by the respondent in the High Court were reduced even further below the *Missford* Rates.

127. Another factor that the court is required to take into account under s. 648(9)(ii), is "the complexity (or otherwise) of the case". The respondent in his affidavit refers to features of the provisional liquidation which he believed gave rise to complexity. Much of the content of the appellant's affidavits were devoted to contesting that there was complexity. The trial judge appears to have agreed with the respondent that "this is a complicated matter" (Transcript p. 15, L. 7). She refers particularly to the injunctions ultimately obtained against the directors in relation to access to property, the reliance by the appellant on a floating charge, the proceedings and ongoing issues in respect of the properties at Bachelors Walk and at Clane, County Kildare, involving proceedings in the Circuit Court and the High Court respectively, the issue related to the continued trading of the Company, the extraction of monies from the Company account which ended up in an account in the name of Ms. Margaret Coyle, and the injunction application that the respondent was obliged to initiate to recover the Company monies, although he did not need to prosecute it to a conclusion. In my view, the trial judge was fully entitled to consider the provisional

liquidation to have been a complicated one, but certainly that was a finding of fact, or a characterisation of the liquidation, that this court should be slow to interfere with.

128. Section 648(9) also requires the court to take into account –

> "(iii) any respects in which, in connection with the company's affairs, there falls on the liquidator any responsibility of an exceptional kind of degree;
>
> (iv) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his or her duties; and
>
> (v) The value and nature of the property with which the liquidator has to deal."

It seems to me that the respondent, by reason of the complexity of the liquidation, and also the level of confrontation between the appellant, or those supporting him, and the respondent and his staff or third parties engaged by him, was required to take on responsibility of an exceptional kind. In securing the Company assets, and in taking the steps necessary to continue the trading, the respondent took on particular responsibility. This enabled the Company to remain in business, and it resulted in the respondent being in a position to aver in his principal affidavit that since his appointment as provisional liquidator up to 30 November 2017 he had achieved asset realisations and trading receipts in the aggregate amount of €698,353.49 and in the same period had made payments for expenses, including trading costs, in the amount of €597,175.44, and that he had funds available at the end of that period to meet the costs of the winding up in the amount of €101,178.00 – and he was able to confirm that the Company was continuing to trade with substantial trading receipts arising in each week, and the prospect of "a further substantial realisation" on the ultimate sale of the Company's trade and assets as a going concern. This also demonstrates the "effectiveness~" with which the respondent carried out his duties (criteria (iv)).

129. Based on the evidence before the court, the trial judge was entitled to approve the respondent's remuneration, and to grant the further orders sought in respect of the legal costs. It is apparent that the trial judge did consider the affidavit evidence, and the appellant's submissions. The suggestion, in Ground 1, that the trial judge failed to scrutinise with particularity and specificity the fees proposed by the respondent cannot be sustained. Similarly, the contention in Ground 3 that the trial judge erred in fact and in law in failing to scrutinise the fees application is not made out.

Ground 2 – payments to third parties

130. Ground 2 in respect of the Fee Approval Order appeal, which was pursued by the appellant in oral argument, asserts that the sums paid to third parties, for example KTech Security, as referred to in the PL Report, were not included in the Fee Approval Application, resulting in the appellant contending that, when these payments are included with the remuneration sought by the respondent, the overall fees exceed €199,000.

131. This ground is also misconceived. S. 645(1) does not require that a provisional liquidator seek approval for anything other than "remuneration". The respondent did not, and was not required, to seek court approval in respect of the figure of €37,314.96 plus VAT paid to the firm of security contractors, or the sums paid to IT Consultants, or the sum of €11,089 plus VAT paid to the firm of auctioneers and valuers who carried out valuations of the Company's assets.

132. It is important here to recall that there are other provisions of the Act of 2014, which replaced similar provisions in the Companies Acts 1963-2012, giving the court jurisdiction in appropriate circumstances to intervene in a liquidation. The duties of liquidators in relation to the collection and gathering-in of Company property, the realisation of such property and the distribution of property are now set out in s. 624(2), although s.624(3) provides that the duties of a provisional liquidator are those "provided in the order appointing him or her or any subsequent order of the court." Importantly, s. 631 empowers the liquidator or provisional liquidator, *or any contributory or creditor* of the Company, and the Director of the Office of Corporate Enforcement, to –

> "[…] apply to the court to determine any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator)".

The court is given wide powers under s. 631(2), if acceding to such an application, to make such order as it thinks fit.

Furthermore, under s. 638(1)(b) the court may, on the application by a member, creditor, liquidator or the Director of the Office of Corporate Enforcement, or on its own motion, "on cause shown, remove a liquidator and appoint another liquidator".

133. These are some of the provisions available to a creditor or contributory who has legitimate concerns in relation to the manner in which the affairs of a company are being conducted by a liquidator. In particular, if the complaints are warranted, the court can, and on occasions does, remove the liquidator and appoint a replacement. The contesting of a liquidator's application for approval of remuneration is not the appropriate forum in which to take issue with or complain about the manner in which the liquidator has conducted a liquidation, or a provisional liquidation. Rather it is a process designed for placing before the court sufficient information to enable it to form a judgment on the fees claimed, in the manner described by Finlay Geoghegan J. in *Re. Mouldpro*. As a matter of convention the liquidator includes with such applications a request for approval of legal costs incurred by him or her in the course of the liquidation, and this conveniently facilitates the making of a court order for taxation of those legal costs where they cannot be agreed. However it is not an appropriate process to follow for airing complaints about other third party contractors engaged by a liquidator, or the amount paid to them for their services. The appellant's attempt to do just that in the context of the respondent's s. 645 Fee Approval Application is misconceived.

134. I would therefore dismiss the three appeals and affirm the orders of the High Court.

135. As the respondent has been entirely successful in these appeals, I would propose that he should be entitled to his costs of these appeals as costs in the winding up, and, in the event that the respondent is unable to recover such costs in the winding up, that he be entitled to recover such costs against the appellant. If either party wishes to seek different orders in respect of costs to that proposed they should so indicate in writing to the Office of the Court of Appeal within 14 days of electronic delivery of this judgment, and a short costs hearing will then be arranged.

136. It is important that I should end this judgment by stating that I do not accept any of the appellant's attempts to portray the respondent as less than honest, and the appellant's repeated refrains on affidavit and to the court that the respondent obtained injunctions fraudulently or otherwise acted improperly are unwarranted, irrelevant and scandalous.

Power and Collins JJ. having read the within judgment have indicated their agreement with it and the proposed orders.