

THE HIGH COURT

[2016 No. 242 COS]

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

JUDGMENT of Ms. Justice Faherty delivered on the 26th day of April 2017

1. This matter comes before the court by way of Notice of Motion grounded on the affidavit of Myles Kirby of Ferris and Associates, who was appointed official liquidator of Star Elm Frames Limited ("the Company") by order of the High Court (Humphreys J.) dated 10th August, 2016.

2. The relevant background leading to the appointment of Mr. Kirby is as follows: On 24th June, 2016, the Revenue Commissioners presented a petition in the High Court seeking to have the Company wound up. The petition was given a return date of 18th July, 2016. The petition was presented following service by the Revenue Commissioners of a demand, dated 10th March, 2016, for the repayment of the total sum of €582,523.35 which the Revenue Commissioners asserted was due and owing by the Company. The members of the Company subsequently nominated Mr. Anthony J. Fitzpatrick, Chartered Accountant, practicing from Clonmoney House, Newenham Street, Limerick as liquidator of the Company in a creditors' voluntary winding up. Mr. Fitzpatrick's appointment terminated on 10th August, 2016, following the appointment of Mr. Kirby by order of the High Court.

3. In addition to ordering the Company to be wound up and appointing Mr. Kirby as official liquidator, it was ordered by Humphreys J. that "pursuant to s. 572(1)(b) of the Companies Act 2014 that Mr. Anthony Fitzpatrick present all books, records, accounts and property of the Company to Miles Kirby liquidator of the Company as soon as possible and no later than the close of business on Monday the 15th August, 2016". On 16th August, 2016, the Company and Mr. Fitzpatrick lodged a notice of appeal against the High Court order.

4. The within motion issued on 30th August, 2016, under the record number for the petition to wind up the Company. The reliefs then being sought were as follows:

- (1) An order pursuant to O. 44 of the Rules of the Superior Court (RSC) for the attachment of Mr. Fitzpatrick "in respect of the deliberate and continuing breach by him" the order of 10th August, 2016;
- (2) An order committing Mr. Fitzpatrick to prison for failing to comply with the High Court order of 10th August, 2016;
- (3) Further or in the alternative, an order directing Mr. Fitzpatrick to pay a fine for the benefit of the winding up of the Company in consequence of his "wilful contempt" of the High Court order;
- (4) Further or in the alternative, pursuant to O. 42 RSC, an order for sequestration and for the appointment of a sequestrator for the assets of Mr. Fitzpatrick of whatever kind for the purpose of having them sequestered as a result of his wilful disobedience of the record order;
- (5) Further or alternative, an order pursuant to s. 596 of the Companies Act 2014 and/or s. 644 of the said Act and/or s. 572 of the said Act and/or pursuant to the inherent jurisdiction of the court directing Mr. Fitzpatrick to take all necessary steps to immediately present and/or transfer control of all books, records, property and accounts of the Company to Mr. Kirby at his office;
- (6) An order directing AIB plc. to transfer control of a bank account opened by Mr. Fitzpatrick in his capacity as voluntary liquidator of the Company to the official liquidator Mr. Kirby;
- (7) An order directing that Mr. Fitzpatrick discharge:
 - (a) the costs of the within application; and
 - (b) the whole (or so much of them as the Court shall specify) of the costs and expenses incurred by the official liquidator in investigating and dealing with the matters which are the subject matter of the within application; and
- (8) An order providing for a payment on account by Mr. Fitzpatrick in respect of costs and expenses as maybe awarded against him in the within application.

The hearing of 2nd September, 2016 and the issue of Mr. Kirby's locus standi

5. The within application first came before the court on 2nd September, 2016, this being the return date for the Notice of Motion which issued on 30th August, 2016. At the outset, objection was raised by counsel for Mr. Fitzpatrick on the basis Mr. Kirby did not have *locus standi* to bring the within application. It was argued that Mr. Kirby was not a party to the proceedings to wind up the Company. As deposed to in the affidavit of Mr. Fitzpatrick's solicitor, Mr. Kilcline, sworn 1st September, 2016, at the hearing of the petition to wind up the Company, Mr. Kirby had not sought special leave to appear pursuant to O. 74, r. 15 RSC. Reliance was also placed on the fact that at the hearing in the Court of Appeal of an application for a stay on the Order appointing Mr. Kirby official liquidator, an affidavit sworn by Mr. John Healy of Ferris and Associates was not permitted to be opened. Moreover, counsel for Mr. Fitzpatrick advised that Mr. Kirby's solicitor was not permitted to address the Court of Appeal at the hearing of the stay application, albeit that Mr. Kirby's costs for attending the hearing were allowed as he had been supplied with a copy of the appeal by Mr. Kilcline. Counsel submitted that in the context of the within proceedings, the only person who could apply to seek Mr. Fitzpatrick's attachment and committal was the petitioner in the winding up proceedings, namely the Revenue Commissioners, whose solicitor was on record in the proceedings. Counsel for Mr. Fitzpatrick emphasised that Mr. Kirby's solicitor was not a solicitor on record in the within proceedings. Accordingly, he argued there was no right of audience for Mr. Kirby in the within proceedings albeit counsel acknowledged that Mr. Kirby, as the official liquidator, could seek the reliefs sought in the Notice of Motion had he instituted his own proceedings and in the proper format.

6. Counsel for Mr. Kirby described Mr. Fitzpatrick's objection as entirely misconceived. He submitted that once Mr. Kirby was appointed official liquidator he was the only person entitled to act on behalf of the Company. It was submitted that where a liquidator

has been appointed by order of the court it was entirely normal for applications to be brought by the liquidator which bear the same record number as the petition to wind up. Counsel contended that the Order made on 10th August, 2016 was that Mr. Fitzpatrick was to present the books and records of the Company to Mr. Kirby. In circumstances where Mr. Kirby was alleging breach of that Order, the only person who could act on foot of the alleged breach was Mr. Kirby. Counsel contended that this was borne out by the ruling of the Court of Appeal in refusing to stay the High Court Order of 10th August, 2016 (save in one discrete regard, namely the award of costs against Mr. Fitzpatrick). Counsel referred to the judgment of Ryan P. in the Court of Appeal who stated:-

"In my view, Mr. Fitzpatrick is not entitled to retain the materials of the Company if he is not the liquidator ... Mr. Kirby is entitled to get all the relevant materials if he remains liquidator."

7. After hearing the submissions of both counsel, this Court was satisfied that as the official liquidator of the Company appointed by Order of the court on 10th August, 2016, Mr. Kirby was entitled to pursue the within application and I ruled accordingly.

8. In the course of the hearing on 2nd September, 2016, counsel for Mr. Kirby and counsel for Mr. Fitzpatrick ultimately reached a consensus (with some prompting by the court) as to how to effect delivery of the books and records of the Company to Mr. Kirby. This was without prejudice to the issues to be determined by this Court on foot of the motion brought by Mr. Kirby.

9. On 6th September, 2016, the court was advised that the Company's books and records had been presented by Mr. Fitzpatrick to Mr. Kirby in Athlone on 5th September, 2016, in line with the suggestion made by the court on 2nd September, 2016.

10. The hearing of the within application resumed on separate days in November and December 2016. Counsel for Mr. Kirby informed the court that given that the books and records of the Company had been handed over to Mr. Kirby, Mr. Fitzpatrick's attachment and committal was no longer being sought. Nor was the sequestration of Mr. Fitzpatrick's assets being pursued. It was submitted however that there remained the question of historical contempt and how this was to be dealt with. Counsel for Mr. Fitzpatrick denied that there had any breach of the Order of 10th August, 2016.

Further preliminary objections to the within application raised by counsel for Mr. Fitzpatrick

11. Counsel for Mr. Fitzpatrick raised a number of preliminary objections to the hearing of the Motion. In the first instance, it was contended that there was defective service of the Order of 10th August, 2016 on Mr. Fitzpatrick. In his replying affidavit sworn 2nd September, 2016, Mr. Fitzpatrick avers that he was "never served the copy of the High Court orders, duly endorsed with a penal endorsement". While it was accepted that Mr. Kilcline, Mr. Fitzpatrick's solicitor, had been served with a copy of the Order by email through the offices of the Revenue Commissioners, it was nonetheless submitted that given that Mr. Fitzpatrick had not been served personally this merited the striking out of the motion to attach and commit.

12. In support of the contention that service of the Order of 10th August, 2016, should have been on Mr. Fitzpatrick personally, his counsel cited O. 41, r. 8 RSC which provides:-

"Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgement or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same, other than an order directing a mortgagor to deliver possession to a mortgagee, or an order under s. 62 subs. (7) of the Registration of Title Act, 1964, there shall be endorsed a memorandum in the words or to the effect following, viz.:—

"If you the within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order."

13. Counsel also referred the court to *Airscape Ltd. v. Powertech Logistics Ltd.* [2008] 4 I.R. 438 where Laffoy J. addressed the issue of service, as follows:

"11. Secondly, a procedural point was raised on behalf of the second and third respondents by their respective counsel that the application must be refused because of failure by the applicant to comply with O. 41, r. 8 of the Rules of the Superior Courts 1986. That rule provides as follows:-

"Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same ... there shall be endorsed a memorandum in the words or to the effect following, viz.: -

'If you within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order.'"

The court was referred to an old Irish decision, Prior v. Johnston (1893) 27 I.L.T.R. 108, in which the court made no order on an application to attach a defendant for non-compliance with an order to file accounts because of failure to serve the defendant with a copy of the order containing the necessary penal endorsement. The court refused the defendant his costs. Counsel for the applicant sought to draw a distinction between an application for an order of attachment and an application for an order of sequestration, suggesting that O. 41, r. 8 need not be complied with when attachment, that is to say, imprisonment, is not being pursued. No authority was cited in support of that proposition and, in my view, as sequestration against the property of a director of a company is a penal sanction, as a matter of principle, such a distinction is not tenable. In this case, before the third motion issued, O. 41, r. 8 should have been complied with. It certainly should have been complied with because of the alternative relief sought under O. 44, r. 6. It is common case that it was not. In those circumstances, in my view, the application should be refused."

14. Reliance was also placed on *Century Insurance Ltd. v. Larkin* [1910] 1 I.R. 91 where it was held that in order to attach and commit the person for contempt, the applicant therefore "must serve the order which compels him to do the act upon him, and it must contain proper endorsement upon it". Counsel for Mr. Fitzpatrick also cited *Mander v. Falcke* [1891] 3 Ch. 488 in support of his contention that the appearance of a person in court would not procure a defect in service.

15. In contending that Mr. Fitzpatrick was properly served and that the service of the Order of 10th August, 2016 on Mr. Fitzpatrick did not have to be by way of personal service upon him, counsel for Mr. Kirby relied on the decision of Peart J. in *Laois County Council v. Scully* [2007] IEHC 262 as to the meaning of O. 41, r. 8 RSC. Peart J. addressed an argument (made in the context of an application for attachment and committal) that personal service was required in the following terms:-

"[38] It does not seem clear to me that, under O. 41, r. 8 of the Rules of the Superior Courts 1986 or any other rule to which the court has been referred, personal service of an order upon a defendant is required before such defendant may be attached and committed, so long as the order has been served. Forgetting the elderly case law to which the court has been referred for a moment, it is clear from, for example O. 121, r. 8 and O. 70, r. 68 already referred to, that there are situations where personal service of a judgment or order may not be required.

[39] There is a footnote to O.121, r. 1 in O'Flóinn & Gannon Rules of the Superior Courts at p. 968 which, refers to the fact that personal service is required of a summons under O. 9, r. 2, and a footnote to O. 41, r. 8 refers to the fact that personal service of an order made under O. 84, r. 1 is required. In that regard, O. 84, r. 1(3) specifically provides that "Every order referred to in this rule shall be served personally on the person to whom it is directed, unless the Court otherwise directs". It is clear therefore that the Rules provide for the cases in which personal service of an order is required, and it is obvious that there will be also situations and cases where such personal service of an order or judgment is not required.

[40] Even O. 70, r. 68 referred to by counsel for the respondents (but which relates only to matrimonial causes or matters as already mentioned) commences with the words "When it is necessary to serve personally any judgment or order ...", clearly envisaging that there are situations where it is unnecessary to serve such an order personally.

[41] I notice that the case referred to by counsel for the respondents, namely *Century Insurance Co. v. Larkin* [1910] 1 I.R. 91 was a case in which no solicitor was on record for the defendant, and that the defendant appeared personally in court. On the other hand, the point at issue in *McClure v. McClure* [1951] I.R. 137 was not so much the question of personal service as the fact that the order when originally served did not contain a penal endorsement and that is why service was found to have been defective. There is no perceivable injustice in my view in a situation where an order made is served upon a person's solicitor at a time when that solicitor is still acting for the person.

[42] Order 41, r. 8 makes no reference to personal service being required. There is simply a requirement in relation to an order requiring a person to do an act, to state the time after service by which it has to be done, and that the copy order served be endorsed with a penal endorsement. It seems to me that under the Rules of the Superior Courts 1986 an order such as the present one is not an order which the Rules require to be served personally on a defendant bound by it. It is not an order under O. 84, r. 1 for example. It seems to me, therefore, that where an order of this kind is made against a defendant for whom a solicitor is on record, service on that solicitor is permitted, since the Rules themselves have not required service to be personal service. The cases to which I have referred can be distinguished on their facts. That is not to say that out of an abundance of caution a plaintiff's solicitor ought not to in fact effect personal service of such an order duly endorsed upon the defendant personally, but it does not appear to be a requirement."

16. Having regard to the aforesaid submissions and the case law, overall I am satisfied to adopt the approach of Peart J. in *Laois County Council v. Scully*. I find that the reliance placed by counsel for Mr. Fitzpatrick on *Airscape Ltd.* to be misplaced. From a reading of that case, what was decided by Laffoy J. was not so much the issue of personal service of the court order with the penal endorsement but rather whether compliance with O. 41, r.8 was necessary where it was sequestration that was being looked for as opposed to an order for attachment, an issue the learned judge decided in the affirmative.

17. In the present case, Mr. Kilcline, who was on record for Mr. Fitzpatrick, received on 15th August, 2016, a copy of the Order of Humphreys J. with the penal endorsement thereon. Moreover, Mr. Kilcline at the time of service upon him remained Mr. Fitzpatrick's solicitor for the purpose of Mr. Fitzpatrick's appeal of the Order of 10th August, 2016.

18. I also note the affidavit of Emma O'Reilly, of the Revenue Commissioners, sworn 30th August, 2016, wherein she sets out her attempts, on 11th August, 2016 and 15th August, 2016, respectively, to personally serve the Order of 10th August, 2016 and the Order as amended by Humphreys J. on 15th August, 2016, on Mr. Fitzpatrick. She was unable to effect personal service.

19. Counsel for Mr. Fitzpatrick also highlighted what he described as defects in the form of the Motion which was before the court. He maintained that the Notice of Motion itself did not comply with O. 52, r. 7 RSC given the absence of any reference to Mr. Kilcline thereon. This, counsel maintained, was in circumstances where reliance was being placed on the fact that Mr. Kilcline had been served with a copy of the Order by the Revenue Commissioners. It was further asserted that there was no applicant or respondent named on the Notice of Motion and that Mr. Fitzpatrick was not a proper respondent to the Motion. Counsel also submitted that there was a question as to whether, as a matter of form, the application was properly before the court, given that the Notice of Motion does not even bear Mr. Kirby's name. In support of his argument in this regard, counsel for Mr. Fitzpatrick relied on *Tucon v. Governor of Bank of Ireland* [2016] IECA 211 where the Court of Appeal held that proceedings under the Companies Act 2014 ("the 2014 Act") were improperly constituted in circumstances where the said proceedings were invoked in the name of the Company, whereas the relevant section relied on provided for a cause of action vested in a liquidator, creditor or contributory of the Company. The Court of Appeal held that it was not open to the court to extend *locus standi* to a party upon whom it has not been conferred by the express words of the statute. I am not satisfied that the *ratio* of the Court of Appeal in *Tucon* has any particular bearing on the present application. I am satisfied that it is more than clear in the present case that Mr. Kirby is pursuing the reliefs sought in the Notice of Motion in his capacity as official liquidator of the Company. Thus, the present case can be distinguished from the factual position in *Tucon* where the applicant was the company in circumstances where the relief being sought, pursuant to certain provisions of the 2014 Act, did not permit of such an application and where the liquidator had expressly declined to be added to the proceedings.

20. It was further submitted on Mr. Fitzpatrick's behalf that insofar as Mr. Kirby was seeking an order under s. 596 of the 2014 Act, that amounted effectively to a duplication of the Order already made on 10th August, 2016. Similarly, counsel contended that Mr. Kirby was not entitled to seek an order pursuant to s. 572 of the 2014 Act as that order was already made by Humphreys J. pursuant to s. 572(1)(b) (albeit Mr. Fitzpatrick takes issue with the invoking of this section by Humphreys J. and has appealed same to the Court of Appeal) Counsel submitted that it was not clear why the court was being asked to make such an order in the within application when such an order was more appropriate to a winding up petition.

21. In response to Mr. Fitzpatrick's counsel's submissions, counsel for Mr. Kirby made the following concessions: orders under ss. 596 and 572 of the 2014 Act were no longer being pursued by Mr. Kirby given that the books and records of the Company had been delivered by Mr. Fitzpatrick on 5th September 2016. It was submitted however that it had been entirely for Mr. Kirby to seek such orders given that at the time the Motion issued, the books and records of the Company had not been forthcoming from Mr. Fitzpatrick.

22. Section 596 of the 2014 Act provides:

(1) Upon the appointment of a liquidator to a company, the liquidator shall take into his or her custody or under his or her control the seal, books and records of the company, and all the property to which the company is or appears to be entitled.

(2) A person who, without lawful entitlement or authority, has—

(a) at the date of the appointment of a liquidator to a company, possession or control of the books, records or other property of the company, or

(b) subsequent to such date comes into such possession or control,

shall surrender immediately to the liquidator such books, records or other property,

as the case may be.

(3) In this section “liquidator” does not include a provisional liquidator.

23. Notwithstanding that the relief sought pursuant to s. 596 effectively duplicated that which was granted by Humphreys J. on 10th August, 2016, I am satisfied that it was open to Mr. Kirby to seek relief under the section given the mandatory nature of subsection 2 (a) and given that as a matter of fact, as of the date of the issuing of the Motion, the Company's books and records had not been surrendered by Mr. Fitzpatrick. However, I have some sympathy for Mr. Fitzpatrick's counsel's argument as to the efficacy of seeking an order under s. 572 of the 2014 Act in circumstances where an order was already made pursuant to that section by Humphreys J. This court however makes no adjudication on whether it was open to my learned colleague to direct that the books and records of the Company be presented to Mr. Kirby pursuant to s. 572 (1)(b) as that question is not for this court to decide. In any event, as these reliefs sought pursuant to s.572 and s. 596 are not now being pursued by Mr. Kirby, it is unnecessary for the court to pronounce further upon these particular matters.

24. Counsel for Mr. Fitzpatrick also advanced the argument that Mr. Kirby has no *locus standi* to seek an order pursuant to s. 644 of the 2014 Act. It was submitted that applications under s. 644 are limited to former liquidators of the Company, the Director of Corporate Enforcement or a member or creditor of the Company. Counsel contended that the entitlement to seek an order under s. 644 did not extend to newly appointed liquidators. He maintained that the application for relief under s. 644 was not properly before the court as Mr. Kirby did not come within the ambit of that particular section. It was further contended that, in any event, on 26th August, 2016, Mr. Kilcline had written to Mr. Kirby's solicitors advising that Mr. Fitzpatrick was prepared to furnish his books and records, in compliance with s. 644. This was before any motion issued and against a backdrop where Humphreys J. had not made any order under s. 644. Furthermore, it was asserted that on 2nd September, 2016, Mr. Fitzpatrick's books and records as liquidator of the Company were handed over to Mr. Kirby together with the Company's books and records.

25. Counsel for Mr. Kirby's position was that an order under s. 644 of the 2014 Act was required to be made by the court. It was submitted that there was no question but that Mr. Kirby had the requisite *locus standi* to seek such an order given that Mr. Fitzpatrick was removed as liquidator by the Order of 10th August, 2016 and a new liquidator, Mr. Kirby, appointed. It was submitted that while s. 644(2) provides for a particular role for a former liquidator where no new liquidator is appointed, that did not arise in the present case given Mr. Kirby's appointment. Mr Kirby's contention was that as the new liquidator he was entitled, pursuant to s. 644 (2)(b)(i), to look for the books and records of the former liquidator where those books and records were not forthcoming. It was also contended on Mr. Kirby's behalf that if Mr. Fitzpatrick's counsel's interpretation of s. 644 was accepted by the court, it would mean effectively that the section was devoid of any purpose. Counsel submitted that Mr. Fitzpatrick's submissions begged the question as to who was to bring an application to court for the books and records of a former liquidator where default arose if it is not to be the newly appointed liquidator of the Company.

26. It was acknowledged by counsel for Mr. Kirby that books and records held by Mr. Fitzpatrick as liquidator of the Company were provided on 5th September 2016, following the issuing of the within Motion and the court hearing of 2nd September, 2016, albeit that these books and records did not form part of the Order made by Humphreys J. on 10th August, 2016. However, there was dispute between Mr. Kirby and Mr. Fitzpatrick as to whether all such records have been provided. Counsel for Mr. Fitzpatrick stated to the court that he could put the matter no further than to state that the former liquidator's books and records were handed over on 5th September, 2016, in Athlone. Counsel for Mr. Kirby stated that it was imperative that an order would be made pursuant to s. 644 given the contents of certain correspondence which passed between Mr. Fitzpatrick and Mr. Kirby over the course of September and December, 2016.

27. It was submitted that while this particular dispute was not for this court to decide in the context of the within application, the court must nonetheless decide whether Mr. Kirby has standing to seek an order pursuant to s. 644 (1) and s. 644 (2) (b)(1) of the 2014 Act and, if so, whether such an order should be made by this court, as sought by Mr. Kirby. Counsel for Mr. Kirby's submission is that an order of this court is required for the purpose of any future application which might be required vis-a-vis Mr. Fitzpatrick's obligation, as former liquidator of the company, to hand over his books and records.

28. Section 644 of the 2014 Act provides as follows:

(1) This section applies where a person vacates the position of liquidator of a company (the “former liquidator”) whether such vacation is by

reason of his or her having—

(a) ceased to be qualified to act as a liquidator of the company,

(b) been removed as liquidator, or

(c) resigned as liquidator.

(2) Where this section applies and no person remains appointed to act as liquidator of the company, the former liquidator

shall retain custody of-

(a) the seal, books, records, and any property of the company in his or her possession or control, and

(b) the books and records kept by him or her as liquidator, (which seal, property, documents or other things are referred to in this section as the "relevant items") until—

(i) a new liquidator is appointed to the company — whereupon the former liquidator shall deliver custody of the relevant items to the new liquidator, or

(ii) directed by the court, upon the application of the former liquidator, the Director of Corporate Enforcement or a member or creditor of the company, to effect delivery or disposal of the relevant items as Corporate Enforcement or a member or creditor of the company, to effect delivery or disposal of the relevant items as the court thinks fit.

(3) The delivery of any of the relevant items pursuant to subsection (2) shall not prejudice any lien which a liquidator may have over it.

(4) A person who fails to comply with this section without lawful excuse shall be guilty of a category 3 offence.

In my view, a reading of s. 644 (2)(b)(i) clearly lays the foundation for a new liquidator to apply to court for delivery of the former liquidators books and records if the former liquidator has not delivered custody of the relevant items (including delivery of the former liquidator's books and records). However, it is also my view that s. 644 (2)(b)(i) clearly and unambiguously mandates the former liquidator to deliver up his or her books and records upon the appointment of the new liquidator. Thus an application after such appointment is not strictly necessary. I am fortified in this conclusion by the observation of Ryan P. in the decision of the Court of Appeal quoted earlier in this judgment that as liquidator appointed by Court Order, Mr. Kirby was entitled to the Company's books and records. Even if I am wrong in interpreting s. 644 (2)(b)(i) as permitting Mr. Kirby to apply to the court, I am of the view that it is open to the court to direct that Mr. Fitzpatrick comply with the provisions of this subsection in light of Mr. Kirby's appointment as the new liquidator of the Company. In his affidavit, Mr. Kirby has sought the directions of the court. My conclusion as to whether an order or direction pursuant to s. 644 in favour of Mr. Kirby should be made in the context of his liquidator's file is addressed later in this judgment.

29. I note Mr. Fitzpatrick also takes issue with Mr. Kirby's averment that he is seeking the directions of the court. He contends that while the s. 631 of the 2014 Act provides that a liquidator, provisional liquidator, creditor, contributory or director can apply to seek directions, the only entity named in the within Motion is the Company. Counsel submitted that, accordingly, Mr. Kirby cannot apply for directions, albeit he acknowledges that the court has already ruled that Mr. Kirby has *locus standi* to bring the within application. I do not find any merit in the argument advanced on behalf of Mr. Fitzpatrick. As this court has found that Mr. Kirby as the official liquidator of the Company has *locus standi* to bring the within application, it must follow that he may seek the directions of the court.

30. I turn now to the principal issue in this application, namely the alleged breach by Mr. Fitzpatrick of the Order of 10th August, 2016.

The law in relation to civil contempt

31. As a matter of first principle, for the purpose of any finding of contempt on his part, Mr. Fitzpatrick is entitled to know of what it is he is alleged to be in contempt. (*Chiltern District Council v. Keane* [1985] 1 WLR 619 refers). Paragraph 1 of the within notice of motion satisfies this requirement in my view.

32. As set out by Denham C.J. in *Dublin City Council v. McFeeley* [2012] IESC 45, there must be a "factual foundation" upon which to make a finding of contempt of court. In *IBRC v. Quinn and Others* [2012] IESC 51, Fennelly J. addressed the question of sufficiency of evidence for the purpose of contempt, as follows:-

"The correct approach to resolution of this issue is to ask whether there was sufficient evidence before the High Court to enable it, as the forum with the exclusive role of determining the facts, to decide beyond reasonable doubt that the appellant was guilty of contempt. The first stage is whether there was sufficient prima facie evidence which, if taken at its highest, was accepted by the court, to permit the court to go to the second stage and consider whether the case is proved beyond reasonable doubt. It was a matter for the learned trial judge to decide whether or not she believed the witnesses. Likewise, only she could determine whether the case had been proved to the criminal standard. This Court performs the appellate function of deciding whether there was sufficient prima facie evidence." (at para.65)

33. As to the requisite standard of proof for a finding of contempt, there is no dispute but that the matter must be determined on a beyond reasonable doubt basis, as referred to by Fennelly J. above. This is also set out by Keane J. in *National Irish Bank v. Graham* [1994] 1 I.R. 215 and by Laffoy J. in *Brightwater v. Allen* [2005] IEHC 155. In *P. Elliott and Co. Ltd. v. Building and Allied Trades Union and others* [2006] IEHC 340, Clarke J. addressed the issue in the following terms:

"3.1 ...It is accepted that the facts alleged to constitute contempt of the court order must be established beyond reasonable doubt. Reference was made to National Irish Bank v. Graham [1994] 1 I.R. 215 where the dicta of Lord Denning MR in Re Bramblevale Limited [1970] 1Ch. 128 was approved. The same principle is clear from Bridgewater v. Jemma Allan and Robert Walters Limited (Unreported High Court, Laffoy J., 12th May, 2005).

3.2. Counsel for Elliott submitted that the required intention to commit a contempt of a civil order is established where it is shown that the defendant concerned knowingly (but not necessarily wilfully) disregarded the court's order. Therefore, it is said, there will be contempt of an order where the person concerned deliberately does not act and knows of the court order even if they are not aware that the act concerned is in breach of the court order. Reliance in that regard was placed on Director General of Fair Trading v. Smiths Concrete [1991] 4All E.R. 150.

3.3. In the course of debating the issue with counsel it was agreed on both sides, and I agree, that there is one refinement to the position that needs to be noted. Courts strive to ensure that orders are made clear in their terms. It is particularly important in cases where a party may be exposed to the risk of severe sanction for breach of an order that it be clear to that party what they can, cannot or must do. However despite the best efforts of all concerned it does remain the case that on certain occasions it may not be absolutely clear as to what is or is not within the scope of a binding order of the court. In those circumstances I am satisfied that, having regard to the penal nature of the contempt jurisdiction, a party could not be said to be in contempt of a court order where, objectively speaking, there

was reasonable doubt as to whether the actions complained of came within or without the scope of the order concerned. I should emphasise that in my view the relevant test is an objective one. Would a reasonable and informed person, having had sight of the court order, come to the view that the acts complained of were legitimate having regard to that order."

Counsel for Mr. Kirby did suggest that since the attachment and committal of Mr. Fitzpatrick was no longer being sought in the within application a standard lower than beyond reasonable doubt might be applicable. The court does not adopt that suggestion and I am satisfied that the requisite standard for a finding of contempt must be beyond reasonable doubt.

The alleged contempt of court on the part of Mr. Fitzpatrick

34. Effectively, the case being made by Mr. Kirby is that he was compelled to seek an order for the attachment and committal of Mr. Fitzpatrick by reason of the latter's failure to present the books and records of the Company to him no later than 5 pm on 15th August, 2016, in accordance with the Order of Humphreys J. dated 10th August, 2016. While the attachment and committal of Mr. Fitzpatrick is no longer being sought, it is urged by counsel for Mr. Kirby that the test for contempt has been met in this case and that the court should make a finding of historical contempt and mark its displeasure at such contempt by sanctioning Mr. Fitzpatrick, as the court deems appropriate.

35. Before addressing the issue of Mr. Fitzpatrick's alleged contempt of court, it is apposite to reprise the background to the making of the Order of 10th August, 2016 and to set out the course of dealing between Mr. Kirby and Mr. Fitzpatrick following the making of the said Order.

36. It is common case that after the Revenue Commissioners presented their winding up petition in relation to the Company on 24th June, 2016, the Company nominated Mr. Fitzpatrick to be its voluntary liquidator and he was appointed as such at a creditors meeting on 18th July, 2016. The winding up petition was ultimately heard over three days before Humphreys J. Both the Company and Mr. Fitzpatrick appeared and they were represented by the same counsel and solicitor. The outcome of the hearing was the Order made by Humphreys J. on 10th August, 2016.

37. In his affidavit granting the within application, Mr. Kirby avers as follows:

"At a meeting which was arranged with Mr. Fitzpatrick for the afternoon of Monday 15 August 2016 in Limerick, two representatives of Mr. Fitzpatrick refused to deliver any books, records, accounts or property to two members of my staff, namely Mr. Patrick McCoy and Mr. John Healy. Mr. Healy swore an affidavit on 18 August, 2016, outlining the events which took place. That was in the context of an application brought in the Court of Appeal by, among others, Mr. Fitzpatrick, seeking a stay on the winding up of the Company."

38. The meeting referred to by Mr. Kirby was arranged via an exchange of emails dated 10th August, 2016 and 15th August, 2016, between representatives of Mr. Kirby's office and Mr. Fitzpatrick. The first of these emails was sent by Mr. McCoy of Mr. Kirby's office to Mr. Fitzpatrick's office on 10th August, 2016. It referred to the Order of 10th August, 2016 and the appointment of Mr. Kirby as official liquidator. A request was made for a meeting at Mr. Fitzpatrick's office or the Company's premises (both in Limerick) on 11th August, 2016. Mr. Fitzpatrick replied on the 10th August stating, *inter alia*, that he had not yet seen the High Court Order. He stated that his understanding was "that the earliest contact to be made with you is on Monday next, 15th August, 2016, at 5.00 pm". The court notes that this was the date and timeframe set out in the Order of Humphreys J. Mr. Fitzpatrick confirmed his unavailability for a meeting on 11th August, 2016. On 15th August, 2016, Mr. Kirby's office wrote to Mr. Fitzpatrick requesting that he confirm a meeting with Mr. McCoy at 5 pm on 15th August, 2016 at Mr. Fitzpatrick's office. Mr. Fitzpatrick's response was that the meeting would take place at the Company's premises at 5 pm. A further email from Mr. Kirby's office on the same date requested that the meeting be held at 4 pm, which was agreed to by Mr. Fitzpatrick.

39. In his affidavit sworn 29th August, 2016, Mr. Healy avers as follows:

"At a meeting which was arranged with Mr. Fitzpatrick for the afternoon of Monday 15 August 2016 in Limerick, two representatives of Mr. Fitzpatrick refused to deliver any books, records, accounts or property to Mr. Patrick McCoy and I as Mr. Kirby's representatives and further the said individuals confirmed that earlier that day they had removed property of the Company from the Company's premises. The removal of property of the Company from the Company's premises occurred sometime after Mr. Fitzpatrick was removed as liquidator by the High Court and was carried out unlawfully without the consent of Mr. Kirby or the Company's landlord."

40. Later in his affidavit he avers:

"By appointment, we had arranged to meet with Mr. Fitzpatrick at the Company's premises on 15 August 2016 at 4.00 pm, in order to facilitate the handover of the Company's books, records and property in his possession. Mr. McCoy and I had travelled to Limerick on behalf of the Official Liquidator, as a matter of courtesy, in order to facilitate Mr. Fitzpatrick.

Two individuals arrived at 4.45 pm. They introduced themselves as Michael Murphy and John Kirby. Mr. McCoy and I spoke with them ...

Patrick McCoy asked them if they worked for Mr. Fitzpatrick. Michael Murphy stated in response that he was a '*representative of Mr. Fitzpatrick's as you are the representative of Mr. Kirby*'. Patrick asked them what records they had with them to hand over. Michael Murphy stated that they had no records with them. Mr. McCoy asked why. Michael Murphy stated that '*there was a major problem with the Order*' and that '*the Court does not have jurisdiction to make an order in relation to another liquidator*'. Michael Murphy stated they were acting on Counsel's advice which they were bound to follow and that an appeal would shortly be lodged against the Order. He produced an e-mail which he stated contained such advice, which he did not hand to us, but on which a line was highlighted stating the Court did not have jurisdiction to make an Order against a liquidator. He stated that this e-mail had just been received '*half an hour ago*'.

Mr. McCoy pointed out that there was a Court Order compelling Mr. Fitzpatrick hand over the records and property no later than 5.00 pm on 15 August 2016. He said that the failure to hand over the records, particularly in relation to the employee claims and debtor collections was preventing the Official Liquidator from doing his job and we needed to know where to begin working from. In response, Michael Murphy stated that all of this work was already done.

Mr. McCoy stated that a witness had seen two individuals from Mr. Fitzpatrick's office moving computer hard drives and records from the Company's offices between 8.30 am and 11.30 am that morning. Michael Murphy responded that '*the*

records were actually removed between 8.30 am and 10.30 am not 11.30 am'. Michael Murphy confirmed that he and his colleague, John Kirby had removed the records to safeguard same. Mr. McCoy asked what they had removed. Michael Murphy stated that it was the 'remainder of the books and records'. Patrick asked if they had a list of what was removed, Michael Murphy said there was no list but it was mainly computers and hard drives.

Mr. McCoy asked why the records had been removed given that Mr. Fitzpatrick was no longer the liquidator. I pointed out to Michael Murphy there was no stay on the Court Order relieving Mr. Fitzpatrick as voluntary Liquidator and appointing Myles Kirby as Official Liquidator. Michael Murphy stated that they did not accept the Court Order and that, in his opinion, Mr. Fitzpatrick was still the Liquidator of the Company. He repeated a number of times that Mr. Fitzpatrick was 'still the Liquidator', despite the Court Order being clear that this was no longer the case."

41. In his affidavit sworn 1st September, 2016, in response to Mr. Kirby's affidavit, Mr. Kilcline, avers, *inter alia*, that he was "instructed that Mr. Kirby's agents attended at the company's factory premises to accept delivery of company material on 15th August, 2016. The court order specifies Mr. Kirby as the intended recipient our client had not agreed to handover the books and records to other parties. In any case, the factory had been locked by landlord and it was not possible for my client to deliver relevant items to Mr. Kirby's agents."

42. Mr. Fitzpatrick's account of the events of 15th August, 2016, is set out at para. 4 of his replying affidavit, as follows:

"I fully intended to hand over these records to the new liquidator in line with what the Court had ordered. With the knowledge that there were some of the books/records and computer hard drives remaining at the Company's offices, which had previously been under my security and control having changed these locks and a potential breach of security of these records was now a possibility as a third party appeared to be in control of the premises, I decided to instruct my staff to intend at the Company's offices at 8.30 hrs on Monday, 15th August, 2016, with a view to taking possession of any and all remaining computer hard drives and manual records including my own records for safekeeping. During the course of Monday, 15th August, 2016, I was advised that Myles Kirby's representatives would be meeting both the landlord and a professional equipment valuer at the premises at 16.00 hrs. Given my caretaker's role as former liquidator and my obligations to safeguard same for handover to the new liquidator I received an email from my Solicitor confirming that the Court erred in law in directing the handover of books and records on that day and he was putting in an appeal for a stay on that basis. At approximately 16.00 hrs I was verbally advised that a stay on the order and an appeal against the appointment of Myles Kirby were now being entered in the Court and until these matters were finalised by the High Court I was to maintain the status quo and none of the books and records were to be handed over to Myles Kirby for the time being. My staff, Mr. Michael Murphy and Mr. John Kirby, met with Mr. Patrick McCoy of Ferris and Associates, who said he was representing Mr. Myles Kirby, recently appointed Official Liquidator of the Company and Mr. John Healy at approximately 16.50 hrs on Monday, 15th August, 2016, and explained the position to them. In any case Mr. Kirby had no personal appointment to meet me on 15th August, 2016 and did not attend personally, as required by the Order. As Official Liquidator, Mr. Kirby had a responsibility to attend to accept delivery of the books and records. No subsequent appointment was made by Mr. Kirby to accept delivery of the books and records despite repeated requests by my Solicitor for him to do so as evidenced by the inter partes correspondence between my Solicitor and Mr. Kirby's Solicitors..."

43. The correspondence referred to by both Mr Kirby and Mr. Fitzpatrick in their respective affidavits commenced on 16th August, 2016, when Mr. Kirby's solicitors, Maples and Calder, wrote to Mr. Kilcline advising, *inter alia*, that "it was clearly understood that the purpose of the meeting [on 15th August, 2016] was to facilitate the handover of the Company's books and records in your client's possession in advance of the Court - imposed deadline of close of business that same evening" and that as a result of Mr. Fitzpatrick's representatives' refusal to provide the books and records, Mr. Fitzpatrick was in breach of the order of 10th August, 2016. Mr. Kilcline was advised that Mr. Kirby intended to seek the directions of the court regarding the bringing of a motion seeking the attachment and committal of Mr. Fitzpatrick. Reference was also made to the "unlawful removal" by Mr. Fitzpatrick's representatives of books, records and other property from the Company's office on 15th August, 2016. The writer went on to state that "it is extraordinary for your client to cause our client's staff travel to Limerick to meet him with a view to furnishing the books and records of the Company - only for your client to then resile from that position when the meeting took place". Receipt of this letter was acknowledged by Mr. Kilcline on 16th August, 2016 and he advised that same had been forwarded to Mr. Fitzpatrick and that a stay of the Order appointing Mr. Kirby was before the Court of Appeal on 19th August, 2016.

44. Mr. Kirby's solicitors wrote again to Mr. Kilcline on 18th August, 2016, noting the absence of a reply to their letter of 16th August, 2016 and advising that they were in receipt of a motion for the attachment and committal of Mr. Fitzpatrick returnable for 19th August, 2016 but that it was not proposed to issue the motion pending the outcome of Mr. Fitzpatrick's application to the Court of Appeal for a stay on the Order made by Humphreys J. on 10th August, 2016.

45. On 19th August, 2016, Mr. Kilcline replied advising that he was acting only for Mr. Fitzpatrick in the winding up proceedings he had "no instructions from Mr. Fitzpatrick in relation to any matters between himself and Mr. Kirby" and that he had "no authority from Mr. Fitzpatrick to correspond with any party who is not [a] party to these proceedings (such as your client)."

46. On 24th August, 2016, Mr. Kirby wrote directly to Mr. Fitzpatrick in the following terms:

"As discussed with your solicitor, I am now calling on you to provide the following immediately:

(a) The books, records, accounts and property of the Company as referred to in the Order of Mr. Justice Humphreys dated 10th August, 2016; and

(b) The books and records kept by you as liquidator, to include all correspondence (whether by letter or email) entered into by you as liquidator and all other documents on your liquidation file.

You will be aware that the obligation on you to provide the books and records kept by you as liquidator arises under section 644 of the Companies Act 2014. You will also be aware that it is an offence for a person to fail to comply with this obligation.

Please also be advised specifically that, without prejudice to the generality of the foregoing, I require you to immediately contact the AIB branch at O'Connell Street, Limerick, be opened to your liquidation bank account, in order to confirm that all funds contained in that account (and control of the account) are to be immediately transferred to me as Official Liquidator. ..."

Mr. Fitzpatrick was requested to present the necessary books to Mr. Kirby's office by close of business on 26th August, 2016, in compliance with the High Court Order and the 2014 Act. It was further advised that in default of compliance with the Order of 10th August, 2016, an application for Mr. Fitzpatrick's attachment and committal would be made. On the same date, Mr. Kirby's solicitors wrote to Mr. Kilcline in similar terms.

47. Mr. Kirby wrote again to Mr. Fitzpatrick on 25th August, 2016, referring, *inter alia*, to his correspondence of 24th August, 2016 and requesting that Mr. Fitzpatrick as a matter of urgency provide specific items as set out in his letter "immediately".

48. As records demonstrate, on 26th August, 2016, Mr. Kirby was unsuccessful in his attempts to speak to Mr. Fitzpatrick or his staff by telephone.

49. On 26th August, 2016, Mr. Kilcline wrote to Mr. Kirby's solicitors in the following terms:-

"As you are aware, Section 644(2)(b)(i) of the Companies Act 2014 states: "the former liquidator shall deliver custody of the relevant items to the new liquidator". My client desires to make an arrangement to give effect to the foregoing provision.

On Friday, 2nd September, 2016 my client proposes to deliver custody of all relevant items to your client at my client's offices at Clonmoney House, Newenham Street, Limerick. I respectfully suggest that your client liaise with my client to agree a mutually suitable time on 2nd September, 2016 for the delivery of the relevant items to your client."

50. In their response of 26th August, 2016, Mr. Kirby's solicitors took issue with Mr. Fitzpatrick setting a "unilateral deadline" of 2nd September, 2016 "as to when he claims he will cease to be in breach [of] an Order of the High Court" and stating that Mr. Fitzpatrick was also "in continuing and deliberate of his obligations under section 644 of the Companies Act 2014". They repeated their assertion that Mr. Kirby's representatives were refused access to the books and records of the Company by Mr. Fitzpatrick's representatives on 15th August, 2016 and that the former had admitted that they had taken active steps to put the Company's books beyond the reach of Mr. Kirby. Reference was made to the application on Mr. Fitzpatrick to "deliver" the books and records of the Company and his books as liquidator to the new liquidator of the Company and that Mr. Fitzpatrick was not acting in "good faith" into the matter.

51. Mr. Kilcline responded on 28th August, 2016, stating that he did not agree with the "scenario" set out in above letter. He went on to state:

"Neither the Order nor the Companies Act stipulates any time limit or venue for the delivery of the relevant items to take place so the only reasonable presumption is that it is to take place as soon as practicable. To this end, Mr. Fitzpatrick proposes to deliver custody of all relevant items to your client on 2nd September 2016 [in Limerick]. Your client may nominate any time on that date which suits him. If your client has any particular difficulty with taking delivery of the relevant items on 2nd September, 2016 then he may propose an alternative subsequent date and my client will endeavour to accommodate. However, my client feels that an effort should be made to effect delivery on 2nd September, 2016 in order that the liquidation may proceed without further delay.

My client denies that he, or any agents on his behalf, obstructed your client's agents in any way on 15th August, 2016 and he is (a) stranger to the allegations in your letter."

The reference in this letter to the Order not stipulating any time limit is surprising given that it is clearly recited that the Company's books and records were to be presented no later than close of business on 15th August, 2016.

Mr. Kilcline went on to advise that he saw no basis for any application to the court by Mr. Kirby.

52. Mr. Kirby's solicitors' response on 30th August, 2016 was to advise that their instructions were to proceed to issue a motion seeking the attachment and committal of Mr. Fitzpatrick. This was replied to by Mr. Kilcline on the same date who advised that Mr. Fitzpatrick was awaiting Mr. Kirby to contact him to arrange a time for delivery of both the Company's books and his liquidator's file on 2nd September, 2016 and that Mr. Fitzpatrick was in the throes of providing the relevant mandate to AIB to transfer his liquidation account to Mr. Kirby.

53. On 30th August, 2016, Maples and Calder acknowledged receipt of Mr. Kilcline's letter at 2.34 on 30th August, 2016 and advised Mr. Kilcline that earlier that day an *ex parte* application had been made for liberty to serve a motion on Mr. Fitzpatrick returnable for 2nd September, 2016, seeking, *inter alia*, the attachment and committal of Mr. Fitzpatrick. On the same date, there was a further exchange of correspondence between the legal representatives wherein, *inter alia*, Mr. Kilcline advised that a motion was unnecessary and that Mr. Fitzpatrick awaited a time to be set by Mr. Kirby to effect delivery of the books and records on 2nd September, 2016. This was met by a request from Mr. Kirby's solicitors that the items were to be delivered to Mr. Kirby's office in Dublin "immediately". Mr. Kilcline's response was that Mr. Fitzpatrick and Mr. Kirby should liaise with each other "to come to a mutually suitable venue for the delivery of relevant items" It was hoped that "common sense" would prevail.

54. On 31st August, 2016, Mr. Kilcline wrote to Maples and Calder forwarding a letter from Mr. Fitzpatrick to Mr. Kirby and which enclosed a cheque for €87,955.76 being the balance of the funds in Mr. Fitzpatrick's liquidation account. It was again proposed that the balance of the relevant items would be delivered to Mr. Kirby on 2nd September, 2016 in Limerick, "without the need for legal intervention". On 1st September, 2016, Maples and Calder acknowledged receipt of Mr. Fitzpatrick's cheque.

55. In the course of his submissions, counsel for Mr. Kirby urged on the court that it was clear both from Mr. Fitzpatrick's own affidavit and the correspondence between Mr. Fitzpatrick and Mr. Kirby that there was a breach of the Order of 10th August, 2016, by Mr. Fitzpatrick. It was submitted that as he was subject to a court order, it was not open to Mr. Fitzpatrick to decide when he would comply with same. Nor was he entitled to attempt to set an agenda other than that set out in the Order. Furthermore, Mr. Fitzpatrick was not entitled to treat his application to the Court of Appeal as a stay on the Order. Counsel emphasised that even when a stay was refused by the Court of Appeal on 24th August, 2016, the Company's books and records were still not handed over to Mr. Kirby. Counsel submitted that there was sufficient evidence before the court, even taking Mr. Fitzpatrick's position at its height, to find that he was in contempt of court.

56. Counsel for Mr. Fitzpatrick submitted that there was no intention on Mr. Fitzpatrick's part not to comply with the Order of Humphreys J., as averred to by Mr. Fitzpatrick himself in his replying affidavit. As to the events of 15th August, 2016, counsel pointed to the fact that Mr. Kirby himself did not attend at the meeting in Limerick, sending only his representatives who, counsel submitted, had no *locus standi* to substitute themselves for Mr. Kirby for the purpose of giving effect to the Order of 10th August, 2016. It was

further submitted that Mr. Kirby himself did not aver in his affidavit that the purpose of the meeting arranged for 15th August, 2016, with Mr. Fitzpatrick was for the purpose of the handing over of the books and records of the Company. Furthermore, the exchange of emails on 10th and 15th August, 2016 between Mr. Kirby's representatives and Mr. Fitzpatrick do not allude to the Company's books and records.

57. With regard to Mr. Healy's affidavit, counsel for Mr. Fitzpatrick pointed to the absence therein of any averment that Mr. Healy sought the authority of Mr. Kirby to collect the books and records of the Company. Nor does Mr. Healy aver that Mr. Fitzpatrick would not hand over or present the books to Mr. Healy. It was submitted that Mr. Healy avers only that Mr. Fitzpatrick's representatives refused to "deliver" any of the books and records to himself and Mr. McCoy. Counsel submitted that, on its face, all the Order required of Mr. Fitzpatrick was that he was to present the books and records to Mr. Kirby and not any other person. It was counsel's submission that in all of those circumstances, that there could be no question of any breach of the court order by Mr. Fitzpatrick on 15th August, 2016. It was conceded that had Mr. Kirby himself attended in Limerick on the said date and not being presented with the books and records, there might have been grounds for a finding of contempt, but that was not the scenario which ultimately presented on the date in question. It was further contended that there was clear evidence of Mr. Fitzpatrick's intention at all relevant times to comply with the Order as reflected in Mr. Fitzpatrick's affidavit and Mr. Kilcline's letters of 26th, 28th and 30th August, 2016.

58. Counsel contended that the key letter in the series of correspondence in relation to the within matter was that from Mr. Kirby to Mr. Fitzpatrick on 24th August, 2016 where, for the first time, Mr. Kirby requested the books and records be delivered to his office. This correspondence was engaged with by Mr. Fitzpatrick's solicitor. Furthermore, it was a matter of some significance that in his letter of 24th August, 2016, to Mr. Fitzpatrick, Mr. Kirby did not refer to Mr. Fitzpatrick's or his representatives' failure to hand over the books and records to Mr. Kirby's representatives on 15th August, 2016. With regard to this argument, I note that Maples and Calder's letter of 16th August, 2016 to Mr. Kilcline does address this issue.

59. It was submitted by counsel for Mr. Fitzpatrick that in all of the circumstances of this case there is no direct evidence of any contempt by Mr. Fitzpatrick and Mr. Fitzpatrick cannot be said to have failed to present the books and records of the Company to Mr. Kirby given that the latter was not present in Limerick on 15th August, 2016. Counsel also contended that that for the court to make a finding of contempt on the part of Mr. Fitzpatrick the court would have to read the words "servants or agents" into the Order of Humphreys J. This was not something that could be done and in this regard counsel cited *Irish Shell Ltd. v. H. J. McLoughlin (Balbriggan) Ltd.* [2005] IEHC 465 and *Gormley v. Minister for Agriculture* [2013] IEHC 459.

60. In response to the approach adopted by counsel for Mr. Fitzpatrick to Mr. Kirby's non-attendance in Limerick on 15th August, 2016, counsel for Mr. Kirby pointed out that it was equally noteworthy that Mr. Fitzpatrick himself, albeit having made arrangements with Mr. Kirby's representatives, was not present on 15th August, 2016 and was content to leave matters in the hands of his representatives.

61. In the first instance, I do not find any particular merit in Mr. Fitzpatrick's counsel's submission that the email arrangements made by Mr. Kirby's representatives to meet with Mr. Fitzpatrick made no reference to the books and records of the Company. The absence of such reference cannot, to my mind, be the decisive factor in light of the admissions which Mr. Fitzpatrick himself makes at para. 4 of his affidavit and the contents of Mr. Healy's affidavit. Both Mr. Fitzpatrick's and Mr. Healy's respective affidavits make it clear that Mr. Kirby's representatives expected to be provided with the books and records on 15th August, 2016. In particular, I am satisfied that Mr. Fitzpatrick's representatives clearly understood that Mr. Kirby's representatives expected to be provided with the books and records on that date, in furtherance of the Order of Humphreys J. Mr. Healy avers to certain utterances made by Mr. Fitzpatrick's representatives as to the stance they were instructed to take arising from the position which Mr. Fitzpatrick was then adopting in relation to the Order of Humphreys J. These utterances are not contested by Mr. Fitzpatrick. He further acknowledged *via* his counsel that the persons who met with Mr. McCoy and Mr. Healy were his representatives. The message which was clearly conveyed to Mr. Kirby's representatives on 15th August, 2016, by Mr. Fitzpatrick's representatives was that the books were not going to be handed over to them because it was believed by Mr. Fitzpatrick (as advised by his legal advisors) that Humphrey J. had erred in making the Order appointing Mr. Kirby as liquidator. I am satisfied to make these findings even accepting that Mr. Kirby's representatives travelled to Limerick for other reasons also on the date in question.

62. I am also not persuaded by the argument with regard to Mr. Kirby's non attendance in Limerick on 15th August, 2016 or that it was only Mr. Kirby to whom the books and records could be presented. I note that Mr. Fitzpatrick's emails on 10th and 15th August 2016 take no issue with meeting Mr. McCoy and Mr. Healy. It seems to me that it is entirely open to the court to draw an inference that the purpose of the proposed meeting between Mr. Fitzpatrick and Mr. Kirby's representatives related to the handing over of books, particularly given the contents of para. 4 of Mr. Fitzpatrick's affidavit, as set out elsewhere in this judgment.

63. I note that Mr. Fitzpatrick was satisfied to forward a cheque representing the company's funds to Mr. Kirby's solicitors on 31st August, 2016, without requiring that it be presented to Mr. Kirby in person. Furthermore, from the contents of Mr. Healy's affidavit, Mr. Fitzpatrick's representatives appear not to have expressed any qualms about Mr. Kirby not appearing in person in Limerick, their particular focus being on their recently obtained instructions (which they claimed they were bound to follow) that no books or records were to be handed over because of certain legal advices of which they had become apprised a half hour or so before the meeting with Mr. Kirby's representatives. As already quoted above, in his affidavit Mr. Fitzpatrick avers that as "an appeal against the appointment of Myles Kirby were now being entered in the Court and until these matters were finalised by the High Court I was to maintain the status quo and none of the books and records were to be handed over to Myles Kirby for the time being."

64. Following the Court of Appeal's refusal to stay Humphrey J.'s substantive Order, there was no immediate surrender of the Company's books and records by Mr. Fitzpatrick to Mr. Kirby albeit Mr. Fitzpatrick set a date for the delivery of the said items to be effected at his office in Limerick, namely 2nd September, 2016. This date was first mooted in Mr. Kilcline's letter of 26th August, 2016. The projected delivery was accordingly some eighteen days later than the court appointed date and some nine days after the refusal of the stay. It bears noting that this was also after both Mr. Kirby and his solicitors wrote separately on 24th August, 2016 requesting that the Company's books and records be presented at Mr. Kirby's office by close of business on 26th August, 2016. This correspondence emanated after the Court of Appeal had rendered its decision on the stay application and in circumstances where Mr. Kirby's solicitors had previously refrained from issuing the Motion until after such decision. I have already rehearsed the correspondence which ensued after 26th August, 2016. Suffice it to say that there was no progress made in this matter until the parties met in Athlone on 5th September, 2016, following the initial hearing of this matter, when the Company's books and records were finally handed over.

65. I am satisfied beyond a reasonable doubt that the evidence establishes that there was a breach of the Order made by Humphreys J. on 10th August, 2016. As deposed to by Mr. Fitzpatrick himself a decision was taken by him on 15th August, 2016 not to comply with the Order of Humphreys J. "for the time being". I accept however that Mr. Fitzpatrick's decision not to hand over the Company's books and records at that time was on foot of legal advice that he was to maintain the status quo pending an application to the

Court of Appeal for a stay. At this juncture however it is a historical breach and I regard it as a limited breach since it was remedied on 5th September, 2016 and in circumstances where as of 26th August, 2016, Mr. Fitzpatrick was stating via his solicitor that that he was proposing to effect delivery of all relevant materials on 2nd September, 2016, in Limerick.

66. I note the case law referred to by counsel for Mr. Kirby, including *Laois County Council v. Hanrahan* [2014] IESC 36, as to the circumstances where by reason of the nature or consequences of a breach of a court order “[a court may feel] compelled to intervene or further intervene so as to mark its disapproval of conduct ... where the behaviour in question, is threatening to the court itself or otherwise constitutes a serious or significant challenge to it”. However, I am satisfied that the present case does not remotely approach the scenario contemplated by the learned McKechnie J. in the above case as to when it might be appropriate for a court to penalise on a civil contempt motion. As the jurisprudence in this area emphasises, the focus of the court in circumstances of civil contempt should be on having the terms of its order enforced. That has now been achieved, albeit on a date later than that set by the Order.

67. I also take into consideration that while the terms of the Order were entirely clear as to the date and time specified for the handing over of the relevant books and materials and while the obligation was on Mr. Fitzpatrick to comply, the Order was silent as to the location where the handover was to be effected. Indeed the location for the handover of the material proved to be a sticking point between Mr. Kirby and Mr. Fitzpatrick until the intervention of the court.

68. In all the circumstances of this case, I am not satisfied that the imposition of a fine on Mr. Fitzpatrick, as was suggested by counsel for Mr. Kirby in the event that the court were to find that Mr. Fitzpatrick was in breach of the Order, is warranted given that, albeit some two weeks or so beyond the date of compliance, the Company’s books and records were handed over by Mr. Fitzpatrick.

69. I turn now to the question of whether the court should make an order or direct compliance with the provisions of s.644 of the 2014 Act. On balance, although it is accepted that Mr. Fitzpatrick has handed over his liquidator’s file, I am minded to direct that Mr. Fitzpatrick comply with the provisions of s. 644(2)(b)(i) of the 2014 Act. Notwithstanding that s. 644 (2)(b)(i) is clear on its face as to the obligation on a former liquidator, the contents of the correspondence which has passed between the parties, and their respective legal representatives, between 16th September, 2016 and 12th December, 2016 persuades this court that such a course of action is warranted so as to ensure the orderly progress of Mr. Kirby’s functions as official liquidator.

70. I will hear submissions on costs.