THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 103

Record No. 2016/412

Peart J.
Irvine J.
Gilligan J.

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

BETWEEN:

STAR ELM FRAMES LIMITED

FIRST APPELLANT

ANTHONY J. FITZPATRICK

SECOND APPELLANT

- AND -

MICHAEL GLADNEY

PETITIONER/RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 19th DAY OF APRIL 2018

1. By Order of the High Court (Humphreys J.) made on the 10th August 2016 it was ordered that Star Elm Frames limited ("the Company") be wound up pursuant to the provisions of the Companies Act 2014 ("the Act"), it being unable to pay its debts, having failed to comply with a demand in writing served on the company pursuant to s. 570(a)(i) of the Act. Mr Myles Kirby of Ferris Associates, Chartered Accountants was appointed as official liquidator of the company.

2. The winding up of the company had been sought by way of petition presented by the Revenue Commissioners to the High Court on the 24th June 2016. That application was opposed by two directors of the company, namely Niall Freeman and Anthony O'Gara, as well as by David Sage, an employee of the company. In addition, the winding up application by Revenue was opposed by Anthony Fitzpatrick, Chartered Accountant, who had previously been appointed as liquidator at a meeting of creditors of the company at which an ordinary resolution for the voluntary winding up of the company had been passed on the 18th July 2016, and where a majority of the creditors' votes cast at the meeting was in favour of the appointment of Mr Fitzpatrick as liquidator, Revenue having proposed Mr Kirby.

3. The meeting of creditors at which the ordinary resolution for a voluntary winding up was passed was called by the company following the presentation by Revenue of its petition to the High Court. Revenue had wished Mr Kirby to be appointed as liquidator at that meeting, and when that did not occur, Revenue proceeded with its petition before the High Court so that it could again seek to have Mr Kirby appointed as liquidator. The reason for preferring Mr Kirby to be appointed is stated in the affidavit grounding the petition sworn on the 20th July 2016 as follows:-

> "35. I say that for the reasons outlined herein, the petitioner seeks the appointment of Myles Kirby as official liquidator. I say that the petitioner, the Collector General, has had a previous course of dealings with Anthony Fitzpatrick in his capacity as liquidator and prefers his nominee to act as liquidator over the assets of the company.
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> 36. I say that the Revenue Commissioners have previously made an application to have Anthony Fitzpatrick removed as the liquidator from Ballyrider Limited (in Voluntary Liquidation) and I beg to refer to a true copy of judgment of Mr Justice Murphy delivered on 21st of July 2015 together with order of the 24th of July 2015 upon which marked with the letters and numbers "DL8" I have signed my name prior to the swearing hereof. I say that the said order is under appeal.
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> 37. I further say that Anthony Fitzpatrick is the nominee of the members of the company. I say that given the matter is outlined herein, it is the position of the petitioner and Collector General, that an official liquidator unconnected with the members of the company ought to be appointed.
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> 38. I say that serious issues arise regarding the conduct of the company, the implementation of the Scheme of Arrangement and the non-payment of taxes."

4. On the hearing of the petition, the said Anthony O'Gara, David Sage and Anthony Fitzpatrick sought the leave of the High Court to be heard as respondents to the application for the winding up order. That leave was granted and solicitors came on record for them by entry of appearance.

5. Before addressing the issues that were raised in the High Court, and that application generally, it is necessary to give some brief background facts.

6. The company was incorporated in July 2011, and carried on the business of the manufacture, sale and supply of windows and window frames. The company appears to have taken over the business operated by a different company, Star Elm Limited, which went into liquidation in September 2011 owing Revenue c. €780,000 according to the affidavit which grounded the present petition to the High Court.

7. The company got into financial difficulties and went into examinership in October 2013. It was Revenue's opinion at that time that the company did not have a reasonable prospect of survival, and it engaged Mr Kirby to analyse the proposed Scheme of Arrangement, the independent accountant's report and the affairs of the company. Mr Kirby raised a number of concerns with regard to the viability of the company going forward, but, notwithstanding those concerns, the High Court (Kelly J.) approved the Scheme of Arrangement on the 16th January 2014. The grounding affidavit to the petition herein sets forth details of the gradual further deterioration of the company to the point where as of the date of swearing of that affidavit (20th July 2016) the total amount due and owing to Revenue was stated to be €566,930. In such circumstances, it was averred that the concerns which Revenue had in relation to the viability of the company in the light of the Scheme of Arrangement had proven to be correct, and that the company was insolvent. It was in such circumstances that Revenue proceeded to present its petition to the High Court, and sought to have Mr Kirby appointed as official liquidator. As I have stated already, it was immediately following the presentation of that petition by Revenue, that the company called a meeting at which an ordinary resolution was passed on the 18th July 2016 for the voluntary winding up of the company and whereby Mr Fitzpatrick was appointed liquidator by a majority by value of the creditors present. Mr Kirby had been proposed as liquidator by Revenue, but that proposal was defeated.

The High Court judgment

8. A feature of the present case that is unusual is the fact that Mr Fitzpatrick, a chartered accountant, who was appointed as liquidator for the purposes of the winding up of the company, should have sought leave of the High Court to appear on the hearing of the Revenue's petition, which leave was granted, and that he should so actively involve himself in opposing the petition at the hearing in the High Court. He is neither a shareholder nor a director of the company, and his only interest presumably is that he wishes to retain his appointment as liquidator in the voluntary liquidation, so that he can gain some financial reward by way of fees he would be entitled to charge for the professional services he renders. That is an unusual situation to say the least, and one which the trial judge adverted to early in his judgment. He endorsed the judgment of Harman J. in *Hewitt Brannan* (Tools) Co Ltd [1991] BCLC 80 who stated that a liquidator "had no business to take an attitude as to the continuation or not of his voluntary liquidation". The trial judge stated that he considered that approach to be correct advising that: "the liquidator should stand back from an application of this type and allow the primary parties, being the disagreeing creditors, and to a lesser extent the directors, to fight the issue out". I agree. The trial judge went on to state:

> "Mr Fitzpatrick's failure to do so has led to this application being much more protracted and expensive than it otherwise would have been. Furthermore it led to the unedifying position whereby he, rather than the chairman of the creditors' meeting, took on the primary onus of defending the chairman's rulings and conduct of that meeting."

9. As a result, the trial judge ordered that Revenue recover the costs of the proceedings against Mr Fitzpatrick personally and the company jointly and severally, when those costs were taxed and ascertained, and went on to direct that any costs payable to Mr Fitzpatrick in his role as voluntary liquidator up to the date of the winding up order (10th August 2016) shall be set off against the costs due and owing to Revenue. Mr Fitzpatrick appeals, inter alia, against that order and I will come to that in due course.

10. Having addressed himself to that unusual role being played by Mr Fitzpatrick, the trial judge then dealt with the issues related to the jurisdictional basis for the winding up of the company by the court, as well as the issue relating to whether Mr Kirby or Mr Fitzpatrick ought to be appointed as official liquidator by the court in the event that the company was ordered to be wound up.

The letter of demand issue

11. Counsel for the parties opposing the petition, Mr Hudson, had raised an issue as to the lawfulness of the letter of demand served on the company by Revenue on the 9th March 2016, because the amount stated therein to be due and to be paid by the company was not correct. It has turned out that the amount shown was overstated because an amount that had been agreed to be written off under the scheme of arrangement for the examinership had not been allowed for in the sum set forth in the letter of demand. Mr Hudson had submitted that the amount specified as being due in the letter of demand had to be accurate, and if not, the demand was invalid.

12. The trial judge rejected that submission. He referred to the basis relied upon by Revenue for the winding up of the company, namely that it was unable to pay its debts. He then referred to s. 570 of the Act which specifies a number of different ways in which that inability to pay its debts may be proven, and in particular under s. 570 (a) where a failure to meet a letter of demand may establish an inability by the company to pay its debts. He referred to the judgment of Laffoy J. in *Riviera Leisure Limited* [2009] IEHC 186 herein she stated that "it is well settled that, in order to be effective, the demand should be unequivocal, of a peremptory character and unconditional (MacCann and Courtney, Companies Acts 1963-2006, 2008 ed. at p. 428)". The letter of demand in that case had referred to a larger amount than the amount of the alleged debt which granted the petition. But there were other features of the letter of demand which prevented the letter of demand in that case being considered as one which was "unequivocal, of a peremptory character and unconditional". The conclusion that the letter of demand did not suffice was not based upon the inaccuracy of the sum specified as being due and owing to the petitioner.

13. The trial judge went on to note that under s. 570(a)(i) of the Act the debt owing must exceed €10,000. He then referred to the judgment of Keane J. (as he then was) in *Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd* [1996] 1 I.R. 12 where he stated:

> "Where the company admitted its indebtedness to the creditor in a sum exceeding the statutory minimum [then £1000] but disputed the balance, even on substantial grounds, the creditor should not normally be restrained from presenting a winding up petition".

14. Having noted that the decision in *Truck and Machinery Sales* had been approved by the Supreme Court in *Meridian Communications Ltd v. Eircell* [2001] IESC 42, the trial judge stated:

> "17. … The effect of that approach seems to me to be that a dispute or even mistake as to the precise amount of the debt does not preclude the presentation of a petition so long as there is an undenied debt of at least the statutory minimum.
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> 18. Furthermore, debt to an ongoing creditor is something of a moving target. As stated above, the Revenue position at the hearing was that a liability exceeding that originally demanded was likely to exist, but in any event that liability was ongoing by reference to P30s and VAT as they fell due. An identity between a letter of demand and an amount of debt proved at a hearing may well be impossible to achieve. The petition procedure should not break down as a result.
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> 19. More broadly, a letter of demand is not the only mechanism for establishing that a company is not able to pay its debts, because s. 570(d) permits the court to be satisfied of that in some other way. Mr Hudson admits that the company is unable to pay its debts, and therefore, even if there is a defect in the Revenue letter of demand, the

statutory basis for the court to be entitled to order a winding up of the company nonetheless exists.

20. Mr Hudson submits that the "process is defective" as a result, but it is not so defective as to mean that the company is to be regarded as somehow now its debts. It is not so able."

15. On this appeal, Mr Hudson has again argued that the letter of demand was defective in stating an incorrect amount as being due by the company, and has submitted that the trial judge erred in law in this regard. However, he was unable, when asked, to point to any Irish authority for the proposition that some error or inaccuracy in the amount otherwise due by the company in the letter of demand invalidated the process thereby depriving the High Court of jurisdiction to make an order winding up the company. Mr Hudson candidly, and quite properly, accepted that he could not put the matter further than the decision of Laffoy J. in *Riviera Leisure Limited*. However, he sought nevertheless to argue that the position should be likened to that under the bankruptcy code where strict accuracy was a requirement. However, I can see no basis for identifying the procedures under the bankruptcy code with those under the Companies Act. They are separate.

16. While Mr Hudson has referred to the judgment of the U.K. Court of Appeal (Buckley L.J) in *Stonegate Securities Ltd v. Gregory* [1980] Ch. 576 (Court of Appeal) in support of his submission as to the invalidity of the letter of demand in this case, it must be remembered that this was a case where there was a substantial dispute raised in relation to the debt. It was not a question of simply the wrong figure being specified. The dispute related to the entire basis for the claim to be entitled to the sum demanded at all. At best it was a contingent debt.

17. In the present case, there is no dispute that the company was significantly indebted to Revenue. There had simply been an error made in the letter of demand by including in the figure demanded to be paid a sum that was not payable by virtue of the earlier scheme of arrangement. That is insufficient of itself to invalidate the letter of demand.

18. In my view the appellants' argument on this ground of appeal must fail.

Extension of time to file verifying affidavit

19. Order 74, r. 12 of the Rules of the Superior Courts provides:

> "Every petition for the winding up of the company by the Court shall be verified by affidavit. Such affidavit, which shall be in one of the Forms Nos. 6 or 7 shall be made by the petitioner, or by one of the petitioners if more than one, or in case the petition is presented by a corporation or company, by some director, secretary or other officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition."

20. In this case the Revenue Commissioners presented the petition in the High Court on the 24th June 2016. The affidavit verifying same was, as found by the trial judge, sworn on the 30th June 2016, six days after the petition was presented. However, in the light of the provisions of Ord. 122 of the Rules of the Superior Courts he concluded that this affidavit was sworn within the time provided. But he went on to conclude that though sworn within the time provided under the rules, it was "served" out of time. It is safe to presume that the word "served" is an error, and that the intention was to refer to the fact that the affidavit had not been "filed" within that 4 day period, as required by Ord. 74, r. 12 of the Rules of the Superior Courts. In that regard he stated:

> "21. Contrary to Mr Hudson's submission the affidavit of verification was not sworn out time. Four days are allowed by O.74. r. 12 and the affidavit was sworn on 30th June, 2016, 6 days after the petition was presented on 24th of June, 2016. However a combination of the disregard of the first day (O. 122, r. 10) and the weekend. Where the limitation is less than six days (O.122, r. 2) mean that the petition was in fact presented within 4 days together with the extensive that period allowed by the rules.
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> 22. The affidavit was however served out of time. Mr Hudson submits that the winding up rules in O. 74 are self-contained and that a late affidavit of verification is not something hat can be rectify by order of the court as he describes it as "statutory". Rules of court are not self-contained. Any individual rule of court is a statutory instrument or an element of a statutory instrument but has been inserted into a larger scheme. By amending the 1986 rules through the insertion of a new O.74, those provisions are made subject to the existing and overarching terms of the rules, including the provision in O. 122, r. 7 permitting the court to extend time. Not only has the court got a jurisdiction to extend the time for a verifying affidavit, but it should exercise that jurisdiction in the interests of justice where there has been no irredeemably prejudicial delays; and as those criteria are met in this case, I do so here."

21. Order 122, r. 7 of the Rules of the Superior Courts provides:

> "Subject to any relevant provision of statute, the court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the court may direct, and any such enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed."

22. The appellants have urged in the notice of appeal that the trial judge acted unreasonably in granting an extension of time to the petitioner in circumstances where that extension of time was requested on the third day of the hearing of the petition, and only after the issue as to the lateness of the affidavit had been raised by counsel for the appellants on the previous day.

23. In circumstances where no prejudice of any kind arose to the appellants by the failure of the petitioner to file the verifying affidavit within the period of four days for doing so specified in Ord.74, the trial judge did not act "unreasonably" (as it is put in the notice of appeal) in exercising his discretion under Ors.122, r. 7 of the Rules of the Superior Courts to extend the time for that affidavit to be filed. I would reject this ground of appeal.

Winding up under order of the Court where a voluntary liquidation already exists

24. The appellants' argued in the High Court that where the company the subject of the petition was already in voluntary liquidation, the Court should not order it to be wound up instead under order of the Court. The trial judge concluded that it was a matter for the court's discretion whether or not to do so, and having considered all the evidence and submissions made he concluded that the company should be wound up under order of the court. The notice of appeal states in this regard that "the learned trial judge erred in law and in fact insofar as [he] had insufficient regard for the authorities opened by counsel and this appellant [the company] in respect of the criteria to displace a voluntary liquidator". I cannot agree.

25. The trial judge had been referred to the judgment of O'Neill J. in *Hayes Homes Limited (in voluntary liquidation)*, unreported, High Court, 8th July 2004. That was a case also involving Mr Fitzpatrick who had been appointed as liquidator in a members' voluntary winding up. The Revenue were the holders of 90% of the company's indebtedness, but an issue arose as to the lawfulness of the proxy appointing a representative of Revenue to attend and vote at a meeting of creditors. In the event that proxy was excluded by the chairman having taken legal advice. The High Court was called upon to determine firstly whether the proxy was properly excluded, but also to decide if the company should be wound up by order of the court rather than by way of a voluntary liquidation. The conclusions of O'Neill J. on the first issue of the proxy are not relevant to the present appeal, but in relation to the second issue O'Neill J. had to address a similar question as arises herein. Having considered both English authority and Irish authority, noting some divergence between the two strands of authority, O'Neill J. concluded at p. 14 as follows:

> "What is quite clear is that the court has a discretion and it must weigh up all the factors relevant to the exercise of that discretion. It can of course be fairly said that in the English case[s] in circumstances where a liquidation was in the hands of the nominee of those who could be said to be responsible for the insolvency and where there was some evidence of asset transfers prior to winding up, at an undervalue to associated companies, that decisive weight was attached to the justifiable sense of grievance of so-called outside or independent creditors who stood to lose considerable amounts of money. In the Irish cases referred to, the evidence supporting the petitions did not appear to establish circumstances of that kind and hence given that there was no dispute as to the independence and capacity of the liquidators chosen, the sense of grievance of the petitioners in those cases was clearly discounted.
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> In my view this court should be disposed to intervene if the circumstances deposed to an affidavit show that assets of the company, such as the goodwill of its business, have gone to an associated company without any payment and the liquidation is in the hands of the nominee of the person or persons who had control over the company and the connected or associated companies, and where the nominee of the majority creditors who stand to lose substantial monies has been rejected."

26. On the facts in *Hayes Homes Limited*, O'Neill J. was satisfied that the company should be wound up by the court since it was only due to some technical failure in relation to the proxy for the creditors' meeting that the Revenue had not prevailed at that meeting. There were other factors also which the judge identified as justifying the winding up by the court. The important point is that there is undoubtedly a discretion which the court enjoys in relation to replacing the voluntary liquidation with one ordered by the court. It is for the judge in any particular case to consider the facts of any case and all its surrounding circumstances and arrive at a reasoned conclusion for the exercise of that discretion in one direction or another, when that question arises for determination.

27. In the present case Revenue had put on affidavit all its concerns about the voluntary liquidation, the background to it, and the appointment of Mr Fitzpatrick as liquidator, and the reasons for its desire that the company be wound up by order of the court. The trial judge considered all the competing factors, and dealt with these in some detail in his judgment. He set out some nine factors which he stated "militated in favour of a winding up under the supervision of the court". He went on to state that those factors in favour of exercising his discretion for a winding up under the direction of the court "are overwhelmingly more weighty than those against", and therefore made the order in that regard.

28. I have referred to the ground of appeal in this respect, and to the fact that the ground is argued on the basis that the trial judge erred by having insufficient regard to the authorities opened to him. There is no challenge mounted to the findings made by the trial judge in relation to the factors which he identifies as persuading him to exercise his discretion as he did. Nevertheless, I am satisfied that his conclusions are justified on the evidence which he had before him. He was in my view perfectly entitled on the evidence to consider it preferable that the company be wound up under the court's supervision, and to make an order in that regard. I would reject this ground of appeal.

29. Closely allied to that issue is whether the trial judge was correct to appoint Mr Kirby as official liquidator. The appellant makes an argument that Mr Fitzpatrick ought not to have been replaced as liquidator except for some cause shown. In fact, it is not accurate to say that Mr Fitzpatrick is being replaced as such. Rather, the position is that the voluntary liquidation in respect of which Mr Fitzpatrick was appointed by the members as liquidator has been replaced by a court winding up on foot of the petition of the Revenue. Having decided that such an order should be made, the trial judge then had to consider who should be appointed to act as official liquidator.

30. In deciding whether to appoint Mr Fitzpatrick or Mr Kirby, or even perhaps somebody else entirely, the trial judge must decide on the basis of evidence before him in the event of a contest. Clearly an official liquidator must be appointed. Normally, the petitioning creditor will nominate a person to act as such, and in most cases that suggested person will be appointed where he/she has the appropriate knowledge, skill and experience, and has consented to act. Here, however, the trial judge had to make a choice. Provided he did so rationally and reasonably and based on credible evidence, there is no good reason for this court to interfere with his decision, unless it can be shown that in some way he clearly erred.

31. At paras. 40–41 of his judgment, the trial judge carefully and in detail set forth the factors which he considered. He set forth the reasons put forward in favour of Mr Kirby's appointment, and those against. He did not consider that in the context of the present case it was necessary to show some "cause" as to why Mr Fitzpatrick ought not to be appointed, but went on to state that if that was required of him, he would consider that some of the factors referred to by him would fulfil that requirement.

32. I am not persuaded that there is any error in the approach adopted by the trial judge, and in his decision to appoint Mr Kirby to act as official liquidator. I would reject this ground of appeal.

Books and records

33. The second named appellant, Mr Fitzpatrick, appealed against the order made by the trial judge that he hand over the books and records of the company. But since he has in fact by now done so, this ground of appeal is moot and was not addressed in argument.

Costs

34. Mr Fitzpatrick appeals against the order for costs of the proceedings made against him in favour of Revenue. This was an order made against him personally and against the company jointly and severally. The trial judge further ordered that any costs payable to Mr Fitzpatrick arising from his role as voluntary liquidator be set off against the costs due and payable by him to Revenue .

35. The grounds of appeal raised in this regard states:

> "2. The learned judge erred in law insofar as he ordered the petitioner to recover its legal costs from Mr Anthony Fitzpatrick, the second named appellant, because, inter alia, the second named appellant is not a party to the petition.

3. The learned judge failed to take cognizance of the submissions of counsel on behalf of Anthony Fitzpatrick in respect of the limitations of the Judicature Act insofar as costs against a non party is concerned.

36. These grounds ignore completely the fact that it was Mr Fitzpatrick who explicitly made application to the trial judge to be added as a respondent to the petition proceedings, and obtained such leave, and instructed solicitors to enter an appearance, and counsel to appear at the hearing of the petition. The trial judge stated in his judgment:

> "Costs must follow the event in this case. The liquidator by consuming a substantial amount of court resources over 3 days in vacation must accept the corresponding liability for the costs of having done so. Had he stood back and let the primary parties deal with the matter, there would have been no costs liability to him and the matter would have been dealt with much more cheaply and quickly."

37. For whatever reason, Mr Fitzpatrick needlessly chose to intervene in the petition proceedings by seeking to be joined as a party, and he was so joined so that he became the 'legitimus contradictor' opposing the making of the winding up order. Like any other party who does not succeed in court proceedings, he was exposed to the possibility that the normal rule would apply pursuant to Ord .99, rr. 1 and 3 of the Rules of the Superior Courts, namely that costs will follow the event unless some special cause could be identified which would just making a different order. The trial judge was in a good position to adjudicate upon whether there was any special cause such that an order for costs would not follow the event, but was very clear in his reasons for making the order against Mr Fitzpatrick and the company jointly and severally.

38. The making of a personal costs order against Mr Fitzpatrick was, again, something which the trial judge was entitled to make in the exercise of his discretion, taking into account all matters averred to by Revenue in its affidavits, and also as averred to by Mr Fitzpatrick. Clearly the trial judge took a particular view of the facts of the case, and this was adverse to Mr Fitzpatrick. Had Mr Fitzpatrick not sought to intervene as he did by making an application to be joined to the proceedings, and had he not been so joined, there is little doubt from the papers that in the ordinary way the hearing of this petition before the trial judge would have been completed within half an hour. Instead, the matter took three days. The trial judge was in the best position to adjudicate on whether a personal costs order against Mr Fitzpatrick was justified in the circumstances, and I would not interfere with the manner in which he exercised his discretion in this particular case.

39. Counsel for the appellant has referred to Ors. 74, r. 15 of the Rules of the Superior Courts which provides:

> "Every person who intends to appear from the hearing of a petition shall serve on, or send by post to, the petitioner or his solicitor at the address stated in the advertisement of the petition, notice of his intention. The notice shall contain the address of such person, and shall be signed by him, or by his solicitor and shall be served, or if sent by post, shall be posted in such time as in the ordinary course of post to reach the address not later than five o'clock in the afternoon of the day previous to the day appointed for the hearing of the petition. The notice may be in the Form No. 8. A person who has failed to comply with this rule shall not, without the special leave of the Court be allowed to appear on the hearing of the petition."

40. Counsel has submitted that Mr Fitzpatrick was perfectly entitled to seek the special leave of the court so as to be allowed appear on the hearing of the petition, and having been granted leave, should have been entitled to his own costs of so doing, let alone having an order made against him in respect of the costs of the petition hearing. It is urged that given the criticisms of Mr Fitzpatrick that were contained in affidavits filed by Revenue, it was reasonable for Mr Fitzpatrick to wish to appear and defend his actions.

41. Counsel has referred to the provisions of s. 617 of the Act which provides:

> "617(1) All costs, charges and expenses properly incurred in the winding up of the company, including the remuneration of the liquidator, remaining after payment of:–
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> (a) the fees and expenses properly incurred in preserving, realising or getting in the assets, and
>
> (b) where the company has previously commenced to be wound up voluntarily, such remuneration, costs and expenses as the court may allow to a liquidator appointed in such voluntary winding up,
>
> shall be payable out of the property of the company in priority to all other claims, and shall be paid or discharged in the order of priority set out in subsection (2).
>
> (2) The costs, charges and expenses referred to in subsection (1) shall, subject to any order made by the court in a winding up by it, be liable to the following payments which shall be made in the following order of priority, namely:
>
> (a) First – in the case of a winding up by the court, the costs of the petition, *including the costs of any person appearing on the petition whose costs are allowed by the court*;
>
> (b) Next – any costs and expenses necessarily incurred in connection with the summoning, advertisement and holding of a creditors' meeting under section 587;
>
> (c) Next – the costs and expenses necessarily incurred in and about the preparation and making of, or concurring in the making of, the statement of the company's affairs and the accompanying list of creditors and the amounts due to them as required by section 587 (7);
>
> (d) Next – the necessary disbursements of the liquidator, other than expenses properly incurred in preserving, realising or getting in the assets as provided for in subsection (1);
>
> (e) Next – the costs payable to the solicitor for the liquidator;
>
> (f) Next – the remuneration of the liquidator;
>
> (g) Next – the out-of-pocket expenses necessarily incurred by the committee of inspection (if any).

(3) Subsection (4) applies in relation to a person who has provided funds to discharge any such costs, charges or expenses (other than costs or expenses referred to in subsection (2) (b) or (c) as referred to in subsection (1).

(4) Such person shall be entitled to be reimbursed to the extent of the funds so provided by him or her in the same order of priority as to payment out of the property of the company as would otherwise have applied to the costs, charges or expenses concerned." (Emphasis added)

42. What is clear from this section is that the costs of any party appearing on the hearing of the petition are at the judge's discretion. Section 617(2)(a) specifically refers to the costs of any person appearing on the petition "whose costs are allowed by the court". There is nothing in the section which entitles the party as of right to their costs of appearing on the petition. In the present case the trial judge clearly considered that Mr Fitzpatrick should not be allowed his costs of appearing. The trial judge explicitly stated that he ought not to have taken part, and ought to have allowed the matter to proceed. When one considers that Mr Fitzpatrick was not even a creditor of the company, but simply a person who had been appointed as liquidator in a voluntary winding up prior to the hearing of the petition, it is difficult to see what interest of his justified his participation in the petition hearing for the purpose of opposing it.

43. As for the making of an order against Mr Fitzpatrick in respect of the costs of the petition hearing, again I would consider that the trial judge retained a discretion in that regard under Ord.99 of the Rules of the Superior Courts, and was entitled to make an order personally against Mr Fitzpatrick where there was a reasoned basis for doing so. I'm satisfied that the trial judge was entitled to exercise his discretion in the manner in which he did, and to take the view that he did on the facts as disclosed on affidavit, and in the light of his overall conclusions on the issues raised by Mr Fitzpatrick and the company in their opposition to the petition.

44. For all these reasons I would dismiss the appeals by both appellants.