APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/229

Costello J.
Power J.
Allen J.

Neutral Citation Number [2022] IECA 243

IN THE MATTER OF AN APLICATION PURSUANT TO SECTION 631(1) AND SECTION 684(1) OF THE COMPANIES ACT, 2014

AND IN THE MATTER OF THE SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND THE THIRD IRISH FORESTRY FUND PLC (IN LIQUIDATION)

BETWEEN

LAR SHEERAN, AISLING MURPHY AND

RICHARD MULCAHY

APPELLANTS

AND

ALAN FITZPATRICK (AS LIQUIDATOR OF THE SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND AS LIQUIDATOR OF THE THIRD FORESTRY GROWTH PLAN PLC (IN LIQUIDATION))

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 26th day of October, 2022

Prologue

1. Section 684(1) of the Companies Act, 2014 empowers the High Court, at any time after the making of a winding-up order or the commencement of a voluntary winding up, to make such order for the inspection of the accounting records, books and papers of the company by creditors or contributories as the court thinks just.

2. That power, which can be traced back to s. 156 of the Companies Act, 1862, has been the subject of judicial consideration in England and Australia but not, heretofore – save in the judgment of the High Court the subject of this appeal – in Ireland.

3. The application and the appeal have given rise to interesting legal questions as to the circumstances in which, and the purposes for which, the jurisdiction to make an order for the inspection of books and records of a company in liquidation may properly be invoked and exercised.

Introduction

4. The appellants were shareholders in two public limited companies which are in liquidation. In 1999 and 2007 the appellants subscribed for non-voting preference shares in the companies. The business plan, which was set out in some detail in the prospectuses, was that the companies would buy land, and plant and manage forests until they would be ready for sale thirty years thence. The prospectuses set out a thirty year timeline from the land purchase until *"clearfell"* and held out the prospect of a thirty two fold return on the investments.

5. The appellants were surprised to learn in media reports in May, 2019 that the forests had been sold. That was, in the case of one of the companies, ten years, and in the case of the other, eighteen years, sooner than had been planned. The appellants were disappointed by the return on their investments, which was a long way short of what had been contemplated at the time they subscribed for their shares. The appellants believe that the forests were sold too soon and that the decision to sell was, or at least might have been, made in breach of the directors' duties. They point to the promise made repeatedly in the prospectuses that the forests would be managed with a view to maximising the return for the investors.

6. If, on one view, the appellants doubled their investment, their return was a long way short of what they had hoped for. The appellants question the decision of the directors to sell the assets of the companies. They want to investigate why the companies' assets were sold, when they were sold, and for the price that was achieved. To that end they want to see the books and records of the companies, but they need a court order to be able to do so.

7. The appellants applied to the High Court for orders requiring the liquidator to provide information and to permit the inspection of documents which would allow them to assess their options but, for the reasons set out in the judgment of Keane J. delivered on 16th July, 2021, ([2021] IEHC 488) their application was refused.

The evidence

8. The companies the subject of this appeal are two of eighteen public limited companies established between 1999 and 2008 using the same model. The share capital of the companies was divided into ordinary and preference shares. The ordinary shares – which carried the voting rights but no economic rights – were allotted to the promoters. The preference shares – which carried all of the economic rights but no voting rights – were

offered to the public for subscription at a substantial premium. The eighteen funds, between them, came to have about 10,000 acres of forest under management in 185 estates. A total of some €40 million was raised from 2,400 investors.

9. The Sixth Irish Forestry Fund plc was incorporated on 14th July, 1999 under the Companies Acts, 1963 to 1999 with the main object of carrying on all or any of the businesses of forest proprietors, forest managers, afforesters, investment managers and so on. The capital of the company was IR£33,000, divided into 30,000 ordinary shares of IR£1 each and 3,000 redeemable preference shares of IR£1 each.

10. On the same day a prospectus was issued inviting applications for the 3,000 preference shares at IR£500 each. According to the executive summary:-

> *"The Sixth Irish Forestry Fund plc. was incorporated on the 14 July 1999 for the purpose of raising IR£1.5 Million to invest in forestry in Ireland. Once planted, these forests will take approximately thirty years to mature. Once mature, the trees will be sold to the highest bidding mill and the underlying land will be sold on the open market. At that stage the Fund will be wound up and all the profits of the Fund will be distributed to the Preference Shareholders."*

11. The prospectus indicated that the forests would be established by Green Belt Ltd. and managed by IFS Irish Forestry Services Ltd. in conjunction with Forest Enterprises Ltd., with whom contracts had been signed, which, it was said, would ensure that the plantations would be managed by experienced professionals: thus maximising the value of the forests. It was said that:-

> *"Based on the assumptions set out on page 9 of this prospectus a once off investment of £500 per share should result in a distribution in excess of £16,000 Tax Free per share when the crop is harvested in approximately 30 years' time. This equates to a compound annual rate of return of 12¼% per annum. Assuming inflation to average*

4½% per annum, this equates to a real rate of return (i.e. net of inflation) of 7¾% per annum."

12. I pause here to make clear that the appellants do not make the case that these returns were guaranteed. The prospectus spelled out that the projection of illustrative returns should not be regarded as a forecast but as a projection based on the assumptions set out.

13. The business plan was that the money raised from the investors would be used to purchase suitable land. There were grants available from the Irish Government – 25% – and the E.U. – 75% – which would pay for the land to be cleared, fenced and planted. Thereafter – it was contemplated – forest premia would cover essential forest management fees and other overheads.

14. Under the heading *"project timescale"* it was said that it would take approximately thirty years for the trees to mature, at which time they would be sold to the highest bidder. Initially 2,500 trees would be planted per hectare. These would be thinned over the years to allow the better performing trees to grow. The thinnings were expected to provide the necessary income to help finance the fund to maturity.

15. Under the heading *"general information"* it was said that the preference shares were the only shares entitled to participate in the growth of the forest investment and in the final distribution to be made at the time the forest was harvested: in approximately thirty years' time. The 30,000 ordinary shares of IR£1 each had been issued and paid up to 25p per share. These shares were later transferred to a company under the control of the directors called IFS Asset Managers Ltd., which is a wholly owned subsidiary of IFS Irish Forestry Services Ltd.

16. The prospectus disclosed three material contracts: the forestry management contract, which had been awarded to Green Belt Ltd.; the contract for the maintenance of the forest, which had been awarded to IFS Irish Forestry Services Ltd., of which the promoters were directors; and the forest management consultant contract, which had been awarded to Forest

Enterprises Ltd. The promoters, who were the directors, were not to be remunerated by the Fund but it was noted that the directors were also directors of IFS Irish Forestry Services Ltd., which had the maintenance contract for IR£30 per acre, index linked to the retail price index. Earlier in the document there was an estimate of IR£37,500 for the initial costs of establishing the Fund, including commissions, stamp duty, professional fees and marketing costs.

17. Broadly speaking, then, the directors were not to be paid directly for their management of the Fund but indirectly, through IFS Irish Forestry Management Ltd., would benefit from the maintenance contract. In the affidavit of Mr. Lar Sheeran, on which the application is grounded, the point is made – and it appears to be a fairly thinly veiled complaint – that over the years significant fees have been paid to entities connected with the directors and specifically that companies associated with the directors were awarded a fixed price contract for management services at €38 per acre, index linked, notwithstanding that after the first four years management costs were small, since the plantation was by then fully established. As I will come to, I understand the appellants' principal concerns to be directed not to the management of the forests but the decision to sell them after twenty and twelve years rather than thirty years, but if the appellants are at this stage less than happy with the fees paid in connection with the management of the forests, the fact and terms of the management contract were clearly spelled out in the prospectus.

18. Mr. Sheeran invested IR£20,000 (€26,100) to purchase forty preference shares in the Sixth Fund. Ms. Murphy, the second appellant, also invested in the Sixth Fund. Mr. Mulcahy, the third appellant, invested in the Third Fund. The model and the prospectuses, as I have said, were essentially identical.

19. On 19th May, 2019 the *Sunday Independent* newspaper reported that all of the forests had been sold to a global institutional buyer. This came as a surprise to Mr. Sheeran who

says that no advance notice was given to any of the investors and that the general rule is that forests remain of low value until they start to become marketable after about twenty years, after which – it is said – they accelerate in value rapidly until they are harvested after about thirty years.

20. On 15th August, 2019 each of the companies was placed in voluntary liquidation and the respondent, Mr. Alan Fitzpatrick, was appointed liquidator.

21. On 16th August, 2019 cheques were issued to the preference shareholders in respect of their dividend and distribution. Mr. Sheeran complains that the cheque was signed by one of the directors after the company had gone into liquidation – rather than by the liquidator – but I do not believe that anything turns on that. Mr. Sheeran's cheque was for €44,276 which, he says, was a little more than one twentieth of the return of €812,632 after thirty years, projected for him in the prospectus.

22. On 2nd October, 2019 Mr. Sheeran wrote to Mr. Fitzpatrick. He acknowledged receipt of the cheque. He expressed the belief that the Company's assets had been sold prematurely and that in facilitating the sale the directors had a conflict of interest and had acted in breach of their duties to the Company and the investor shareholders. He said that he would cash the cheque but without prejudice to his and the Company's right to seek redress, including but not limited to seeking to have the transaction set aside.

23. In his initial letter to Mr. Fitzpatrick, Mr. Sheeran did not identify the alleged conflict of interest or – beyond, perhaps, the timing of the sale – the alleged breach of duty. In his affidavit grounding the application made to the High Court he elaborated to some extent. Mr. Sheeran deposed that the manner of disposal of the assets differed dramatically to the strategy outlined in the prospectus. He suggested that on the face of matters and in the absence of any compelling explanation, the timing of the sale was contrary to the interests of the investors in that it occurred just before the likely dramatic acceleration of the value of the assets. He said

that the return on the appellants' investments was *"many multiples lower"* than had been projected, which was particularly difficult to understand in circumstances in which – he suggested – it is well known that the value of forestry land has appreciated by many multiples since the late 1990s.

24. Mr. Sheeran accepted unreservedly that the returns projected in the prospectus were not guaranteed but expressed his disappointment at the outcome, which he and the other appellants were concerned might have been caused by (a) the taking of excessive and unwarranted fees, and (b) the decision to sell at the worst possible time. He went on to say that:-

> *"For the foregoing reasons, the applicants are concerned that the directors may have been guilty of misrepresentation and/or misselling at the inception of the investments and/or making untrue statements in the prospectuses in breach of section 49 of the Companies Act, 1963 and its successor provisions and/or misfeasance and/or breach if duty and/or breach of trust in relation to their management of the Company's assets. We are also concerned that the holder of the ordinary shareholding in the Companies, being a company controlled by the directors, may have acted in disregard of our interests in relation to the decision to sell the assets and to place the Companies in liquidation."*

25. By letter dated 17th October, 2019 the appellants, by their solicitors, conveyed to Mr. Fitzpatrick their concern that the forests had been disposed of prior to maturity, without reference to the investors, and contrary to the stated intention in the prospectuses. They asked that Mr. Fitzpatrick would investigate the sale and asked for a variety of information and documentation in relation to the decision to sell and the sale. Specifically, Mr. Fitzpatrick was asked to provide details of all fees and benefits received or to be received by the directors, directly or indirectly, related to or connected with the assets, and to clarify the

nature and terms of any management agreement with the purchaser, or fees or benefits received or to be received by the directors, directly or indirectly, from the purchaser. It was suggested that there was no reason why the shareholders should not be entitled to this information as it directly concerned their investment and that Mr. Fitzpatrick might consider seeking rescission of the sale and/or damages by way of compensation.

26. Mr. Fitzpatrick replied on 29th October, 2019. He said that he had discussed with the directors the process that was employed in the timing and value of the assets. The Companies, he said, had employed Deloitte Corporate Finance for the purpose of (a) establishing the market value of the assets, (b) establishing the best sale process in order to achieve the best return for the preference shareholders, and (c) identifying a suitable buyer. Mr. Fitzpatrick wrote that he was satisfied that the directors had taken reputable professional advice, that the required steps of the process had been applied correctly, and that the directors had acted honestly and responsibly. He concluded by reminding the appellants' solicitors that if the appellants believed that the directors had acted inappropriately there were various remedies available to them at common law and under the Companies Act, 2014.

27. The appellants' solicitors, by letter dated 20th December, 2019, suggested that Mr. Fitzpatrick's letter of 29th October, 2019 was an effective refusal to provide the information sought and threatened an application to the High Court pursuant to s. 631 of the Companies Act, 2014 if the information sought was not provided by 10th January, 2020. They suggested that the process employed by the directors in selling did not appear to have been in compliance with what had been promised in the prospectuses.

28. In early 2020 Mr. Fitzpatrick engaged solicitors who wrote to the appellants' solicitors on 19th March, 2020. They said that Mr. Fitzpatrick, having engaged in further consultations with the directors, and in correspondence with the directors and their solicitors,

had concluded that all decisions made by the directors, including specifically the decision to sell prior to the estimated maturity, were appropriate in the circumstances.

29. In the meantime, the appellants' solicitors had also been in correspondence with the directors and IFS Irish Forestry Services Ltd., and with solicitors on their behalf.

30. On 4th February, 2020 the appellants' solicitors had a long letter from the directors' solicitors. As to the appellants' request for information, it was said that as the Companies were in liquidation, it was the liquidator who had control of the books and records. As to the appellants' threat of proceedings, it was said that the appellants had no right to bring any such proceedings. Without prejudice to that, the directors' solicitors offered an explanation of the decision to sell.

31. The directors' solicitors suggested that in the course of their continuous review of the Irish forestry market, the directors, in or around 2017, had identified significant issues that were starting to adversely and seriously affect the forestry industry in Ireland. They pointed to the chairman's letters – dated variously between 22nd March, 2019 and 2nd April, 2019 – which had accompanied the financial statements for the year ended 31st May, 2018 and which had been sent to all of the preference shareholders, in which it was said:-

> *"The directors are cognisant of the increasingly volatile economic cycles we have experienced over the past decade and remain alert to other current macro-economic issues, especially the risks associated with maturing illiquid forestry funds in an economic downturn or in an uncertain economic climate. With this in mind, the directors will monitor and investigate various strategic initiatives, including early disposal and maturity for the benefit of the Preference Shareholders. The directors will therefore employ strategic flexibility to maximise shareholder value and to minimise these risks."*

32. I pause here to recall that Mr. Sheeran's evidence was that the sale came to his attention in the *Sunday Independent* of 19th May, 2019. Among the numerous documents exhibited by Mr. Sheeran were copies of the reports and financial statements for the Third Irish Forestry Fund plc and the Sixth Irish Forestry Fund plc for the period from 1st June, 2018 to 21st May, 2019. Mr. Sheeran's declared object in referring to these documents was to show, by way of example, that the ordinary shares in the several Companies had been transferred to IFS Asset Managers Ltd. and that IFS Asset Managers Ltd. was controlled by the directors – which they do – but the directors' report offers an explanation for the sale.

> *"As reported in prior years, the Company is facing significant new risks with others beginning to emerge. The new risks facing the Company could not have been foreseen when the Company launched and have only developed over recent years. These include Brexit and a worsening US-China international trade war. ...*
> *New risks that are now emerging and which may impact on the Company's future performance include climate change and Ireland's general economic performance.*
> *...*
> *As reported in prior years, the directors have been investigating various strategic initiatives for the benefit of the Preference Shareholders. It was noted in prior years that this strategic flexibility would include the early disposal of the Company's forest assets. During the period the Company received a compelling offer from a significant international investor for the Company's forest portfolio. In light of the information available to the Company, and in consideration of the new risks identified in this and in prior year's (sic.) reports together with those pre-existing risks intrinsic to forestry, the directors are convinced that it is in the Preference Shareholders' best interest to lock in the value that they already have in their*

portfolio. The directors have therefore taken the strategic decision to dispose of the Company's forestry assets and return all profits to the Preference Shareholders. In light of this decision, the Company exchanged binding contracts of sale on 18th April, 2019 in relation to the Company's portfolio of forest lands including forestry. The sale completed successfully on 15th May 2019 and the directors are pleased to report that the Company is preparing for the return of capital and profits to the Preference Shareholders."

33. It is not evident to what extent the directors' investigation of various strategic initiatives had progressed at the time the financial statements for the year ended 31st May, 2018 were circulated in late March and early April, 2019 but it does rather appear that it accelerated fairly rapidly between then and the exchange of contracts on 18th April, 2019. The notes to the financial statements for the Sixth Irish Forestry Fund plc show that the sale had allowed the Company to deal with significant related party liabilities.

34. In their letter to the directors, the appellants' solicitors had asked for more or less the same information and documentation which they had sought from Mr. Fitzpatrick, including details of all fees and benefits related to or connected with the assets. The directors' solicitors replied that they did not see the basis of any entitlement to such information but they confirmed that a company called Veon Ltd., in which the directors were interested, was to continue to have a role in managing the forest portfolio for the new owner, although – it was said – its role, and consequently it fees, had been significantly reduced. Any claim that the directors and/or Veon Ltd. benefitted from the sale at the expense of the preferential shareholders was rejected as entirely unfounded.

35. As to the request for information and documents, the directors' position was that the books and records of the Companies were under the control of the liquidator and that the preference shareholders had no entitlement to the information. The directors' solicitors

nevertheless enclosed a nine page memorandum, signed by the directors, entitled *"Factors taken into account by the directors of the Second Irish Forestry Fund plc, the Third Irish Forestry Fund plc, the Fourth Irish Forestry Fund plc, the Fifth Irish Forestry Fund plc and the Sixth Irish Forestry Fund plc in reaching the decision to sell the assets of the Irish Forestry Funds."*

36. This correspondence and the directors' memorandum was exhibited by Mr. Sheeran but he did not really engage with it, beyond condemning the memorandum as having been retrospectively prepared, self-serving, vague, and lacking in objective weight.

The application to the High Court

37. By originating notice of motion issued on 27th May, 2020 the appellants applied to the High Court for an order directing Mr. Fitzpatrick to provide them with a variety of copy documents and information. The application was initially made by reference to s. 631(1) of the Act of 2014 but following objection on behalf of Mr. Fitzpatrick that the application – if it was appropriate at all – should be pursuant to s. 684(1), the notice of motion was amended to invoke both sections.

38. As I will come to, there was later substantial engagement as to the terms of the appellants' request but the documents and information originally sought were:-

(a) Copies of all sale documentation and all corporate approvals relating to the disposal of the assets of the Companies *("the Assets")* to AXA Investment Managers;

(b) Copies of all third party valuations carried out in relation to the Assets at or prior to the time of the disposal of the Assets;

(c) A list of all of the assets that were sold, and of any assets of the Companies which were not sold, including details of each plantation, acreage and age of trees;

(d) Copies of any advice received by the Companies (or anyone connected to them either directly or indirectly) including any advice from a silvicultural expert, in relation to the sale of the assets;

(e) Copies of any management agreement, fee structure, carry fee, or other benefit received or to be received, whether directly or indirectly, by the directors of the Companies, IFS Asset Managers Limited and/or Veon Limited (or anyone connected to each or any of them either directly or indirectly) in connection with the disposal of Assets;

(f) Particulars of the basis on which Deloitte Corporate Finance was engaged in relation to the sale of the Assets and copies of any engagement documents;

(g) Copies of any documentation showing the decision making process carried out in relation to the sale of the Assets, including board minutes, notes of meetings and any other documents showing what weight, if any, was given to the terms of the prospectuses on which the appellants relied when investing;

(h) Particulars of all fees and/or benefits received or to be received by the directors of the Companies, IFS Asset Managers Limited and/or Veon Limited (or anyone connected to each or either of them directly or indirectly) related to or connected with the Assets over the course of the appellants' investments, such information to be provided on an annualised basis together with the source of payments (e.g. grants, premia etc);

(i) Copies of any insurance policies in relation to the Companies;

(j) Particulars of the respondent's agreed and/or proposed remuneration in relation to carrying out the liquidations of the Companies;

(k) The names and full addresses of all shareholders in each of three Companies and details of the amounts of their holdings.

39. The documents and information sought by the notice of motion were broadly those and that which had previously been sought in correspondence.

40. In his affidavit in response to the application, Mr. Fitzpatrick first expressed his concern to ensure that there was a proper legal basis to furnish the information sought. The purpose of the application – which was at that time confined to s. 631 – he suggested, was to obtain an order that he would furnish information rather than to ask the court to determine any issue concerning the decision of the directors to sell the assets, which, it was said, fell outside the usual legal framework for obtaining documents for the purpose of litigation.

41. By reference to the documents which had been exhibited by Mr. Sheeran, Mr. Fitzpatrick did not dispute the broad structure of the investments. He pointed to the most recent financial statements which had identified the risks which had influenced the decision to sell as being Brexit, the US-China trade war, climate change, and increased warnings about risks to the Irish economy.

42. Mr. Fitzpatrick emphasised that the basis of the application appeared to be that the applicants believed that the directors *"may have"* been guilty of misrepresentation, misselling, misfeasance, breach of duty and/or breach of trust. He suggested that it was apparent that Mr. Sheeran had formed his own view that the assets of the Companies had been sold prematurely and that the directors had acted in breach of their duties to the Companies and the investors. Mr. Fitzpatrick said that he had conducted an investigation which was commensurate with his duties as liquidator and had found that the sale of assets had been undertaken in line with professional advice received as to the appropriate sales

process with a view to realising value from the forestry assets for the benefit of the preferential shareholders. Beyond that, Mr. Fitzpatrick expressed no view on the claims or allegations.

43. Mr. Fitzpatrick went though the correspondence which had been exchanged, emphasising that the basis upon which the information had first been requested was that *"[t]here is … no basis on which the shareholders are not entitled to this information as it directly concerns their investment."* Despite having been invited to do so, he said, the applicants' solicitors had not clarified their legal entitlement to the information sought nor had they addressed the substance of his conclusions as to propriety of the sale. Mr. Fitzpatrick's position was that he was not prepared to provide information unless he was satisfied that it was appropriate and lawful. He expressed particular concern as to the purposes to which any information which he might provide would be put.

44. Mr. Fitzpatrick examined the correspondence which had been exchanged between the applicants and the directors and the directors' solicitors. He suggested that it was clear from that correspondence and from the affidavit of Mr. Sheeran that the applicants had determined that the sale of the assets was improper and that they were entitled to, and intended to, seek redress.

45. Mr. Fitzpatrick expressed particular concern that the applicants had made various statements on online platforms concerning the disposal of the assets and that Mr. Sheeran, in particular, was posting information as to the progress of anticipated proceedings, in general, and of the application then before the High Court, in particular. Mr. Fitzpatrick had identified a website called *"Irish Forestry Action Claim"* which suggested that the funds had been *"sold … at a fraction of their actual value"* and invited all investors in the eighteen forestry funds to join in an action against Veon Limited and to *"hold management responsible"*. Mr. Fitzpatrick suggested that this website might be associated with a

company called Irish Forest Action Association Limited, which had been incorporated on 12th December, 2019 and the directors of which were Mr. Sheehan and a Mr. Declan Kennedy, who was originally one of the applicants on this motion.

46. Mr. Fitzpatrick's declared position was that he did not wish to prevent or obstruct any action which the preference shareholders might wish to take but that he did not believe that it was open to him to disclose personal, privileged, confidential, or commercially sensitive information otherwise that strictly in accordance with law on foot of a clear legal entitlement of the requesting party.

47. In response to Mr. Fitzpatrick's affidavit, a further affidavit of Mr. Sheeran was filed in which he stood over the then applicants' position that the orders sought might be made under s. 631 but sought to add an application under section 684. While Mr. Sheeran said that Mr. Fitzpatrick had not previously said in correspondence that it might have been unlawful for him to have provided the information, he, Mr. Sheehan, did not point to any power or duty to have done so. Similarly, while Mr. Sheeran said that Mr. Fitzpatrick had not previously raised any concerns as to privilege, confidentiality or commercial sensitivity, he did not attempt to engage with those concerns. Pointedly, Mr. Sheeran did not address Mr. Fitzpatrick's concern that he, Mr. Sheeran, was involved in the *"Irish Forestry Action Claim"* website. Mr. Sheeran deposed that:-

> *"As set out in the grounding affidavit, the main reason why the applicants are seeking the documents and/or information sought is to assist in determining whether we have a cause of action in relation to the sale of the Companies' assets. Depending on the documents and information obtained, the applicants may then be in a position to initiate proceedings seeking, inter alia, the return of those assets for realisation and distribution among the contributories of the Company. I am advised that such proceedings may be brought under section 608 of the 2014 Act if the effect*

of the transaction is to perpetrate a fraud on the company, its creditors or members."

48. Following the exchange of affidavits and the filing of the applicants' written legal submissions in the High Court, there was a further exchange of correspondence which was put before the court by brief affidavits which simply exhibited it.

49. In a letter of 1st October, 2020 Mr. Fitzpatrick's solicitors indicated that they had no objection to the proposed amendment of the application to include section 684. They pointed to a proposition in the applicants' legal submissions that the necessary consequence of any order that might be made in the proceedings contemplated would be that the assets available for distribution would be greatly increased, and to the averment in Mr. Sheeran's second affidavit that proceedings might be brought seeking the return of assets for realisation and distribution as new evidence. If this was not new evidence – which I believe it was – it certainly sharpened the focus of the purpose of the request.

50. In light of that new information and subject to two confirmations and a number of conditions directed to confidentiality and privilege, and subject to the court, Mr. Fitzpatrick was willing to contemplate that he might not object to the making of an order pursuant to s. 684 but would confine his participation to assisting the court. The two confirmations sought were:-

I. That the intended proceedings for which the information was sought were proceedings against the former directors and shareholders of the Third Irish Forestry Fund plc and the Sixth Irish Forestry Fund plc, the proceeds of which would be lodged to the liquidation for distribution among the contributories.

II. That the applicants were in a position to agree conditions which would attach to any order that might be made:

a. That the applicants would not copy, publish, refer to or disseminate documents or information the subject of any order in any manner whatsoever, and would keep such documents and information confidential to their solicitors, counsel, and any expert engaged for the purposes of the intended proceedings.

b. That the applicants would not use the documents or the information contained in them for any purpose unconnected with the proper conduct of the intended proceedings in which they were discovered or produced.

c. That the applicants would pay the reasonable expenses of Mr. Fitzpatrick making available for inspection, and in providing copying facilities, in respect of documents and information the subject of any order.

51. Mr. Fitzpatrick's solicitors went on to address a number of the categories of information and documents from the point of view of relevance, confidentiality and legal privilege. It was suggested that while s. 684 was directed to accounting records, books and papers of the company, it might be in ease of all the parties if, where information was sought, Mr. Fitzpatrick might compile the information.

52. The appellants' solicitors replied on 7th October, 2020. They contested the suggestion that the information in the legal submissions and second affidavit of Mr. Sheeran was new.

53. As to the first confirmation sought, the appellants confirmed that the contemplated proceedings included a claim under s. 608 of the Act of 2014 (for the return of assets which have been improperly transferred) and s. 612 (for the assessment of damages against certain persons for misfeasance or breach of trust) and/or breach of duty and/or breach of trust, the proceeds of which would be lodged to the liquidation for distribution; but went on to say that proceedings were contemplated against the directors pursuant to s. 49 of the Act of 1963 and

its successors in respect of misrepresentation in the prospectuses, the primary remedy for which would be an award of damages to the plaintiffs.

54. As to the second confirmation sought, the appellants confirmed the proposed conditions of confidentiality, adding that they were three of a much larger group of investors who were dissatisfied with the manner in which the Companies' assets were sold and that the confirmation provided was without prejudice to the right of others to seek similar documents and information. In a letter of 12th October, 2020 the appellants' solicitors identified five other persons – investors in the Second, Third, Fourth, Fifth and Seventh Funds – on whose behalf they requested materially identical categories of information and documents.

55. As to Mr. Fitzpatrick's expenses of complying with any order which might be made, the confirmation sought was provided with the caveat that the expenses would be limited to the cost of production and copying and would not extend to any legal advice.

56. The appellants' solicitors went on to address Mr. Fitzpatrick's proposals in respect of each of the categories of documents and information.

57. Mr. Fitzpatrick's solicitors replied on 15th October, 2020. They made the point, first, that the appellants had not bound themselves to a position where the proceeds of contemplated litigation would be lodged to the liquidation, for distribution among contributories. Secondly, they queried whether more investors in addition to the appellants and the five identified additional investors might apply for the information. Thirdly, there was some clarification of the suggestion previously made as to how issues of confidentiality and privilege might be dealt with. It was said that such submissions would be made on the question of costs as might be appropriate at the conclusion of the hearing.

58. Finally, and for the sake of completeness, on 15th December, 2020 the appellants' solicitors replied to Mr. Fitzpatrick's solicitors' letter of 15th October, 2020. The appellants' solicitors were critical of what they perceived in Mr. Fitzpatrick's solicitors' letter to be

criticism of their position and so on. It may be of some significance to note that in explaining the difference between *"intended"* and *"contemplated"* litigation, the appellants' solicitors indicated that it was *"conceivable"* that having received and considered the information and documents sought, one or more of the applicants might decide not, after all, to issue proceedings.

59. The motion was heard by the High Court (Keane J.) on 16th March, 2021 and, as I have said, judgment was delivered on 16th July, 2021.

Section 631 of the Companies Act, 2014

60. I observed earlier that the appellants' originating notice of motion initially invoked s. 631 of the Companies Act, 2014 and that, following Mr. Fitzpatrick's objection that the application – if it was appropriate at all – should have been made pursuant to s. 684(1), the notice of motion was amended to invoke both sections.

61. In the High Court the appellants, although by then acknowledging that s. 684(1) was the more obvious source of jurisdiction to make the order sought, nevertheless argued that s. 631 was sufficiently broad to permit the order to be made under that section.

62. Keane J., for the reasons given at paras. 62 to 70 of his judgment, accepted Mr. Fitzpatrick's submission that the power conferred by s. 631 to determine any question arising in the winding up of a company did not confer a free-standing jurisdiction to order the disclosure of information or documentation.

63. The appellants, in their notice of appeal, suggested that the judge erred in that conclusion but that limb of the appeal was not pursued in their written submissions and was formally abandoned at the oral hearing.

64. Keane J. found that, on the evidence, the power conferred by s. 684 was engaged but was not persuaded to make the order sought.

65. Without deciding the issue, and acknowledging that there was contrary authority in the Australian cases to which reference had been made in argument, the judge was inclined to doubt whether that the power could be exercised solely to permit a creditor or contributory to pursue a private interest that would confer no benefit on the winding up.

66. Following the reasoning of Morgan J. in *Sunwing Vacation Inc. v. E-Clear (UK) plc* [2011] EWHC 1544 – to which I will return – the judge found that the power could be invoked where the potential benefit to the winding up was indirect or incidental, once that potential benefit existed. Because, he said, the appellants were not merely contemplating a civil action for damages for misrepresentation on the companies' prospectuses but also an application to set aside the transfers of company assets and for the assessment of damages for the misapplication of company property or misfeasance or other breach of duty or breach of trust, the proceeds of which would go into the liquidation fund, they had brought themselves within the section.

67. However, Keane J. was not satisfied that it would be just to permit the inspection sought because, he said, the proposed inspection would fall on the wrong side of the line between one which would assist the appellants with an existing or intended claim against the directors or promoters, on the one hand, and one which would allow them to fish for evidence to enable them to determine whether they could formulate a claim, on the other. He found that the expressed concerns of the appellants fell short of establishing a sufficient *prima facie* case of wrongdoing such as would warrant the making of the order sought.

The appeal

68. The appellants' core argument is that the High Court judge took too narrow a view of the power to order inspection.

69. There is, it is said, no analogy between the position of a creditor or contributory seeking to inspect the books and records of a company in liquidation and that of a party to litigation seeking discovery. The power conferred by s. 684(1), it is said, is a free standing statutory jurisdiction which is not constrained or informed by the discovery jurisdiction conferred by O. 31 of the Rules of the Superior Courts.

70. The judge, it is said, erred in finding that the appellants were obliged to show a *prima facie* case and in characterising the application as an impermissible trawl for disclosure in the hope to construct a claim. Alternatively, it is said, the judge erred in finding that the appellants had not made out a sufficient *prima facie* case that the disposal of the assets breached the unambiguous representations made to the appellants in the prospectuses.

71. The application, it is said, was focussed, limited and appropriate having regard to the refusal of the directors and the ordinary shareholder to furnish any meaningful information or documentation in relation to the disposal of the companies' assets.

72. The respondent contests each of the grounds of appeal and has cross-appealed against the finding of the High Court that the contemplation of the possibility of litigation against the directors amounted to an indirect or incidental potential benefit to the winding up.

73. There was, it is said, in truth, no credible basis for the judge's conclusion that the appellants had a real intention to bring proceedings for the benefit of the winding up in light of (a) the basis on which the application was originally brought, (b) the highly conditional nature of the appellants' declared intention to *"contemplate"* proceedings under s. 608 or s. 612, and (c) the adversarial nature of the appellants' correspondence.

74. Accordingly, it is said, the judge erred in his conclusion that it was not necessary to decide the question whether s. 684 was limited to applications the outcome of which would be to swell the assets available for distribution amongst the creditors and contributories.

75. The essence of the cross-appeal, as I understand it, is that the jurisdiction under s. 684 is limited to cases in which the applicant has decided to bring proceedings; that the contemplated proceedings must be for the benefit of the winding up; and that the requirement that the applicant should show a *prima facie* case goes to the engagement of the jurisdiction, as opposed to the discretion of the court in the exercise of the jurisdiction.

Section 684(1) of the Companies Act, 2014

76. The jurisdiction of the High Court to make an order for the inspection of the books and records of a company in liquidation which is now to be found in s. 684 of the Act of 2014 can be traced back to s. 156 of the Companies Act, 1862 and from there, forwards, to the English Companies Act, 1986, and the several Australian Companies Codes and Corporations Laws. The power in s. 156 of the Act of 1862 was limited to companies in respect of which winding-up orders had been made but was extended by the Act of 2014 – as it had been in England and Australia – to voluntary liquidations.

Section 156 of the Companies Act, 1862

77. The earliest case to which we were referred in which the power was considered is a decision of the Court of Appeal in England in *In re North Brazilian Sugar Factories* (1887) 37 Ch. D. 83. In that case the company, which had been incorporated in 1882, collapsed in 1887. A scheme had been approved by the shareholders and sanctioned by the court pursuant

to which all of the assets and undertaking of the company had been sold to a new company. Several dissatisfied shareholders applied to the High Court for an order pursuant to s. 156 of the Act of 1862 permitting their solicitors to inspect the books and records of the company then in the custody possession or control of the company or the liquidator. The application was refused by Charles J. and the applicants' appeal to the Court of Appeal was dismissed.

78. According to the headnote, the decision of the Court of Appeal was that:-

> *"The power given by the Companies Act, 1862, s. 156, of ordering inspection of the books and papers of a company which is in the course of winding-up is prima facie to be exercised only for the purposes of the winding-up and for the benefit of those who are interested in the winding-up, and will not in general be exercised for the purpose of enabling individual share-holders to establish claims for their personal benefit against the directors or promoters.*
>
> *The section only applies to books and papers in the possession of the company, and does not enable the Court to decide any question of right against third parties who have the books in their possession and claim to be entitled to such possession."*

79. One hundred and thirty five years later, Mr. Conroy, for the appellants in this case, says that *North Brazilian Sugar Factories* is a very old decision – which it is – and that it was made in the context of the Companies Act, 1862 which, he says, was an entirely different animal to the Companies Act, 2014 – a point to which I will return. He also submits that the decision of the Court of Appeal turned on the fact that the books and papers were no longer in the possession of the old company or the liquidator but had been handed over to the new company, so that what was said as to the exercise of the power was *obiter*.

80. As to whether what was said in *North Brazilian Sugar Factories* was *obiter*, I think that Mr. Conroy is correct. Cotton and Lopes L.JJ. both found, first, that the section only applied to books in the possession of the liquidator, before hypothesising what order might

have been made if they had not been. That said, it seems to me that what is important is not whether what was said in *North Brazilian Sugar Factories* was *obiter* or *ratio*, but whether it was correct: or, perhaps more to the point, whether it would now be correct.

The Australian cases

81. The appellants' core submission is that while the language in s. 684 of the Act of 2014 is materially identical to that in s. 156 of the Act of 1862, the scheme of the modern legislation is much broader. The Act of 2014, it is said, permits a variety of claims to be made in a liquidation which were not available to creditors or contributories under the Act of 1862. The changes which have been made to the legislation, it is said, require a re-evaluation of the purposes for which the power to order an inspection of the books and records should be available. The Australian courts have done precisely that and their reasoning, it is submitted, is compelling.

82. The first of the cases to which we were referred was a decision of the Supreme Court of Victoria in *Re MMC Pty Ltd. (In liquidation)* (1992) 12 ACLC 45. The principal creditor of a grossly insolvent company sought an order under s. 387 of the Companies (Victoria) Code – which is in the same terms as s. 156 of the Act of 1862 – in order to derive from the company's books such assistance as they might provide with respect to a cause of action against the directors under s. 556(1) of the Code – by which directors were made jointly and severally liable with the company for debts incurred in circumstances in which there were reasonable grounds to believe that the company would not be able to pay its debts as they fell due.

83. When the application first came before Senior Master Mahony, he was inclined to the view that, notwithstanding the consent of the liquidator, the application might have been

barred by the decision in *North Brazilian Sugar Factories*. Following further argument and reflection, he decided that it would be just to make the order.

84. Senior Master Mahony observed that:-

> *"The power conferred by section 387 is unfettered save by the requirement than an order made in exercise of the power shall be as the Court 'thinks just'. The 'justice' of the order sought must be determined, in the circumstances of the particular case, by reference to the purpose for which the power is conferred. In re North Brazilian Sugar Factories exemplifies this. Both Cotton and Lopes, L.JJ. reached their conclusions by reference to the prima facie purpose for which the power was conferred by the section, that is, as they saw it, 'the purposes of the winding up'. That was sufficient to be determinative in the circumstances of that case. Cotton L.J., however, made it clear that he was not going so far as to conclude that the power could only be exercised where it would be for those purposes:*
>
> > *'I do not say that in no case can inspection be ordered where it is not for the general benefit of the contributories, but prima facie it is only to be ordered with a view to their general benefit.'*
>
> *The section necessarily operates in the context of the law as it stands from time to time. It follows that changes in the law could increase or diminish its scope and, consequently, the power conferred by it. In my view, there have been, since 1887, at least two significant changes in the law of Victoria which have to be considered in determining whether it would be 'just' in this case to make the order sought by the applicant.*
>
> *The first, and most directly relevant, was the enactment of section 556, the section under which the applicant is contemplating proceeding against the directors of the company. In its civil aspect, that section conferred on the creditor of a company*

which 'has been wound up or is in the course of being wound up' (see section 553(1)(a)) a cause of action for the recovery from a director of the company of a debt incurred by the company when there were reasonable grounds to expect that it would be insolvent when the time for payment arrived or that, by incurring the debt, it would become insolvent. The existence, or otherwise, of the 'reasonable grounds' for one or other of the requisite expectations would frequently be found in the books and records of the company, which, in the case of a company such as this, a company in the course of being would up, would be in the custody or control of the liquidator. To commence and proceed to trial in a proceeding under s. 556(1) without knowing what was contained in the books and records of the company held by its liquidator would be an obvious impediment to a plaintiff. Indeed, it is clear that it is to avoid this that this application has been made."

85. The second change in the law of Victoria identified by Senior Master Mahony was the provision in rule 32.07 of the General Rules of Procedure in Civil Proceedings, 1986 for interlocutory orders for non-party discovery, the underlying policy of which, he said, was to facilitate the informed preparation of a party's case for trial with such advantages, including as to costs, which necessarily flow from that.

86. If, at the time he gave his decision in *Re MMC Pty Ltd. (In liquidation)* Senior Master Mahony was not yet an Associate Judge of the Supreme Court of Victoria, he was long established in a senior quasi-judicial office and was obviously alive to an issue thrown up by what might otherwise have been thought to have been a routine uncontested application. His judgment was reported in the Australian Company Law Cases. If – as the report shows – the issue which he identified when the case first came before him was not really argued and the submissions made by the applicant's solicitor were not particularly helpful, nevertheless it is clear that Senior Master Mahony gave the matter careful consideration.

87. *Re MMC Pty Ltd.* was decided on 31st January, 1992. The question as to the scope of s. 387 of the Companies Code had previously been argued before the Supreme Court of New South Wales in October, 1991 in a case of *Re BPTC Ltd.* (1992) 7 ACSR 291 in which McLelland J. gave judgment on 3rd February, 1992.

88. The headnote, pithily, shows that:-

> *"Section 387 of the Code is directed towards accountability to creditors, contributories and the company, of those who participated in the conduct of the affairs of the company prior to its winding up.*
>
> *Re North Brazilian Sugar Factories (1887) 37 Ch D 83, doubted."*

89. BPTC Ltd. had been the trustee of six unit trusts until it was replaced as such by new trustees and soon after ordered to be wound up. The new trustees applied for inspection of documents relating to the availability and enforceability of insurance cover for the benefit of the company in respect of any liability for breach of trust, and documents which might disclose facts relevant to the possible liability of third parties, including the company's holding company, in respect of such breaches of trust by the company.

90. McLelland J., starting at the end of p. 292, dealt shortly with *North Brazilian Sugar Factories*:-

> *"There is a statement in that case to the effect that the obtaining of evidence in support of actions by individual shareholders against the directors of a company in the course of being would up necessarily lies outside the proper ambit of the section. In my opinion such a limited view cannot be regarded as acceptable at the present day. Facilitation of the accountability to individual creditors and contributories, as well as the company itself, of those who participated in the conduct of its affairs prior to the winding up should nowadays be regarded as sufficiently related to the winding up to fall within the scope of the section."*

91. As the categories of documents which the applicant wished to inspect suggested, it was contemplated that claims might be made against the company and third parties, specifically the company's holding company, for damages for breach of trust. The company had had professional indemnity insurance policies but the insurers had repudiated. McLelland J. identified a possible issue as to whether the proper claimants would be the applicants – the new trustees – or the beneficiaries under the trusts but was content to proceed on the basis that it was reasonably arguable that the applicants would be the correct claimants. The order was made subject to the applicants' undertaking (a) that they would not, save by leave, disclose the contents of any documents to any person other than their partners, staff and legal advisers for the purpose of obtaining advice upon, considering, and prosecuting, claims or proceedings by them against the company or its insurers, (b) that they would make available to the liquidators and their solicitors any information as they might obtain concerning the liability of the insurers, and (c) that they would pay the liquidators' reasonable costs and expenses of carrying out the order for inspection.

92. It seems to me that the suggestion in the headnote to *BPTC Ltd.* that the decision in *North Brazilian Sugar Factories* was *"doubted"* may not have been strictly speaking correct. I do not understand McLelland J. to have doubted the correctness of the view taken by the Court of Appeal in 1887 of s. 156 of the Act of 1862, rather that he decided that s. 387 of the Companies (New South Wales) Code, 1981 needed to be construed in the context and for the purposes of the Code. For the avoidance of doubt this is no criticism of the law reporter who by reporting the case as he did would have drawn correctly attention to the decision.

93. *BPTC Ltd.* and *MMC Pty Ltd.* were both considered by the Supreme Court of Victoria in *Re William Lawrence (Globe Dyeworks) Pty Ltd. (In liquidation)* (1994) 12 ACLC 45. That was an application by a trade union, as a creditor in its own right and, as it described itself, as *"the representative of the employee creditors"*, for inspection of the books of a

company in liquidation. By then the Australian Companies Code appears to have been replaced by the Corporations Law. The premise of the application was that the applicant trade union *"may wish to consider an action against the company, its directors, the receivers and managers, the appointor of the receivers and managers, or third parties."* The evidence was that *"... it may be that the property of the company was dissipated in the period immediately before the receivers were appointed and that not all of the assets of the company were given into the control of the receivers, let alone the control of the liquidator."*

94. In an *ex tempore* judgment Hayne J. looked at *North Brazilian Sugar Factories, Re BPTC Ltd.* and *MMC Pty Ltd.* and said:-

> *"Since the decision in Re North Brazilian Sugar Factories, company law has moved to provide in various ways for actions maintainable at the suit of individual creditors for their individual benefit in circumstances not contemplated at the time of that decision. The fact that actions of this kind may now be brought by individual creditors is, in my view, powerful reason for thinking that the power under s. 486 may be exercised even in circumstances where the principal motive of the applicant creditor is a motive of furthering its own interests rather than the interests of the creditors as a whole."*

95. Hayne J. went on to say that on the facts of the case before him it was not clear that the actions contemplated would inure only to the benefit of the applicant or its members. At least some of the claims in contemplation appeared to be actions maintainable only by a liquidator; presumably, he said, a liquidator put in funds by the applicant or another creditor, in order that those whom the union represented might themselves obtain the satisfaction of their obligations in the priority for which the law provided. Interestingly, the order was made on the basis that the union was a creditor in its own right – for AUS$3,000, for union dues

deducted in the payroll – but on the basis that it would *"no doubt have in mind"* the interests of its members – who were owed something in the order of AUS$700,000.

96. Hayne J. preferred to rest his analysis and conclusion on the Corporations Law, which was part of Australian national law, and to leave out of account any consideration of the Victoria General Rules of Procedure in Civil Proceedings, which did not have an equivalent in all states.

97. If anything, it seems to me that Hayne J. took an even more liberal view of the power that McLelland J. and Senior Master Mahony. The ultimate objective of the application was to fix those who participated in the management of the company with liability for the deficit, or part of the deficit, but the immediate objective was to establish whether an action might lie against the directors and so forth. As I understand the judgment, while the small liability to the union was the hook on which the order was hung, the judge was not exercised by the fact that the real motivation was the interests of the members. Moreover, if the basis of the distinction drawn in *North Brazilian Sugar Factories* between claims or potential claims which might inure for the benefit of the general body of shareholders and those which might inure for the direct benefit of an individual shareholder was – as it appears to me to have been – the proximity of the claim to the winding up, the position of the Textile Clothing and Footwear Union of Australia (Victorian Branch) was a stage further removed. In part, at least, the object of the inspection which was permitted was to allow the applicant to assess whether it might fund litigation by the liquidator which, if successful, would inure, at least in priority, to the benefit of the preferential creditors.

98. The question of the scope of the power in the Australian Companies Code came before the Supreme Court of Western Australia in *IACS Pty Ltd. v. Australian Flower Exports Pty Ltd. (In liquidation)* (1993) 10 ACSR 769. The declared purpose of the applicant in that case was to bring proceedings against the directors for reckless trading. The first issue

was whether under the Companies Code the liquidator had the power to permit the inspection by the creditor of the books and records of the company. Rowland J. found that he did not. He held that once the company was wound up, the power to permit inspection was conferred only on the court.

99. The second issue in *Australian Flower Exports* was the question of how the discretion conferred by what by then was s. 486 of the Corporations Law should be exercised. Rowland J. looked at *North Brazilian Sugar Factories, Re BPTC Ltd.* and *Re MMC Pty Ltd.* The civil procedure rules in Western Australia did not provide for non-party discovery, so, as McLelland J. in *BPTC* had preferred to do, Rowland J. in *Australian Flower Exports* was bound to rest his reasoning on the Companies Code. He said that the introduction into the Corporations Law and previously the Companies Code of the provision by which directors could be made jointly and severally liable with the company for debts incurred where there were reasonable grounds to expect that the company would not be able to pay its debts, and in particular the inclusion of that provision in that part of the Corporations Law which dealt with winding up, widened the circumstances in which it could be *"just"* that the court would permit an inspection of the books. Rowland J. also pointed out that *North Brazilian Sugar Factories* did not prevent that conclusion but merely made a *prime facie* determination against such a conclusion.

The English cases

100. The court was referred in argument to several modern English cases which dealt with the application in that jurisdiction of s. 155 of the Insolvency Act, 1986. It was suggested that the English courts have followed *North Brazilian Sugar Factories*, which, on one view, they have. On the other hand, the issue argued and decided in cases to which we were

referred appears to have been whether the applicant met the test formulated in 1887, rather than whether the equivalent power in the companies legislation as it stood a century later was to be exercised on the same basis.

101. In *Re DPR Futures Ltd.* [1989] 1 W.L.R. 778 the directors of a company, who were also contributories, and who had been charged with conspiracy to defraud and breaches of the Companies Act, applied for permission to inspect the company's records. Millet J. applied *North Brazilian Sugar Factories* which, he said, was the considered view of the court which had stood unchallenged for more than a century and ought not to be departed from by a judge of first instance even if he were minded to depart from it, which he was not. Millet J. found that the records in question were not in the possession of the company but of the police, and that in any event, the power could be invoked only for the purpose of the winding up and not to allow the applicants to prepare their defence to the criminal charges arising out of their conduct of the company's affairs.

102. In *In re Movitex Ltd.* [1992] 1 W.L.R. 303 an action which had been brought by a company against two former directors and a company associated with one of them for alleged breach of fiduciary duty was continued after the company went into liquidation, and lost, with costs. The liquidators had failed to refer to the committee of inspection an offer of settlement and the action had been prosecuted for 71 days although early in the trial a witness had given evidence exonerating the defendants. Substantial monies which would otherwise have been available to pay pre-liquidation debts were instead used to pay part of the costs of the failed action. One of the directors and the company with which he was associated – which had been a defendant in the failed action – had been pre-liquidation creditors and were post-liquidation creditors for the unpaid balance of the costs.

103. An application for liberty to inspect the books and records of the company with a view to establishing an explanation as to how the company's assets which would otherwise

have been available for distribution had been wasted in pursuing the litigation was refused by the English High Court but the applicants' appeal was allowed.

104. In practical terms, the applicants' ultimate objective was to recover from the liquidators the equivalent of the dividend in respect of their pre-liquidation debts which they would otherwise have been paid and the shortfall between the costs which they had been awarded and the money available to meet the company's post-liquidation debts. In the High Court, it was admitted that the object of the inspection application was to enable the applicants to consider whether or not they should sue the liquidators personally. Mervyn Davies J. took the view that the applicants were seeking to use the winding up procedure for a purpose which was unconnected with the winding up. On appeal, as Scott L.J. put it, their object was put a little differently. The object, it was said, was not to enable the appellants to consider whether *they* should sue the liquidators, but to enable them to consider whether *the company* had a cause of action against the liquidators. This made all the difference. The Court of Appeal found that on the facts, if there was a cause of action at all, it was a cause of action vested in the company. The cause of action (Scott L.J. referred to it as a chose in action, but I think that it was more correctly a cause of action) was an asset of the company. The fact that the action which was being contemplated was a post-liquidation asset of the company did not make it inappropriate to use the winding up procedure to get it in and translate it into money. Accordingly, what Scott L.J. referred to as the practical objection expressed by the Court of Appeal in *North Brazilian Sugar Factories* did not apply to or bar the application in the present case.

105. The Court of Appeal went on to consider various other objections to the making of the inspection order but they were particular to the facts.

106. In *Movitex* the Court of Appeal held that in the exercise of its discretion it would order that the applicants should be permitted to inspect the records and documents in order to

ascertain whether the company had a cause of action in misfeasance against the liquidators. Significantly, one of the main justifications for the making of the order was that while something appeared to have gone wrong with the prosecution of the 71 day action, the applicants did not know what went wrong or whether or to what extent the liquidators might have been at fault. The applicants had undertaken to meet any expenses of the liquidators in facilitating any inspection that might be ordered. Scott L.J. said, at p. 312, that:-

> *"Resistance by the liquidators to inspection by the applicants of the relevant documents is either unnecessary, if there is nothing that the documents can reveal, or, an unpleasant alternative, involves the use by the liquidators of their control over the company and its documents for their own protection."*

107. I will return to the point later but it is useful at this stage to note that while the applicants in *Movitex* were able to point to something which appeared to have gone wrong in the course of the winding up, their declared object in asking for the inspection, and the declared object of the court in permitting it, was to allow an assessment to be made as to whether there was a cause of action. Moreover, although it was not spelled out, the immediate object of the inspection appears to have been to allow the creditors to decide whether they would fund an action by the company against the liquidators.

108. The next case to which reference was made was the judgment of Harte J. in *Inland Revenue Commissioners v. Blueslate Ltd.* [2003] EWHC 2022 (Ch.). That was an application under s. 112 of the Insolvency Act, 1986 for an order permitting the inspection of the books and records of a company in voluntary liquidation. Section 112 of the English Act of 1986, as it was put by counsel in the present case, is *inter alia* a gateway in voluntary liquidations in England for applications for the exercise by the court of any powers which the court might exercise if the company were being wound up by the court, including section 155. The report shows, however, that the application was argued as an application for pre-action

disclosure under CPR 31.16, rather than an order pursuant to section 155 for inspection and was dealt with as such. It is not in point save, perhaps, in the rejection of *"Why on earth not?"* as a sufficient basis for permitting an inspection.

109. In *Sunwing Vacation Inc. v. E-Clear (UK) plc* [2011] EWCA 1544 counsel for the applicant accepted that the authorities in England meant that the unqualified statutory wording of s. 155(1) of the Insolvency Act, 1986 was qualified by a purpose requirement, so that the power must be exercised for the purpose of the winding up. In that case a creditor of the company in liquidation sought to inspect identified classes of documents with a view to advancing a claim against third parties which, if or to the extent that it was successful, would be credited against the applicant's claim against the company. Morgan J. was satisfied that the prospect of the documents being of use and resulting in a beneficial outturn for the applicant and indirectly the company was sufficiently for the purposes of the liquidation to engage the jurisdiction to consider the making of an order. The issue, again, was whether the *North Brazilian Sugar Factories* test had been met, not whether the 1887 test had survived the changes in the law.

110. The last of the modern English cases to which we were referred was *M G Rover Dealer Properties Ltd. v. Hunt* [2013] B.C.C. 698. That was an application by two companies in an insolvent group for an order that the liquidators of the group provide copies of the documents provided by a creditor bank in support of its proof of debt, alternatively for an order permitting the inspection of the books and records of one of the group companies in relation to the sale or lease of vehicles owned by it or in the possession of other group companies. The facts were fairly complicated but, broadly speaking, the applicants were among seven companies which had given a cross-guarantee for the obligations of another group company. Following the insolvency a large number of cars were sold on behalf of the bank and the proceeds used to discharge some of the guaranteed debt. The applicants

complained that the sales process had not achieved the best price obtainable for the cars and hoped, if they could show that, to reduce their liability for the rump of the guaranteed debt. The application was resisted by the liquidator on a number of grounds, including that the inspection was not required for a purpose connected with the winding up.

111. Chief Bankruptcy Registrar Baister found that the applicants' purpose – of defending the bank's claim for the shortfall – might technically have been in the interest of the winding up so as to engage the jurisdiction but was not persuaded that anything the applicants might do could make any serious difference to the outcome of the winding up. He regarded the applicants' offer to meet the costs of the inspection as a factor in favour of the making of the order sought but said that all the other factors weighed against it.

112. For present purposes it seems to me that the only relevance of *M G Rover Dealer Properties Ltd.* is that it applied the rule – or followed the *prima facie* approach – ordained in *North Brazilian Sugar Factories*, that the inspection must be for the purpose of the winding up.

The commentators

113. Besides the cases, counsel drew attention to two of the textbooks.

114. *McPherson & Keay The Law of Company Liquidation* (4th Ed.) (2017) at para. 7-069, suggests that in England:-

> *"It appears to be the prevailing view that inspection exists for the purpose of the winding up and not for the benefit of individual shareholders, so leave to inspect would not be granted where there was no prospect of increasing the assets of the company and the applicant was simply hoping to obtain evidence for the purpose of taking private proceedings against the directors. But, it has been suggested that the court may grant leave other than where inspection is needed for the purpose of*

winding up. Professors Sealy and Milman suggest that leave may be given where information needs to be obtained either by a creditor in order to permit the defence of a claim made against it pursuant to a guarantee, or by an insurance company which is subject to proceedings."

115. *Loose & Griffiths on Liquidators* (9th Ed.) (2019) put it slightly differently, at para. 5.74, where, citing *Re DPR Futures Ltd.*, *Sunwing Vacation Inc.* and *MG Rover Dealer Properties Ltd.*, it is suggested that leave is likely to be granted *" ... if required for some purpose connected with the liquidation."* [Emphasis added.] If, as it seems to me to be, *"a purpose connected with the winding up"* is broader than *"the purpose of the winding up"*, I do not see in the cases referred to by the authors any authority for the reformulation of the test.

Fishing

116. Finally, as to legal principles, I want to say something about fishing. In the instant case, one of the respondent's objections to the inspection sought was that the appellants were fishing. The appellants were adamant that they were not. What was less clear was what precisely either side meant by fishing. Broadly speaking, I understand the respondent's objection to have been that since the appellants had not commenced proceedings against the directors and had not declared an absolute determination to bring proceedings, the object of the inspection could only be to establish whether there was a cause of action. The appellants' case, by contrast, was that they had reasonable grounds for believing that they had a good cause of action and that the inspection sought was focussed on the sale of the forests.

117. Mindful of the appellants' submission that the jurisdiction in s. 684 of the Companies Act, 2014 is a free standing statutory power, the exercise of which ought not be constrained

by the rules applicable to discovery in litigation *inter partes*, it seems to me that it is useful to look briefly at the established approach to discovery.

118. The prohibition on fishing is a long established rule which applies in the context of *inter partes* discovery but it seems to me that the concept of fishing can be elusive. At one end of the scale, it is settled law that that a party is not entitled to trawl through the documents of the opposing party to see what might be there. At the other end, if, as it is, the object of discovery is to *"enable each party to learn, in advance of the trial, of the existence of documents on which his opponent might rely at the trial" – McCarthy v. O'Flynn* [1979] I.R. 127 – the requesting party will not know for sure what documents his opponent has, still less, what information they might disclose. The requesting party will need to establish that it is reasonable to suppose that documents exist which contain information which may – not must – contain information which will enable him either directly or indirectly to advance his own case or damage that of his opponent – *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55. Thus, on one view, at least, the requesting party will have identified a pool in which it is reasonable to suppose that a relevant fish is to be found and, on that basis, will be permitted to cast his line. If the ultimate objective of discovery is to arm the parties to fight the case, it will more immediately allow an assessment to me made of the merits of the case and will often lead to a settlement.

119. In the ordinary way, the pleadings will have been closed before discovery will be ordered but this will not necessarily be so. A plaintiff applicant for pre-statement of claim discovery will be able to point to something which has gone wrong and the likely existence of documents which will likely contain relevant information. The premise of the application will be that the applicant believes that he has a good cause of action but if the purpose for which the disclosure is sought it to allow him to plead his case with specificity, he will not be able to say precisely what his case is. Broadly speaking, such an applicant will be able to

articulate what he is looking for but, to a greater or lesser extent, will be fishing for information.

120. A useful starting point is a passage from the judgment of Sir Thomas Bingham M.R in in *R v. Secretary of State for Health, ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994) which was cited with approval by O'Caoimh J. in *Shortt v. Dublin City Council* [2003] 2 I.R. 69 and by the Supreme Court in *Carlow/Kilkenny Radio Ltd. v. Broadcasting Commission of Ireland* [2003] 2 I.R. 69 and is reproduced at para. 10-31 of the fourth edition of *Delany and McGrath on Civil Procedure* (where, puzzlingly, the Master of the Rolls is demoted to Bingham J.). The proscription on fishing was thus stated:-

> *"It is not open to a plaintiff in a civil action, or to an application [recte. applicant?] for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."*

121. In *Keating v RTE* [2013] IESC 22 McKechnie J., at para. 60, observed that discovery *inter partes*:-

> *"… is not designed to identify grounds capable of establishing a cause of action, i.e. it cannot be used to enable a person to plead a cause of action or a defence which he is not otherwise in a position to plead."*.

122. Later in the same case, at para. 63, he said that:-

"In order to avoid the prohibition on fishing, to use an old but apt phrase, it is necessary for the moving party to disclose some information on which the plea is based."

123. As Clarke J. (as he then was) put it in *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3:-

"... a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation. The need for such a restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information."

124. With the caveat that the point was not argued, it seems to me that as far as discovery *inter partes* is concerned, there may be a distinction to be drawn between fishing for a cause of action – which is impermissible – and *bona fide* fishing for evidence in a case in which the requesting party is able to identify reasonable grounds on which the discovery is sought. In practice, there is likely to be a grey area between the two.

Discussion

125. The issue identified by the trial judge was whether the power conferred by s. 684 of the Act of 2014 can only be invoked for the benefit or purposes of the winding up or may be invoked more broadly by any creditor or contributory who seeks inspection to advance a private interest. That was the issue which arose in *North Brazilian Sugar Factories* which addressed the power conferred by s. 156 of the Act of 1862 but it seems to me that in light of the modern legislation the question is more nuanced.

126. The Companies Act, 1862 comprised 210 sections, of which, in Part IV, under the heading *"Winding up of Companies and Associations under this Act"*, 90 were directed to winding up. The Companies Act, 2014, as enacted, comprised 1,448 sections, of which, in Part 11, under the general heading of *"Winding up"*, 165 are specifically directed to winding up.

127. Chapter 6 of Part 11 of the Act of 2014, under the heading *"Realisation of assets and related matters"* includes provision in s. 599 for the making of an order requiring a related company to contribute to the debts of the company being wound up; in s. 600 for the pooling of assets of related companies; in s. 608 for the making of an order requiring the return of assets which have been improperly transferred; in s. 609 for the imposition of personal liability on the officers where adequate accounting records have not been kept; in s. 610 for the imposition of civil liability for reckless or fraudulent trading; and in s. 612 for the assessment of damages against promoters, directors, liquidators, examiners or receivers. Significantly, the Act permits applications for such orders to be made by any creditor or contributory, as well as by the liquidator, examiner or receiver.

128. In seeking the purpose for which or the circumstances in which the power might be available, Ms. Kierse, for the respondent, posited several purposes for which it could not possibly be available. It could not, she says, possibly be invoked for a purpose incompatible with or detrimental to the winding up. The corollary, she suggested, is that it is only exercisable in cases where to do so would be beneficial to the winding up. I cannot agree. The premise of the proposition that the power cannot be invoked for a purpose incompatible with the winding up is that it can only be invoked for a purpose which would be compatible with – or perhaps for the benefit of – the winding up. That, it seems to me, would be to suppose that the power is limited to the purposes of the winding up without first examining whether it is.

129. In *North Brazilian Sugar Factories* the Court of Appeal in England looked at the power conferred by s. 156 of the Act of 1862 in the context of the Act by which it had been conferred. It seems to me that, in principle, the court in construing s. 684 of the Act of 2014 should look beyond the wording of the power by itself to the context in which the power was conferred. While provision was made in the Act of 1862 for regard to be had to the wishes of the creditors and contributories, the winding up was very much in the hands of the liquidator. By contrast, the Act of 2014 permits a variety of applications to be made by creditors or contributories.

130. In the real world, a creditor or contributory contemplating an application to fix the directors of an insolvent company with personal liability will always be motivated to a greater or lesser extent by a desire to recover his own losses as opposed to a desire to increase the assets available for distribution amongst the class to which he belongs. For my own part, I see nothing wrong with that. Specifically, s. 610 contemplates the possibility of a declaration that a director is to be personally responsible for any part of the debts of the company and for the distribution of any money recovered to a particular person or classes of persons. In other words, the Act clearly envisages that applications and orders under the section will not necessarily be made for the benefit the general body of creditors or contributories and that money recovered will not necessarily be applied according to the ordinary order of priorities.

131. It seems to me that it is not necessary to decide whether *North Brazilian Sugar Factories* was correctly decided, or whether what was said as to the availability of the power to permit inspection was *obiter*, or whether it precluded or merely made a *prima facie* determination against an inspection to obtain evidence in support of an action by individual shareholders for their own benefit, as opposed to the general benefit of the winding up. I see nothing in s. 684 or elsewhere in the Act of 2014 which would warrant limiting the power to

order an inspection to some only of the purposes in Part 11. I am quite satisfied that the provision introduced into the Companies Acts in 1990, and now to be found in the Companies Act, 2014, for applications by creditors and contributories widened the circumstances in which it may be just to make an order under section 684.

132. In the course of argument Mr. Conroy was rather criticial of the later English cases as having followed *North Brazilian Sugar Factories* as established authority without revisiting the power conferred in 1862 by reference to changes in the law in England. I am not sure that that is quite fair. It is correct to say that all of the English cases followed and applied *North Brazilian Sugar Factories* but the issue argued in each case appears to me to have been whether the applicant's claim or contemplated claim was or was not one which could be said to be for the purpose of the winding up, rather than whether the test formulated by the Court of Appeal in 1887 could stand the test of time, or perhaps more accurately, was still valid in the greatly changed landscape.

133. I have to say that I found it surprising that we were not referred to any English case in which an application for inspection was made by a creditor contemplating an action or application against the directors for fraudulent or reckless trading. *Inland Revenue Commissioners v. Blueslate Ltd.* came close on the facts, but the application in that case was put up and ultimately decided as an application for pre-action discovery rather than inspection of the company's books and records. I find the Australian authorities persuasive. The point – as far as the authorities to which we were referred go – not having been argued in England, I see nothing in the English authorities which is inconsistent with the Australian approach.

134. In my view there is no warrant for confining an inspection of a company's books, records and papers to cases in which the applicant creditor or contributory has in mind

litigation for the benefit of the general body of creditors or contributories or for the general purpose of the realisation and distribution of the company's assets.

135. There are two clear conditions in s. 684. The first is that the company should be in liquidation, and the second is that the applicant must be a creditor or contributory. Thereafter, on the literal wording of the section, the court would appear to be at large, but it is clear from the section – as it was common case – that an applicant, beyond establishing that the statutory conditions have been met, must show that the making of the order sought would be just.

136. Mr. Conroy, for the appellants, submitted that the threshold test is most certainly not that the applicant is required to show a *prima facie* case, that is to say, that he has a *prima facie* case to make of wrongdoing on the part of the directors, to whose conduct the inspection sought is directed. There is, he says, no authority anywhere was such a proposition. It is acknowledged that it would not be enough for an applicant to simply ask for inspection of the books with a view to establishing whether he might have a case against the directors. That, it is acknowledged, would be fishing. It is submitted that, on the authorities, it is sufficient that that the applicant should show that he has a reasonable basis for believing that there may be a cause of action. More broadly, it is submitted that if it is shown that the inspection is required to serve a legitimate and *bona fide* objective, it follows that it would be just and beneficial to make the order.

137. Ms. Keirse, for the respondent, had something to say about the genesis and evolution of the application. The appellants, she said, failed in the correspondence to identify any legal basis for the requests made and brought the application under s. 631 – a provision under which it was belatedly conceded that it could not have succeeded. The respondent, it was said, eventually dragged some discipline out of the appellants but the court was entitled to look particularly carefully at an application which was started on one basis and then – as she

put it – swerved to another. The court, it was said, was entitled to assess and weigh the evidence offered in support of the application to get a sense of whether there was a *prima facie* basis for it. The requirement for a *prima facie* case was, it was said, no more that the corollary to the prohibition on fishing.

138. The requirement that an applicant should be able to show a *prima facie* test was, it was submitted, somewhere around a good arguable case in the context of an application for leave to serve out of the jurisdiction. The court, it was said, was required to look at the cogency, quality and objective nature of the evidence offered. The evidence in this case, it was said, fell far short of meeting the test because the appellants could not make up their minds what they wanted to do with the documents.

139. Ms. Keirse was critical of what she suggested was an inconsistency in the appellants' position on the one hand, that the contemplated causes of action were collective, and on the other, that they need not be. She urged that s. 684 needed to be construed in the context of the collective nature of Irish insolvency procedures, the investigative role and function of the liquidator, and the role of the Office of the Director of Corporate Enforcement, as well as how disclosure of documents is dealt with in Ireland.

140. While it is fair to say that there was a lack of clarity in the appellants' correspondence and in the application as it was initially formulated, I see no inconsistency in the appellants' argument as to the legal basis on which an order for inspection may be sought and made and the purpose for which the order is sought in this case. The several individual remedies available to creditors and contributories by Part 11, Chapter 6 of the Act of 2014 do not undermine the general collective nature of insolvency procedure. As to the interpretation of the section, it seems to me that the focus of the liquidator in the discharge of his investigative functions will properly be on the collective outcome while the focus of an unpaid creditor or disappointed contributory will be on his individual position. If anything, this potential

difference in perspective, coupled with the availability of individual as well as collective remedies, points to a broader interpretation of the power. Quite how the role of the Office of the Director of Corporate Enforcement might be material to the construction of the section was not explained. For the reasons already given, I do not believe that the approach to discovery in litigation *inter partes* is relevant to the examination of the free standing statutory jurisdiction under the Companies Act to order an inspection.

141. Later in argument, Ms. Keirse suggested that the test might be whether there was a *prima facie* basis for suggesting that something has gone wrong, or that there was something to look at. Then, it was said, the applicant would be entitled to look at the documents. The test propounded by the English cases, it was submitted, was whether the inspection would be beneficial to the winding up. The Australian test, it was said, extended to an investigative reason.

142. In my view, the appellants are correct in their submission that there is nothing in the Act or in the authorities – English or Australian – which suggests that an applicant for an order for inspection must show that there is a *prima facie* case to be made against the directors. The question is simply whether the making of an order would be just. If the test in England is whether the contemplated action would be beneficial to the winding up, I see nothing in the cases to warrant or require an assessment to be made of the prospects of success of the contemplated proceedings. The test in my view is not whether the applicant has made out that the contemplated proceedings are warranted but only that the proposed inspection is warranted.

143. Nor do I see in the legislation or in any of the authorities any justification for a requirement that the applicant should establish that he is committed to instituting proceedings. The scheme of the Act of 1862, as I have said, was that the liquidation was very much in the hands of the liquidator. Section 156 provided for the making of an order

permitting the inspection of the company's accounting records, books and papers by a creditor or contributory. But if, as the Court of Appeal in England found in *North Brazilian Sugar Factories,* the exercise of the power was limited to the purpose of realising and distributing the company's assets, the most that an applicant for inspection could contemplate was that the inspection would reveal information on which the liquidator might be persuaded to act, or, perhaps, information by reference to which the applicant could decide whether to fund an action by the liquidator. If the contemplated proceedings could only be brought by the liquidator, it follows that it could not have been a requirement that the applicant for inspection should have been committed to bringing proceedings.

144. In *MMC Pty Ltd.* the action contemplated by the applicant was one in which it would need to show that the debt was incurred in circumstances in which there were reasonable grounds to believe that the company would not be able to pay its debts as they fell due. Senior Master Mahony accepted as establishing a sufficient interest with respect to the inspection order sought an averment of the applicant's belief that the debt had been incurred at a time when the company was insolvent. The object of the inspection was perhaps to reinforce the applicant's belief that the company had been insolvent or to secure evidence to prove that but the fundamental object was to allow the applicant to first of all assess whether, and if so prove, that there were reasonable grounds to expect that the debt could not be repaid. Senior Master Mahony was satisfied that the books and records of the company, if properly kept, would harbour evidence of the utmost significance to the applicant's case for the existence of the *"reasonable grounds"* for the requisite expectation and declared himself satisfied that the application was not a *"fishing expedition".*

145. In *William Lawrence (Globe Dyeworks) Pty Ltd.* the declared object of the inspection sought was to see whether the union or its members *"may have a cause of action against the company or its directors"*. The applicant went no further than to suggest that *"it may be"*

that property had been dissipated, and that *"it seems"* that the property of the company had not achieved the best available price.

146. As was emphasised in argument, in neither case was there any suggestion that the applicant needed to show a *prima facie* case – which, plainly, neither applicant did – and in both it was clear that the applicant had not finally decided that it would bring the contemplated action.

147. Similarly, in *BPTC* the applicant wished to inspect the identified documents with a view to establishing – or in order to investigate – the availability of indemnity in respect of any claim that might be brought against the company, or the potential liability of the identified third parties. As Mr. Conroy emphasised, the evidence went no further than that litigation against the insurers and/or third parties was contemplated and that inspection was sought to enable an investigation. That, he says, is precisely what his clients wish to do.

148. Turning to the English cases, I accept the appellants' submission that if the threshold test for the engagement of the jurisdiction is more restrictive, none of them suggest that the exercise of the discretion, if engaged, is premised on the existence of a *prima facie* case. In *Sunwing* inspection was permitted of documents which were shown to have a good prospect of being of use in a German arbitration in which the applicant, but not the company, was involved. Morgan J. was satisfied that the inspection sought would be *"just and beneficial"* without making any assessment the likely admissibility, relevance or persuasiveness of the documents: all of which he left to the arbitral tribunal in Germany.

149. Finally, in this regard, counsel referred to the relatively recent judgment of the English High Court in *Re SCL Group Ltd. (In liquidation)* [2020] EWHC 3770. The applicant in that case had taken what in this jurisdiction would be regarded as a clearly champertous assignment of bare causes of action against a former director of a company in liquidation but Judge Burton was of the view that the assignment was beneficial to the

company. The height of the evidence was that the companies had potential claims against the directors. Judge Burton, being satisfied that the prospect that the company might share in the proceeds of the contemplated litigation brought the application within the purposes of the winding up, permitted the inspection of documents which were shown to likely include documents relevant to the assigned causes of action. As counsel emphasised, the court in *SCL Group Ltd.* was simply dealing with potential claims.

150. I think that it useful to emphasise that in *SCL Group Ltd.* the premise of the application was that the companies, as opposed to the applicants, might have a cause of action against the directors. The litigation contemplated was not litigation by the applicant and the inspection was ordered to allow the applicant to make an assessment of potential claims. It is clear from the fact that the applicants had bought and paid for the potential causes of action that they believed that there was, or at least might be, substance to them but Judge Burton did not attempt to make his own assessment. Rather, the focus was on whether the documents of which inspection was sought were likely to include documents relevant to the assigned causes of action.

151. Authority apart, Mr. Conroy argues that it would be wrong and would make no sense in principle to require an applicant for inspection to show a *prima facie* case. Firstly, he says, the power in s. 684 is not confined to purposes connected to litigation. Secondly, he says, there is nothing in the section which requires that litigation has been or will be commenced. Thirdly, he says, the inspection of documents is necessary for the statutory rights conferred on creditors and contributories to be effective. If the power were limited to litigation which had been commenced or to which the applicant was committed, the applicant would be caught between a requirement to show a *prima facie* case and the unavailability of the information necessary to allow them to do so. The prospect that an applicant would be put in the position that he would have to issue proceedings and apply for non-party discovery was, it

was said, inconsistent with the modern trend towards requiring parties to particularise their case with precision.

152. I agree that there is nothing in s. 684 which confines the availability of an inspection to contemplated litigation. I agree that there is no requirement that an applicant should show a *prima facie* case. I agree that the effectiveness of the statutory rights of creditors and contributories is a factor which may be important in the exercise of the power to order an inspection. I find myself less convinced by the argument as to the inconvenience or difficulty of non-party discovery. As I observed earlier, I prefer to focus on the power available under s. 684 in the context of the Companies Acts rather than by reference to the rules applicable to litigation which has been commenced.

153. Ms. Keirse sought to distinguish the Australian cases on the basis that there was no precisely equivalent provision in Irish law to that in the Australian codes that allows a creditor to sue the director directly, by-passing the company in liquidation. It is true that there is no precise equivalent in Irish law to the Australian Codes. The Australian Codes provide for criminal as well as civil liability for reckless trading and the onus of proof appears to be different but materially it seems to me that the changes in company law which prompted the reappraisal of *North Brazilian Sugar Factories* in the Australian states are mirrored in this jurisdiction. As Hayne J. in *Re William Lawrence (Globe Dyeworks) Pty Ltd. (In liquidation)* preferred to do and Rowland J. in *Australian Flower Exports* was constrained to do, I look no further than the changes later made to the Companies Acts. The rules which govern non-party discovery in litigation which has already commenced are of general application and the power is directed to issues which have arisen or are likely to arise. The jurisdictions being quite different, it seems to me that an attempt to find or define the one in the other is calculated to confuse rather than advance the issue.

154. There was some discussion in argument as to whether there is a difference between the English law and the Irish law. Section 684 of the Act of 2014 – like s. 155 of the Insolvency Act, 1986 and the equivalent provisions of the Australian Codes – allows the court to make such order as the court thinks just. In England, however, s. 112 of the Act of 1986 – which is the gateway to the exercise in a voluntary winding up of the powers of the court exercisable in relation to a court winding up – provides that the powers may be exercised where the court is satisfied that it would be *"just and beneficial"*. It was suggested that s. 631 of the Act of 2014 is the equivalent of s. 112 of the English Act of 1986 but I do not think that it is. Section 631 permits an application by a creditor or contributory for the determination of any question arising in a winding up; but the respondent's consistent position had been, and it was eventually accepted by the appellants, that the order sought is not one that might have been made under section 631.

155. There is no gateway in the Act of 2014 to an application under section 684. Rather, that section expressly extends the old power to order an inspection of the books and records of companies the subject of a court ordered winding up to companies in voluntary liquidation. If I am allowed to say so, I would find it peculiar if the law in England provided for a different test to be applied to applications for inspection depending on whether the company was the subject of a court ordered winding up – whether it would be *"just"* – or in voluntary liquidation – whether it would be *"just and beneficial"*. Jurisprudentially, I confess that I would struggle either with the notion that a gateway provision to the exercise of a power would change the basis on which the power might be exercised, or with the concept of a narrower gateway leading to a broader power. Moreover, with due regard for the presumption that effect should be given to all of the words used in a statute, I find it difficult to contemplate that it might be just to make an order which was not also beneficial.

156. In any event, however interesting or challenging the theoretical issue may be, it does not arise. The only requirement in s. 684 of the Act of 2014 for the making of an order is that the court should think it just to make the order sought.

Conclusions as to the availability and exercise of the power in s. 684 of the Act of 2014

157. The power conferred by s. 684 of the Companies Act, 2014, although framed in the same terms as s.156 of the Companies Act, 1862 was, is nowadays to be construed in the context of the modern statutory scheme.

158. The power may be invoked and exercised for the purposes or one of the purposes for which it was created. Those purposes are not confined to the purposes of the winding up generally but include the object of obtaining evidence in support of contemplated applications by individual creditors or contributories permitted by Part 11, Chapter 6 of the Act of 2014.

159. The power may be exercised in any case in which the court thinks just.

160. There is no requirement that an applicant for an order for inspection must establish a *prima facie* case of wrongdoing. However, the applicant must establish by cogent evidence and argument that the inspection is sought for a proper purpose and that the circumstances are such that would be just to make the order sought.

161. An order for inspection may be made for the purpose of contemplated litigation. It is not necessary that there should be litigation in being, or that the applicant should have finally decided to commence litigation. It is sufficient if the applicant can show that there are reasonable grounds for believing that he may have a cause of action and that it is reasonable to suppose that the company's accounting records, books and papers – or those of the company's accounting records, books and papers of which inspection is sought – may contain information that is relevant to the contemplated claim.

162. An order for inspection may properly be made to allow the applicant to investigate identified circumstances in the management of the company's business in which a creditor finds himself likely to be unpaid or an investor finds himself disappointed. An action or an application for redress is sufficiently contemplated if the applicant can show that there are reasonable grounds upon which it might be brought or made.

163. While s. 684 of the Act of 2014 appears to contemplate an order for the inspection of the accounting records, books and papers of a company, generally, a proper application for an order – identifying and justifying the purpose for which the inspection is sought – will necessarily identify, in broad terms at least, the category or categories of documents to which the application relates.

164. The power may be exercised upon whatever terms – whether as to costs, confidentiality, the use of documents or information obtained, or otherwise – as may be appropriate.

165. The willingness of the applicant to pay the costs and expenses of the proposed inspection will be a significant factor in the consideration by the court as to whether the inspection should be ordered but it is not by itself a reason for making the order. By the same token, the inability of the applicant to pay the costs will not by itself be a reason for not making the order.

The principles applied

166. There was some discussion in the course of the hearing of the correspondence exchanged before and after the application was brought: each side insisting that they had been reasonable and the other unreasonable. I do not consider it useful to go into the detail of the correspondence but I do not believe that it is unfair to say that it was a bit snippy on both

sides. More to the point, perhaps, as far as the application now before the court is concerned, it was not – on either side – terribly focussed.

167. The appellants' solicitors' first letter began with an expression of concern that the forests had been sold prior to maturity, well in advance of the thirty years set out in the prospectuses, and without reference to the preference shareholders. The complaint that the distribution cheques had been signed by the company secretary rather than the liquidator was, in my view, a distraction. The appellants asked the liquidator to do three things: (1) investigate the circumstances in which the forests had been sold, (2) provide various documents and information; and (3) depending on the outcome of the investigation, avoid the sale and/or seek damages by way of compensation.

168. Mr. Fitzpatrick, as he had been asked to do, looked at the disposals and conveyed his opinion that the required steps in the process had been applied correctly and that the directors had acted reasonably and responsibly.

169. As the correspondence progressed, the appellants pressed for a combination of information and explanations as well as documents. Challenged to identify the legal basis for the request for – indeed insistence upon – the information, explanations and documents, the appellants failed to do so. There is substance to the respondent's criticism that the application changed, or at least only became focussed, after the first replying affidavit was filed but it seems to me that the indignation on each side at the position previously taken on the other continued after the eventual identification of the relevant section and to a certain extent coloured the engagement as to whether and on what terms the inspection might be justified. Perhaps it is an unavoidable risk of our adversarial system.

170. Part of the justification offered by the appellants for the inspection is that the sale came as a complete surprise and was entirely unexplained until they were sent the directors' memorandum of 4th February, 2020 – which they did not think much of. Of that I am

unconvinced. Before, if not terribly long before, the sale was announced on 19th May, 2019, the chairman's letters of 22nd March, 2019 and 2nd April, 2019 which accompanied the financial statements for the year ended 31st May, 2018 had raised the prospect of early disposal. The financial statements for the period from 1st June, 2018 to 21st May, 2019 – which are dated 28th June, 2019 – show more or less the same explanation, although it is unclear when those were circulated. Whatever the preference shareholders may have known about the sale, or the reasons for the sale, before the forests were sold, it does not appear to me that it can have come to them out of the blue.

171. Part of the justification offered for the inspection is that the management fees are said to have been *"excessive and unwarranted"*. In my view the evidence does not support any allegation of irregularity in relation the management fees. The prospectuses clearly disclosed the management contracts and the management fees which would be payable and there is no suggestion that the fees paid exceeded those disclosed. Moreover, since the appellants are aware of the management fees paid, there would be no sensible purpose to be served by permitting an inspection of the Companies' books and records by reference to management fees.

172. Part of the justification offered for the inspection is an alleged concern that the directors may have been guilty of misrepresentation and/or misselling and/or making untrue statements in the prospectuses, but there is not even a hint as to how the investments might have been unsuitable or the prospectuses inaccurate. This declared concern is said to be based on (a) the taking of excessive and unwarranted fees and (b) the decision to sell the assets at the worst possible time. For the reason given, I see no basis for the suggestion that excessive fees were taken and I fail to see how the decision to sell the assets years later could go to the accuracy of the prospectuses.

173. The thrust of the appellants' position is that their investments were good investments, that the business plan was a good plan, and that everything that was to have been done was done up to the point when the directors decided to sell. The loss, or shortfall, said to have arisen from the decision to sell and the sale is the difference between the return which the appellants had and the return which they hoped for. It is no part of the case made that the promoters intended from the outset to sell the forests sooner than thirty years after they were planted and, in my view, it would not be just to permit an inspection to allow the appellants to blunder about in the Companies' records to see what might be found.

174. For good measure, none of the categories of documents which the appellants wish to inspect go to the accuracy of the prospectuses or the basis on which the preference shares were offered for subscription.

175. The appellants' core complaint is that the forests were sold too soon.

176. The evidence of Mr. Sheeran offered in support of the application is in some respects thin enough. He has deposed, for example, without identifying his means of knowledge, that it is *"well known"* that the value of forests escalates rapidly twenty years after they are planted. That said, I believe that the appellants have met the threshold of identifying something that has gone wrong with their investment. It may very well be, as the directors have said and, indeed as the appellants are prepared to contemplate – but not, for the moment, to accept – that the early disposal and the price achieved were justified. In the meantime, the objective fact of the matter is that the preference shareholders are out of the forests while the ordinary shareholders, through Veon Limited, have retained or continued their role in the management of the forests. If the terms of that continued involvement are – as the directors have asserted in correspondence – different or less advantageous to the previous arrangement, the appellants do not know what they are.

177. I am not for an instant to be thought to be expressing a view one way or the other on the merits, but it does seem to me that in the model adopted for each of the funds there was potential for tension between the interests of the ordinary and of the preference shareholders. If, as far as dividends and distribution were concerned, the preference shareholders were to have had the exclusive economic interest in the Companies, it seems to me to be more or less common case that the ordinary shareholders – through the various companies with which they were associated – had and continue to have an economic interest in the management of the forests. Mr. Sheeran, as I have said, now suggests that the annual fee of IR£30 or €38 per acre, index linked, struck at the time of the public offering, was a good fee. If and to the extent that it was, and if and to the extent to which the proceeds of sale of the thinnings were and would continue to be sufficient to allow the Companies to pay the management fees on an ongoing basis, the interests of the owners and managers may have been aligned. While it is evident from the directors' memorandum that, indirectly, the ordinary shareholders are to have a continuing role in the management of the forests, the terms of that continuing involvement have not been made clear. Similarly, it has not been made clear whether the forests were sold as managed forests or whether the management contract was negotiated separately.

178. The evidence is – or at least the public announcement suggested – that the forests – covering 10,000 acres, in 185 estates, planted over a period of at least seventeen years – were sold at the same time to the same buyer. What is not evident is how the price for each estate was struck. Indeed it is not clear whether the estates were valued individually or the whole lot sold as a job lot.

179. The plan as set out in the prospectuses was that the timber would be sold after thirty years to the highest bidding mill and that after it had been cleared the land would be sold. Instead, what was sold were the forests on the land on which they stood. Part of the

appellants' declared concern is that the price achieved – or at least the distribution made – did not reflect the likely increase in the value of the land by itself in the twenty or so years and ten or so years between purchase and sale. Again, Mr. Sheeran goes no further than to say that it is well known that the value of forestry land in Ireland has appreciated by many multiples – he does not say how many multiples – since the late 1990s but on this application his evidence has not been challenged.

180. The starting point is that it is common case that the forests were sold much earlier than was planned and at a price which was a small fraction of that which was hoped for. To that extent, it can be said that the appellants have shown that something has gone wrong. If the difference between the preference shareholders' exclusive economic interest in the Companies and the shared economic interest in the forests was not obvious from the prospectuses, it is, it seems to me, apparent in the continuing indirect involvement of the promoters in the management of the forests, whatever that may be.

181. It seems to me that the appellants have established a sufficient basis for interrogating the reasons for the sale and the price achieved as to engage the jurisdiction to make an order for the inspection of the records sought. The appellants do not know what they will find, but, as far as the decision to sell and the sale are concerned, they demonstrably know what they are looking for. If it could be said that they are fishing for documents, they are not fishing for a cause of action. I beg to differ from the High Court judge. The inspection sought is not, in my view, an impermissible trawl.

182. It was submitted on behalf of the respondent that the explanation by the directors as to why they had decided to depart from the original plan a significant factor to be taken into account in the exercise by the court of its discretion whether to make an order for inspection. I accept that. However, the explanation was very much on a macro level. I am not to be thought to be critical of the directors when I observe that the explanation did not set out the

terms of reference of Deloitte Corporate Finance or their advice, nor did the letter spell out precisely how the agreement with AXA Investment Managers had come to be made. It was made clear that the directors, through Veon Ltd., were to have a continuing role in the management of the forests but not what that role was or the terms, not least as to remuneration, of the engagement.

183. Similarly, I take into account the fact that the respondent – at the request of the appellants – had conducted his own investigation. But all that was conveyed to the appellants was the fact and conclusion of the investigation and not the nature of the investigation, the materials examined, or the respondent's reasons for coming to the conclusion which he had. The appellants cannot interrogate the respondent's investigation and conclusion without sight of the relevant material: which may or may not be co-extensive with the material examined by the respondent. I underline again that I am not to be thought to express any view on the merits before saying that the appellants have a statutory right to bring their own proceedings. It seems to me that the very purpose of the provisions of Chapter 11, Part 6 of the Act of 2014 which I have earlier identified is to allow creditors or contributories to advance their own position where the liquidator – for whatever reason – may have decided not to bring proceedings.

184. There was, as I have said, some engagement in the correspondence exchanged between the time the High Court application was issued and the time it was heard as to whether the appellants would bear the costs associated with any inspection that might be ordered but the correspondence was inconclusive.

185. I pause here to say that I see no merit in so much of the appeal as complained that the High Court judge did not sufficiently engage with the inconclusive correspondence as to the terms of which the respondent might acquiesce in the inspection sought. The conditions on which the respondent indicated that he would not oppose the making of an order were not met

by the appellants and the judge was perfectly correct in focussing on whether the appellants had made out their case in law rather than the reasonableness or otherwise of the position taken by the respondent in correspondence.

186. On the hearing of the appeal, appellants offered an undertaking to pay the reasonable costs associated with any inspection which might be ordered. As I have said, the fact that the appellants are willing to pay the costs is not a reason why the inspection might be ordered but it is a significant factor in the exercise by the court of its discretion. Unless the appellants were willing to pay the costs of the inspection, those costs would be borne by the general body of the preference shareholders. Because the appellants are willing to pay those costs, there will be no material prejudice to the winding up.

187. In my view, the High Court judge ought to have engaged more closely with the arguments as to the purpose of the power conferred by s. 684 of the Companies Act, 2014 and erred in finding that the exercise of the power was dependant on the appellants establishing a *prima facie* case of wrongdoing.

188. For these reasons, my conclusion is that the appeal should be allowed and, subject to what I will say as to the form of the order, an order made for the inspection by the appellants of the Companies' accounting records, books and documents.

189. As to the cross appeal, there are several elements in the single ground of appeal. I find that the High Court judge did err in concluding that he did not have to decide the question whether the power in s. 684 was limited to applications the outcome of which would be beneficial for the collective purpose of the winding up. Similarly, I find that the High Court judge took too narrow a view of the power in requiring that the appellants needed to have shown that the proposed inspection would assist them with an existing or intended claim, and in characterising the appellants' wish to investigate the circumstances of the sale as *"fishing"*. On the conclusions to which I have come as to the availability of the power to

order an inspection, the issue as to whether the proceedings contemplated by the appellants could potentially benefit the collective purposes of the winding up does not arise.

190. While there are various elements in the cross appeal, it was advanced as a further ground on which the respondent would have this court affirm the decision of the High Court. The appeal having been allowed, the appropriate order is that the cross appeal should be dismissed.

Form of order

191. The focus of the appeal was on the scope of the power conferred by s. 684 of the Companies Act, 2014 and the circumstances in which that power may properly be invoked and exercised. The arguments did not address the form of order which may be made or – save as to the costs of the proposed inspection, which the appellants declared their willingness to pay – the conditions on which the order might be made.

192. The power conferred by s. 684 is a power to make an order for the inspection of the accounting records, books and documents of the company. However, the originating notice of motion is framed in terms of copy documents and information.

193. I observed earlier that the categories of documents and information which the appellants sought were slightly refined over the course of the correspondence. The request for copies of any insurance policies in relation to the companies, particulars of the respondent's agreed or proposed remuneration and the names and addresses of all shareholders in each of the companies and the details of their holdings have been abandoned. The refined categories continue to be expressed in terms of requests for copy documents, rather than categories of documents which the appellants wish to inspect. The request for particulars of the basis on which Deloitte Corporate Finance was engaged has been changed to a request for copy documents but the appellants' wish to establish the basis of the

directors' continuing involvement in the management of the forests continues to be expressed in terms of a request for particulars, rather than inspection of documents. Similarly, the appellants desire to interrogate what was and what was not sold continues to be expressed in terms of a list, rather than documents they wish to inspect.

194. The correspondence showed a willingness on the part of the respondent – if he could be satisfied as to all other matters – to compile the requested information. If, by the letter of the law, the issue as to whether an inspection should be ordered is a matter between the applicant and the court, it was not inappropriate that the parties should have engaged as to the terms upon which the liquidator might not have opposed an order which the court might have been minded to make.

195. If, but only if, the respondent was agreeable to abstract information from the Companies' records – and any agreement by the respondent to do so would surely be subject to the appellants' agreement to pay the costs – I would be prepared to contemplate such an order. Otherwise, it seems to me, the order will need to be framed in terms of categories of documents. I do not overlook the refusal by the Court of Appeal in England in *Re Movietex Ltd.* to make an order for a list of documents but the application in that case was opposed.

196. Now that the issues of principle have been resolved it seems appropriate to allow a short time for engagement between the parties' solicitors as to the detail of an appropriate order.

197. As to what conditions might be appropriate, in *MMC Pty Ltd.* the order was made on terms which allowed that the directors of the company, who Senior Master Mahony thought might be adversely affected by it, an opportunity to apply to set the order aside. In *Sunwing* Morgan J. – as he put it – anxiously considered whether provision should be made for the respondent to the German arbitration to be able to apply to vary or discharge the order and *"by a fairly narrow margin decided not to take that course"*. Subject to anything which

counsel may have to say on the matter, it seems to me that such a condition would not be appropriate. The object of the inspection is clearly to establish whether there is anything in the books and records of the Companies which might assist the appellants in the litigation they contemplate against the directors. If, for the sake of argument, there was, it might be said that the directors might be adversely affected. However, the books and records the subject of the inspection are the property of the Companies. If, for the sake of argument, it might be said that the inspection may ultimately have consequences as far as the directors are concerned, that is not to say that they may be adversely affected by it.

198. In correspondence, the directors, by their solicitors, have quite rightly taken the position that the books and records are in the possession of the liquidator. There was no suggestion that the directors might have been entitled to be heard as to the making of the order sought. If that is so, it seems to me to follow that the directors can have no right to apply to set aside any order that might be made.

199. Finally, there is the question of the dissemination and use of the documents and information which may be gleaned from them. In *BPTC Ltd.* McLelland J. exacted an express undertaking as to the use and disclosure of the contents of the documents. The judgments in *Emerdata Ltd. v. Green* [2020] EWHC 3770 (Ch) and *Sunwing* show that Judge Burton and Morgan J. had before them proposed orders, but not whether the drafts included a condition as to use and disclosure. There is no reference in the judgment of Sir Stephen Brown P. in *Re Movietex* to use and disclosure. In *Re William Lawrence (Globe Dyeworks) Pty Ltd.*, Hayne J. expressly contemplated that the information which the trade union would glean from the inspection would be used to advantage the interests of the members as well as the applicant union but Hayne J. appears to have accepted the entitlement of the union to have applied as the representative of the employee creditors, as well as on its own behalf.

200. The appellants' solicitors, in their letter of 7th October, 2020, confirmed that the appellants were agreeable to a condition that any order that might be made should be subject to a condition that the documents and information would be kept confidential to them and their advisers and would not be used for any purpose unconnected with the contemplated proceedings but went on to say that the appellants had made no secret of the fact that they were three of a much larger group of investors who were contemplating proceedings.

201. The condition proposed by the respondent in correspondence reflected the implied undertaking which is the foundation of every order for discovery *inter partes*. Subject again to argument, it seems to me that the rationale of the implied undertaking as to the use of documents the subject of an order for discovery and of the information obtained by that process applies equally to an order for inspection under the Companies Act, and that the order should record the appellants' undertaking as to the confidentiality and use of the documents and the information gleaned from them.

202. In their letter of 12th October, 2020 the appellants' solicitors identified five further investors, one in each of the Second, Third, Fourth, Fifth and Seventh Funds, by whom they were instructed. If the appellants' solicitors are acting for other investors, *a fortiori* for investors in other funds and if, as appears to be the case, Mr. Sheeran is contemplating or promoting a sort of class action by or on behalf of all of the investors in all of the eighteen funds or by or on behalf of all of the investors in each of the funds – or by or on behalf of such of the investors who might join in an action – the court would need to be satisfied as to the effectiveness of any such condition.

203. I would allow the appeal, dismiss the cross appeal, and list the matter for submissions as to costs and the form of order.

204. As this judgment is being delivered electronically, Costello and Power JJ. have authorised me to say that they agree with it.