Neutral Citation: [2015] IEHC 272

THE HIGH COURT

COMMERCIAL

[2014/468COS]

IN THE MATTER PANSHIRE LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS, 1963-2013

AND

IN THE MATTER OF SECTION 298 OF THE COMPANIES ACT, 1963

AND

IN THE MATTER OF SECTION 31, 38 AND 139 OF THE COMPANIES ACT, 1990

BETWEEN

AIDAN GARCIA (LIQUIDATOR) AND PANSHIRE LIMITED (IN LIQUIDATION)

APPLICANTS

AND

MARK KILKENNY, PATRICK ROONEY AND DANSKE BANK

RESPONDENTS

JUDGMENT on Preliminary Issue
JUDGMENT of Mr. Justice Haughton delivered the 1st of May, 2015

Introduction
1. This is a preliminary hearing on affidavit in respect of proceedings brought by the applicants by way of Originating Notice of Motion dated 21st October, 2014 ("the main proceeding") under the Companies Acts arising out of the liquidation of Panshire Limited (in liquidation) ("the Company"). The first named applicant brings the main proceeding as official liquidator of the company against the first and second named respondents ("the respondents") who were directors of the company and also the exclusive shareholders, and against the third named respondent Danske Bank. The main proceeding was admitted to the Commercial Court by order of McGovern J on 26th January, 2015.

2. The company was incorporated on 6th April, 2004 as a "special purpose company" to build a development in Finglas known as "Clearstream Court". The development was structured in such a way that the respondents, or at any rate the first named respondent, borrowed the capital required personally from Danske Bank. Danske Bank claimed to have a mortgage over the site at Clearstream Court. The sale structure for completed apartments consisted of two separate contracts which the purchaser would enter into, one with the developer for the sale of the site and one with the company in respect of the building of the apartments.

3. After the completion of the development, but before the completion of sales, the company went into voluntary liquidation, and Mr. John Barry was appointed liquidator by ordinary resolution of the company's creditors on 30th March, 2010. Mr. Barry resigned from his position as liquidator on 2nd August, 2011 whereupon the first named applicant was purportedly appointed as replacement liquidator at a meeting of creditors on the same date.

4. In the main proceeding the applicants claim:-

- That in relation to apartments sold prior to the date of liquidation, monies properly due to the company were wrongfully diverted to Danske Bank in part discharge of the respondents' liabilities.

- That 2 apartments were given away by the company for nil consideration prior to the liquidation.

- That the company is entitled to 80% of net sales proceeds in respect of 43 apartments sold since the company went into liquidation.

- That the company is entitled to 80% of all sale proceeds achieved by the receiver appointed by Danske Bank (Mr. Stephen Tennant) in relation to the remaining apartments.

- That in essence the insolvency was brought about by the use of company funds to pay down personal borrowings of the respondents.

- That the Revenue Commissioners are owed substantial monies in respect of VAT and other taxes.

- That in the foregoing the respondents were in material breach of s. 31 of the Companies Act 1990 (use of company funds by directors to reduce personal indebtedness), and that the disposition of proceeds of sale of apartments when the company owed substantial debts were fraudulent preferences in breach of s. 139 of the Companies Act 1990.

- That the respondents are personally liable pursuant to s. 298 of the Companies Act 1963.

5. The respondents, in an affidavit sworn by the first named respondent on behalf of the respondents, while conceding that there had been an error in respect of VAT on a number of the pre-liquidation apartments in respect of which they immediately notified the Revenue Commissioners, assert that they acted honestly and responsibly in the management of the company and contest the claims made by the applicants. It is anticipated by the parties that in due course the main proceeding will be heard by way of full plenary

hearing.

6. In response to the main proceeding the respondents' solicitors Whitney Moore, by letter dated 8th January, 2015 challenged the validity of the appointment of the first named applicant as replacement liquidator on the basis that the respondents, as creditors, were not sent notice of the creditors meeting on the 2nd August, 2011. The applicants' solicitors Lyons Kenny replied on 13th January, 2015 asserting that:-

> "….your clients are not creditors of the Company and therefore no obligation to notify them of any creditors meetings arose."

7. Following this, they raised this issue in the first affidavit sworn by the first named respondent on 19th January, 2015 on behalf of the respondents. The issue was then raised formally by the Notice of Motion dated 29th January, 2015, in which the respondents seek the following relief:-

> *"1. An Order pursuant to Order 63A Rule 5 RSC and/or Order 63A Rule 6(ii) RSC and/or the inherent jurisdiction of this Honourable Court fixing the following issue to be determined by way of preliminary issue ("Preliminary Issue") in the above entitled proceedings:*
>
> *"Whether the First Named Applicant, Aidan Garcia, was validly appointed liquidator of Panshire Limited (in liquidation) at the purported Meeting of Creditors of Panshire Limited on 2 August 2011?"*

8. The Notice of Motion thereafter seeks consequential orders that the purported resolution of creditors appointing the first named applicant as liquidator "is null and void", and that he "was not validly appointed a liquidator", and an order striking out the main proceeding.

Scope of This Preliminary Hearing

9. At the commencement of the hearing before this Court, counsel disagreed as to the nature and extent of the matters to be determined at the preliminary hearing. Mr. Ross Aylward BL for the respondents/moving parties suggested that in fixing a date for the preliminary hearing McGovern J was setting down for preliminary determination the preliminary issue worded in para. 1 of the Notice of Motion, and the other matters raised in the Notice of Motion. Mr. Gary McCarthy SC for the applicants differed, arguing that the motion was to fix a preliminary issue and in particular said that it should be open to him to argue that no preliminary issued should be entertained by the Court inter alia on grounds of delay and/or estoppel.

10. As no written order or record of any order existed in respect of the relevant direction hearings before the Commercial Court, the Court adjourned and I listened to the Digital Audio Recordings ("D.A.R.s") in respect of the relevant direction hearings which took place before McGovern J on 26th January, 2015, Cregan J on 9th February, 2015 and (most relevantly) McGovern J on 2nd March, 2015.

11. It became evident from the D.A.R. that no actual order had been made fixing for preliminary determination the issue identified at para. 1 in the respondents' Notice of Motion. Ultimately, at the direction hearing on 2nd March, 2015 and in response to the suggestions of both counsel "that the preliminary issue be set down for hearing" McGovern J simply fixed a date for hearing and directed an exchange of written submissions (which did in fact take place). It was also evident that Mr. McCarthy SC had consistently made it clear – and in particular during argument before Cregan J on 9th February, 2015 – that his clients would be opposing the motion on the basis of delay and estoppel, and asserting that the Court should not even entertain the challenge to the validity of the appointment.

12. Accordingly, it seemed to me that strictly speaking the only matter before this Court was the respondents' application to fix a preliminary issue – notwithstanding that at the direction hearing it may have been the general intention that the entire preliminary question be dealt with on the date fixed. This was unsatisfactory for a number of other reasons. Written submissions had been exchanged and the parties were ready and willing to argue the preliminary issue and also deal with all related matters including the delay and estoppel points. Appropriate Court time had been allocated. Moreover the Court was sitting as the Commercial Court and part of the functions and purpose of the Court is to deal to with matters expeditiously. This gives the Court more latitude to regulate its business and procedures so as to address the issues that need to be decided in order to expedite and facilitate decision making. This is emphasised in commercial matters by Order 63A rule 5 under which a judge can at any time give directions and make orders for the conduct of the proceedings "as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the cost of the proceedings". The Court also notes the words of Kelly J in *PJ Carroll & Co. Ltd v. Minister for Health and Children* [2005] 3 I.R. 457 at p. 466 where he stated:-

> "There is a jurisdiction inherent in this court which enables it to exercise control over process by regulating its proceedings..."

This is:-

> "a residual source of power which the court may draw upon as necessary wherever it is just or equitable to do so."

13. This Court therefore afforded time to counsel to agree what the Court should decide by way of preliminary questions, and counsel helpfully drafted an Issue Paper with four issues which they submitted to the Court for determination. While these underwent some minor modification, it was ultimately agreed by the parties that at this preliminary hearing the issues to be addressed by the Court were as follows:

Issue Paper

> *1. Are the first and second named respondents prevented by reason of estoppel and/or delay from challenging the appointment of the liquidator?*
>
> *2. Have the first and second named respondents established a valid legal basis under the Companies Acts for declaring the appointment invalid.*
>
> *3. Whether the first and second named respondents were creditors or to be treated as creditors of the company as of 2nd August, 2011 and if so what value?*

4. What consequences flow from the failure to give notice to the first and second named respondents of the meeting of 2nd August, 2011?

14. This wording was presented in the overall context of the preliminary issue as worded in the Notice of Motion. The parties disagreed only as to the order in which the Court should address the four issues, but they agreed that the order was a matter for the Court. Mr. Aylward BL argued that the correct order was to address issue (3), followed by (4), (1) and (2). Mr. McCarthy SC argued that the Court should address the issues in the order in which they appear above.

15. I formed the view that it was more logical to consider the questions in the order in which they appear in the Issue Paper. For example, if the first question is answered in the affirmative then there is no necessity for the court to determine questions (2), (3) and (4). A decision on the first question can be taken by assuming, for the purposes of the argument, facts that could lead to a conclusion that the first named applicant was not validly appointed liquidator. Similarly if the respondents succeed on the first question but fail to show a valid legal basis for their challenge, then questions (3) and (4) do not arise.

16. It should be emphasised that in reaching this judgment on the preliminary hearing the Court has considered all the evidence on affidavit relevant to each of the questions on the Issue Paper, in addition to the parties written and oral submissions. It should also be noted that at the commencement of the hearing Danske Bank appeared through counsel who made a brief submission as to the scope of the preliminary hearing, but made it clear that Danske Bank did not wish to be heard on the preliminary issues, and with leave of the Court then withdrew.

Legislative Context for Appointment and Replacement of Liquidator

17. It is common case that Mr. Barry was validly appointed liquidator on 30th March, 2010 pursuant to the provisions of s. 266 of the Companies Act 1963. This section sets out the statutory requirements for the appointment of a liquidator in a voluntary liquidation. It provides:-

> "(1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors at least 10 days before the date of the said meeting of the company.
>
> (2) The company shall cause notice of the meeting of the creditors to be advertised once at least in 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situate.
>
> (3) The directors of the company shall—
>
> (a) cause a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors to be held as aforesaid; and
>
> (b) appoint one of their number to preside at the said meeting.
>
> (4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.
>
> (5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors held in pursuance of subsection (1) shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.
>
> (6) If default is made—
>
> (a) by the company in complying with subsections (1) and (2);
>
> (b) by the directors of the company in complying with subsection (3);
>
> (c) by any director of the company in complying with subsection (4);
>
> the company, directors or director, as the case may be, shall be liable to a fine not exceeding €1,904.61, and in case of default by the company, every officer of the company who is in default shall be liable to the like penalty."

18. The 'Directors' Estimated Statement of Affairs' as of March 29th, 2010 put before the meeting on 30th March, 2010 showed a total company deficit of approximately €3.7 million and the Revenue Commissioners as the principal preferential creditor in the sum of €870,187, and unsecured creditors as follows:

> Trade Creditors - €952,150
>
> Director's Loan at commencement €495,000 (the second named respondent) and
>
> Second director's loan - €1,393,000 (first named respondent).

19. On this basis, the combined value of the debts due by the company to the respondents – €1,888,000 – just exceeded the combined value of the other creditors – €1,822,337. As the majority of creditors by value carry a vote, the respondents could theoretically dictate who was to be liquidator, although there does not appear to have been any dispute at the meeting.

20. It is apparent from the "Minutes of Creditors Meeting- Panshire Ltd" dated 30th March, 2010 that present at the meeting in addition to the first named respondent were a solicitor, the proposed liquidator Mr. Barry, and two members of his staff, and 5

creditors including the Revenue Commissioners. The minutes show that many questions were asked of the first named respondent and answers were given at this meeting. The first named respondent avers that Mr. Barry assisted him in the preparation of the statement of affairs.

21. It should be noted in passing that while s. 266(6) provides for liability to fines for those in default of s. 266, the section is silent as to the validity of the purported appointment where there is a failure to comply with the statutory requirements. In particular, there is no statement by the legislature to the effect that a flawed appointment is necessarily void.

22. Section 267 deals with the situation in which the company and creditors nominate different persons to be liquidator, and in such situation under subs. (1) the person nominated by the creditors is deemed to be liquidator. Subsection (2) provides a mechanism for appeal in this situation to the High Court:-

> "Where different persons are nominated as liquidator, any director, member of creditor of the company may, within 14 days after the date on which the nomination was made by the creditors; apply to the court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors."

23. Thus, where there is contention between creditors and members, there is a very short period for challenging the decision as to who is appointed liquidator, and this seems to be a recognition on the part of the legislature that disputes over who should or should not be appointed liquidator in a voluntary liquidation should be determined with expedition.

24. For reasons personal to Mr. Barry, he resigned as liquidator of the company on 2nd August, 2011.

25. Section 270 of the Companies Act 1963 provides:-

> "If a vacancy occurs by death, resignation or otherwise in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the court, the creditors may fill the vacancy."

26. Thus, where a liquidator resigns it is necessary to comply with s. 270 but it is not necessary to comply with the more detailed requirements of s. 266 which apply only on the first appointment of a liquidator to a company. So the posting of notice of the meeting "at least 10 days before the date of the said meeting" to all creditors is not required nor is it necessary for there to be advertisement, nor is there a requirement that a "full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims" be laid before the meeting (however desirable this latter requirement might be).

27. Instead, the requirements for convening and conducting the creditors meeting under s. 270 are set out in the Rules of the Superior Court in Order 74, and so far as is relevant these provide:-

> "57.(1) The Liquidator shall summon all meetings of creditors…by sending by post not less than seven days before the day appointed for the meeting to every person appearing by the company's books to be a creditor of the company notice of the meeting of creditors…
>
> (4) This rule shall not apply to meetings under section 266 or section 273.
>
> 58. An affidavit by the Liquidator or creditor, or the solicitor or clerk of either of such persons, or as the case may be, by some officer or clerk of the company or its solicitor that the notice of any meeting has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed.
>
> 62. At a meeting of creditors, a resolution shall be deemed to be passed when a majority in number and value of the creditors present personally or by proxy and by voting on the resolution have voted in favour of the resolution…
>
> 63. The Liquidator shall file with the Registrar of Companies a copy certified by him of every resolution of a meeting of creditors or contributories.
>
> 64. Where a meeting of creditors or contributories is summoned by notice the proceedings and resolutions of the meeting shall unless the Court otherwise orders be valid notwithstanding that some creditors or contributories may not have received a notice sent to them.
>
> 71. The chairman shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the Court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.
>
> 73.(1) The chairman shall cause minutes of the proceedings at the meeting to be drawn up and entered in a book kept for that purpose and the minutes shall be signed by him or by the chairman of the next ensuing meeting.
>
> (2) The chairman shall cause a list of creditors…present at every meeting to be made and kept as in the Form No. 20 and such lists shall be signed by him."

28. It should be also noted that under Order 74 rule 66 the quorum for such meeting is "at least 3 creditors entitled to vote" where a company has more than 3 creditors.

29. The first named applicant claims that at a creditors meeting of the company duly convened and held on 2nd August, 2011 he was appointed as replacement liquidator pursuant to s. 270. It appears that Mr. Barry resigned as liquidator from a great many other companies at the same time, and the first named applicant also became liquidator of these companies. On 23rd August, 2011, the first named applicant caused to be published a notice in An Iris Oifigiúil a listing of some 25 companies including Panshire Limited, and in which notice is given pursuant to s. 270 of Meetings of Creditors:-

> "duly convened and held on 2nd August, 2011, and the following Resolutions were passed:-
>
> 1. That the resignation of J. Barry as Liquidator of the Company is duly accepted.

2. That the approval of Mr. Aidan Garcia of Collins Garcia Corporate Recovery, 28 Fitzwilliam Place, Dublin 2, as Liquidator is hereby confirmed.

Note: At a subsequent Creditors' Meeting, Aidan Garcia of Collins Garcia Corporate Recovery, 28 Fitzwilliam Place, Dublin 2 was appointed Liquidator.

Dated this: Friday 19th August, 2011".

This is the best evidence of the making and content of the resolution available to the court.

30. There were consequential filings in the Companies Registration Office ("CRO") – on 15th August, 2011 a Creditors Resolution effective on 2nd August, 2011 and a Form 39A "Notice of Appointment of Liquidator" effective on 2nd August, 2011. These records are mentioned because much was made by the respondents of the fact that the first named applicant was unable to produce the complete liquidators file including minutes of the meetings held on 2nd August, 2011, although counsel was careful to emphasise that the respondents in this preliminary hearing do not suggest any wrongdoing on the part of the first named applicant.

31. What the respondents do assert is that, in the absence of any evidence from the liquidator to the contrary, the affairs of the company in so far as creditors are concerned, must be taken at 2nd August, 2011, as the same as the estimated statement of affairs presented on 30th March, 2010 at the s. 266 meeting. Therefore, they must be treated as creditors who are entitled to notice. They aver that they were not sent notice, and were therefore deprived of their right to attend these meetings and to express their views and exercise their vote as creditors. They also argued that little weight should be attached by the Court to a letter exhibited by the first named applicant from Denis McSweeney solicitors dated 24th February, 2015 stating:-

"Dear Mr. Garcia,

I refer to the above. I can confirm that solicitors of this office, including the writer, attended 25 creditors meetings on 2nd August 2011 held due to the resignation of a Liquidator from all of his held Liquidation appointments. As you know the ODCE had also been notified some weeks in advance of these meetings.

The purpose of our attendance was to ensure that the meetings were conducted in full compliance with the provisions of Companies Acts, assisting with any issues that may have arisen during any of the meetings and finally satisfying the requirements that any appointments were validly made. Any such appointments were made being satisfied that meetings were quorate.

This office however did not retain any of the resigning Liquidator's documentation in regards to the various meetings other than a list of the times of the various meetings.

Yours sincerely…"

32. Certainly this letter does not provide any evidence that the respondents were sent notice of the creditors meetings. However, Mr. Aylward BL very fairly did not submit that the letter should be disregarded in its entirety on grounds of hearsay or not being the best evidence. In the view of the Court, some weight should be attached to this letter. In the absence of any other complaints by the respondents as to the conduct of the meeting (as opposed to the omission of notice) it is evidence from which the Court concludes that the meeting itself was quorate and was conducted in compliance with the Companies Acts.

33. The respondents in their submission rely on Order 74 rule 64, arguing that the default position of validity only applies where it can be shown that notices were actually sent to creditors. Thus, if they failed to receive or read them or were away at the time, or indeed had changed address then the proceedings and resolutions of the meeting are valid (unless the Court otherwise orders). In this context they emphasise the importance of the liquidator keeping a proper file, the onus being on the liquidator to prove that notices were sent in accordance with Order 74 rule 58. The respondents say that in the absence of proof of sending of notice, in accordance with Order 74 rule 58, the Court should infer that notice was not sent to them, and it is averred on affidavit that they did not receive any notices.

34. The first named applicant states that despite searches carried out, he was unable to find any minutes of the creditors meeting, and in para. 12 of the affidavit which he swore on 6th February, 2015 he states:-

"I suspect that the reason that they were not notified of the meeting was that they were not considered to be creditors (which from my detailed knowledge of the affairs of the Company is correct)."

35. In truth therefore, there seems to be little if any dispute on the issue of whether or not the respondents were sent notice of the meeting on 2nd August, 2011. However, the first named applicant goes on in para. 12 to aver that that books and records of the company "show clearly that the directors are not creditors, but debtors of the Company". This is fully disputed, and is central to the main proceeding. The respondents assert not only that they are and were creditors on 2nd August, 2011, but also that, for the purpose of the preliminary issue, they are to be treated as if they were creditors on the basis of the available evidence of the position as it prevailed at that time- as set out in the Directors' Estimated Statement of Affairs.

36. A number of other provisions of the Companies Acts should also be mentioned. Under s. 272(1) the liquidator is required to hold a meeting of creditors at the end of the first year of the commencement of the winding up "and of each succeeding year…and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and shall within 7 days after the later of such meetings send a copy of that account to the registrar."

37. Also, under s. 278(1) the liquidator must within 14 days of his appointment, deliver to the CRO a notice of his appointment – and a copy of this on Form E2 was exhibited before the Court showing that it was filed by the first named applicant on 15th August, 2011. This is a document of public record and available for inspection by any person at the CRO.

38. Section 277 of the Companies Act 1963 provides:-

"(1) If from any cause whatever there is no liquidator acting, the court may appoint a liquidator.

(2) The court may, on cause shown, remove a liquidator and appoint another liquidator."

39. This is a provision which could be availed of by a creditor where for example there is no liquidator acting because of ill health, or it is sought to remove a liquidator "on cause shown", e.g. misconduct, and there is a need to replace an existing liquidator. The respondents explained that they did not move under this provision because the view was taken that to have done so would have implicitly recognised the validity of the first named applicant's appointment, and furthermore, they did not allege any misconduct on his part.

40. Section 280(1) provides:-

> "(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court."

41. While this particular provision was not specifically invoked by the respondent in seeking to have the preliminary issue dealt with in these proceedings, Mr. Aylward BL submitted that it was a provision pursuant to which the Court had a legal basis to determine the question of validity of the first named applicant's appointment.

First Issue
"Are the first and second named respondents prevented by reason of estoppel and/or delay from challenging the appointment of the liquidator?"

42. The first named applicant argues firstly that there has been such delay between the date of his appointment on 2nd August, 2011 and the date when the validity of his appointment was first questioned – 8th January, 2015, almost three and a half years – that the respondents should not be permitted to raise the preliminary issue, and the Court should not entertain it. Secondly, the first named applicant contends that by their actions in acquiescing in the appointment of the first named applicant as liquidator, and in engaging with him qua liquidator, and in nominating and appointing him as liquidator to a related company and in other respects using the first named applicant as a liquidator, the respondents are estopped from asserting that the appointment was invalid by reason of any failure to give notice of the creditors meeting. Mr. McCarthy SC also argued that the delay was part and parcel of the reason why the respondents should be estopped.

43. It is therefore appropriate to set out my findings of facts relevant to these issues, which, save to the extent indicated in my findings, were not contested:-

> (1) The respondents caused the incorporation of the company as a special purpose vehicle for undertaking the "Clearstream" development, and they were developers, and directors of the company. They were directors who managed the company, and in the course of that work clearly had significant dealings with Danske Bank, with builders and company staff. In the ordinary sense of the description the respondents were businessmen and developers.
>
> (2) The respondents as directors of the company initiated the liquidation process, and were involved with Mr. Barry in the preparation of the Directors' Estimated Statement of Affairs presented to the meeting on 30th March, 2010, and were also engaged with solicitors in that process. At that meeting the first named respondent read his "Director's Statement" and the minutes indicated he was called upon to answer numerous queries raised by the creditors who attended.
>
> (3) Denis McSweeney solicitors were involved in the meeting on 30th March, 2010 and were again present at the meeting on 2nd August, 2011. It is clear from this letter that the purpose of their attendance at the later meeting was to ensure compliance with the requirements of the Companies Acts. I find that his letter is evidence that the meeting of 2nd August, 2011 was quorate and conducted in full compliance with the Companies Acts.
>
> (4) The filing in the CRO on 15th August, 2011 of the change in liquidator from Mr. Barry to the first named applicant put that matter on a public record.
>
> (5) The publication in An Iris Oifigiúil on 23rd August 2011 again placed those matters on public record, and is the best evidence of the content of the resolution. I find that this record is good on its face.
>
> (6) It was plain from emails passing between the first named applicant and the second named respondent that the respondents were actually aware of the resignation of Mr. Barry and the appointment in his place of the first named applicant as liquidator by 28th November, 2011. It is common case that the first named applicant had never met the respondents. Equally it has never been suggested that the first named applicant had any conflict of interest or impediment that would have prevented him from carrying out the duties of liquidator of the company.
>
> (7) From 27th November, 2012, the respondents, through solicitors Sheehan & Co., engaged with the first named applicant in relation to past and ongoing sales of units in Clearstream and the ongoing liquidation of the company.
>
> (8) On 11th October, 2012 the first named applicant had written to Sheehan & Co. in the following terms:-
>
> > "Re: Panshire Limited (In Liquidation)
> >
> > Dear Sirs,
> >
> > I write in relation to the above. I was appointed as Liquidator to the Company on 2nd August 2011 by virtue of a meeting held in accordance with Section 270 of the Companies Acts and Order 74 of the rules of the superior Courts. Please find evidence of my appointment enclosed.
> >
> > The Company's directors have informed me that your firm dealt with the conveyancing on all properties sold at Clearstream Court Finglas. Therefore I am requesting that you provide me with your files in relation to the Company.
> >
> > Please contact my office to arrange for collection of same.
> >
> > Yours faithfully"

Notwithstanding this express statement by the first named applicant to the respondents' solicitors that he was properly appointed in accordance with s. 270 and Order 74 (which of course contains the notice requirement in rule 57) there was no challenge to the validity of his appointment until January, 2015.

(9) There followed correspondence in relation to the liquidation between the first named applicant and Sheehan & Co. in relation to the first named applicant's ongoing concerns about the liquidation and the first named applicant's request for documentation concerning sales. As this became more contentious, the first named applicant engaged Lyons Kenny solicitors to conduct the correspondence on his behalf from and after 21st January, 2013, up until the institution of the main proceeding. In the course of this correspondence, Sheehan & Co. consistently referred to the first named applicant as "the Liquidator", and they state on behalf of their clients that they are happy to assist the first named applicant "in any way in relation to the liquidation of the above company…" (letter dated 24th January, 2013 to Messrs Lyons Kenny). At no point during this correspondence do Messrs Sheehan & Co. on behalf of the respondents raise any concern or doubt over the validity of the appointment of the first named applicant.

(10) At the time of the purported appointment of the first named applicant as liquidator, or at any rate as of 17th August, 2011, it is apparent that the company was before the Labour Court in respect of a complaint from UNITE in respect of alleged breaches of employment legislation by the company and director with potential criminal prosecution consequences. As a result, on 28th November, 2011 the second named respondent emailed the first named applicant stating:-

> "Aidan,
>
> Thank you for taking my call this morning. I have attached a copy of the demand from the Labour Court and the two previous letters I have sent. I would be delighted if you could send a letter to the Labour Court confirming the liquidation of Panshire and our inability to pay.
>
> On the second matter we will contact you in the new year, also could you send me a copy of your letter for our files.
>
> Regards
>
> Paddy Rooney"

(11) Firstly, this confirms that the second named respondent was in fact aware, from a telephone conversation with the first named applicant, of the replacement of Mr. Barry by the first named applicant as liquidator of the company. Secondly, the respondents sought to rely on the first named applicant's position as liquidator of the company to assist them personally in respect of their possible exposure as directors/managers in the company under the relevant employment legislation.

(12) In response to this request from the second named respondent, the first named applicant did prepare a letter for the Labour Court, the draft of which met with the following emailed response to the first named respondent:-

> "Aidan,
>
> That's perfect, could you send that to the Labour Court and a signed copy for our records. See you tomorrow at 2pm."

(13) In the same exhibit there is also a copy of an email from the second named respondent to the first named applicant dated 12th December, 2011 stating inter alia "… I can confirm our meeting 2.00 pm, Wednesday, in your offices 28 Fitzwilliam Place."

Accordingly, it is clear that the respondents had direct contact with the first named applicant in the context of the liquidation at that time. The respondents suggest that these emails do not go so far as to support an acceptance that the first named applicant "was acting as the liquidator of the company", but rather merely confirm that the company was in liquidation, and the directors' "inability to pay". Why, if that is the case, did the second named respondent chose to write to the first named applicant? In the view of the Court, the proper inference from reading these exhibits is that the second named respondent wrote to the first named applicant because he believed and accepted that he was liquidator, and that he was acting as liquidator of the company.

(14) The correspondence between Sheehan & Co. and the first named applicant also shows that in respect of ongoing sales of units in the Clearstream development, payments in respect of 80% of the VAT payable from the proceeds of sale were paid to the first named applicant. See for example Sheehan & Co.'s letters of 6th January, 2013 and 25th July, 2013. Some 26 letters dealing with different VAT payments appear at exhibit ML8 in the period January, 2013 to March, 2014.

(15) In September, 2012 the first named applicant was approached by the second named respondent to ask if he could nominate the first named applicant as liquidator in the liquidation of Ballon Construction Ltd, a related company – of which the respondents and the first named respondent's brother Michael Kilkenny were directors.

(16) In a letter dated 13th June, 2013 from the first named respondent to the Revenue Commissioners concerning the first named respondents Revenue affairs, the first named respondent stated "I would also like to give consent for you to contact Aidan Garcia Liquidator of Panshire Ltd". It was not contested that this was an effective request by the first named respondent that the Revenue Commissioners liaise directly with the first named applicant in relation to the affairs of the company in so far as they impinged on the first named respondent's tax affairs.

(17) In a letter dated 26th January, 2012 to the first named applicant, the first named respondent requested that he fill in certain forms to enable a former employee of the company to obtain statutory redundancy to which he was entitled. Although not expressly stated, this can only have been requested from the first named applicant on the basis that he was

regarded by the first named respondent as the liquidator of the company in succession to Mr. Barry.

(18) Further filings in the CRO were undertaken by the first named applicant in respect of "Liquidators Account of Actions & Dealings" on 1st August, 2012 and 1st August, 2013. Again these filings were matters of public record.

(19) Sheehan & Co. solicitors were the solicitors initially on record for the respondents in the main proceedings, but their present solicitors Whitney Moore came on record in January 2015. The first intimation that the validity of the appointment of the first named applicant was questioned was in a letter from Whitney Moore solicitors to Messrs Lyons & Kenny dated 8th January, 2015. It should be noted that there was some delay in raising this issue between the date of commencement of the main proceeding by Notice of Motion dated 21st October, 2014 and the letter of 8th January, 2015. This is part of the delay that falls to be taken into account. The Court is satisfied that there was no undue delay after 8th January, 2015 in raising the invalidity issue on affidavit and by way of the Notice of Motion in respect of a preliminary issued dated 29th January, 2014.

(20) The respondents have never questioned the first named applicant's qualifications or experience or his fitness to be liquidator of the company. Nor have they averred that, had they been present at the meeting on 2nd August, 2011, they would have proposed any other person as liquidator or done anything other than accept him as replacement liquidator.

Delay

44. On these facts, Mr. McCarthy SC argued that on a "stand-alone basis" there was an excessive delay between the date of appointment on 2nd August, 2011 and the first challenge to invalidity on 8th January, 2015 – a period of almost 3 and a half years. He accepted that there was no statutory period of limitation fixed for such a challenge, either under the Companies Acts or in the Rules of the Superior Courts. He relies by analogy on the 14 day period provided in s. 267(2) for an application to the Court in circumstances were there is a contest over who should be appointed as liquidator at the outset. He finds support for this in the decision of Kelly J in *Re Titan Transport Logistics Limited (In voluntary liquidation)* (unreported, 19th February, 2003). That was an application to the Court pursuant to Order 74 rule 71, which allows an application to the Court where the chairman of a creditors meeting is in doubt as to whether a proof by a creditor should be admitted or rejected. Kelly J went through the various grounds upon which the applicant maintained that the chairman had acted incorrectly, and concluded that he did not discern any wrongdoing on his part that would attract relief. He nevertheless went on to deal, clearly *obiter*, with an argument that there had been undue delay in bringing the application before the Court. He noted that Order 74 rule 71 did not have any built in time limitation within which such an application ought to be made. The creditors meeting had taken place on 23rd December, 2002, an originating letter intimating the application was dated 8th January, 2003, and the motion/appeal was originated on 29th January, 2003. Kelly J noted that in the meantime the liquidation had proceeded and was the subject of a comprehensive report before the Court in respect of which no issue was taken. He stated that:-

> "[i]t seems to me that Order 74, Rule 71, although not the subject of an express time limit for the making of an application of this sort, must be subject to an implied provision to the effect that such an application must be made timeously. Otherwise one could have a situation where long after a liquidation has got underway an application of this sort could be made thereby placing a question mark over all that has taken place in the interim.
>
> Under Section 267 of the Act there is a provision for the removal of a liquidator and that is subject to a strict time limit of 14 days. That time limit is not capable of being extended by the Court. Although of course here there is not the slightest suggestion that there is any basis for the making of an application under Section 267. Nonetheless it seems to me that the time limit chosen by the legislature there of 14 days has a great deal of attraction as being applicable to Order 74, Rule 71 because the net affect of the order which is sought here would be the same as if the liquidator were being removed under Section 267 because I am asked to substitute another liquidator for Mr. Wise if I am to find in favour of the applicant.
>
> It seems to me that the legislature in fixing 14 days was mindful of the developments which may take place in a liquidation and was concerned to ensure that an application of that sort should be strictly circumscribed by reference to the time prescribed. Otherwise huge uncertainty could be created. In the present case it is clear that the application was not made within 14 days and there is no explanation which is proffered for the delay between 8th January when the letter for action was written and 29th January when the motion was issued.
>
> In my view that does not demonstrate a timeous approach to the application and on that basis alone the application ought in my view to be refused particularly having regard to the fact that the liquidator has undertaken so much work in the meantime as is demonstrated in the report which he has presented.
>
> Whilst I think that the 14 days is undoubtedly the appropriate time to apply, I am not saying that it necessarily applies with the same rigour as is prescribed under Section 267. But in the present case it seems to me that 14 days would have been a perfectly reasonable time. I have no evidence before me demonstrating [why] the application was not made prior to 29th January. And having regard to all that transpired in the meantime I am of the view that this application has not been made within a reasonable period of time. And on that basis alone I would have refused it. But I have also refused it on the merits in respect of each of the other heads of claim and the net effect of all that is that the application would be dismissed."

45. In response to this, Mr. Aylward BL pointed out that the comments were *obiter*, and that we were not here concerned with an appeal to the High Court pursuant to Order 74 rule 71. Such appeals, he contended, are not concerned with invalidity, but are rather concerned with the chairman's decision in respect of proofs submitted by creditors. He argued that the requirement that notice of creditors meetings be sent under Order 74 rule 57 is a statutory requirement in that the Rules are a statutory instrument promulgated under Ministerial Order[1] – which is undoubtedly correct. He argues that such a statutory invalidity cannot be "cured" by delay. He also pointed out that the wronged creditor who brings an appeal under Order 74 rule 71 is a person or body who will have been present or represented at the creditors meeting, and it is therefore reasonable to require that they act in time. He therefore argued that the enunciation of policy that led Kelly J to comment that such appeals "must be made timeously" does not apply to the present case. Mr Aylward BL argued as no issues of equity arose in this case, and the Court is not given any discretion, the applicants cannot rely on the delay point.

Mr. Aylward BL also argued that in the present case there is no challenge to the liquidation as such, but only as to who ought to be liquidator. He argued that the Companies Acts provide for the replacement of liquidators, as often happens in lengthy liquidations or

where there are retirements for whatever reason. In this regard, he points to s. 270, which allows creditors to appoint a replacement liquidator, and to the power of the Court to appoint replacements in respect of Court appointed liquidators. He argued that there was no policy consideration discernable from the Acts to suggest why, in the present case, assuming that the appointment of the first named applicant was invalid, a replacement liquidator could not be appointed by the Court. He argued that it would be wrong for the Court to ratify an appointment of an invalidly appointed liquidator, which would be the affect of a decision refusing to declare the appointment invalid on grounds of delay or estoppel.

Decision on Delay

46. The difficulty with Mr. Aylward's submissions is that they ignore the fact that the liquidation has been ongoing since August 2011. In this case, as we have seen, the liquidator was continuing to engage with the respondents/their solicitors over a protracted period of time, and to receive from the respondents' solicitors monies in respect of VAT on new sales of apartments. It is also apparent from the papers that over the period of time under discussion the first named applicant engaged experts to advise in respect of the valuation of apartments and on various tax aspects of the liquidation. So for instance, Colliers International carried out a report and evaluation following an inspection on 8th October, 2013. The first named applicant also undertook extensive correspondence with the respondents through their solicitors, particularly in respect of his efforts to obtain documentation and ongoing VAT payments.

47. Although Order 74 contains some time limits in relation to petitions, there is a remarkable absence of specific time limits or any generic time limits in relation to voluntary liquidations and the procedures that liquidators are to follow. Apart from the requirement that notice of the creditors meeting be sent not less than 7 days before the day appointed for the meeting, there are time requirements in Order 74 rule 130 in relation to the statements that liquidators must send to the Registrar of Companies where winding up is not concluded within 2 years. The first such statement must be sent within 30 days of the expiry of that 2 year period "or within such extended period as the Court may allow" and subsequent statements must be sent in the case of voluntary winding ups at intervals of half a year (intervals of one year in respect of compulsory liquidations). Order 74 rule 70 also has a 28 day period within which a secured creditor who has used their vote at a creditors meeting may be required to give up security for the benefit of creditors generally. These rules do not therefore provide any assistance in relation to whether the present challenge to the validity of the creditors' resolution is out of time.

48. In the *Titan* case, in respect of the Order 74 rule 71 appeal that was before the Court, Kelly J felt that the order "although not the subject of an express time limit for the making of an application of this sort, must be subject to an implied provision to the effect that such an application must be made timeously. Otherwise one could have the situation where long after a liquidation has got underway an application of this sort could be made thereby placing a question mark over all that has taken place in the interim."

49. It is of course true that the appeal in *Titan* was under Order 74 rule 71, and concerned specific proofs actually presented at a creditors meeting, and therefore the complainant should have been very alive to the right and opportunity to appeal, and the need to appeal promptly. It is also true that the decision on the delay point was *obiter*. I also accept that the analogy with the 14 day time limit in s. 267 was more apposite in such a case, at least where the creditors meeting arose at the commencement of a liquidation. Nevertheless the decision is striking in terms of the shortness of the period within which Kelly J considered such appeals should be brought on the basis that immediately following the creditors meeting the liquidation gets underway, and the appeal could place a question mark over "all that has taken place in the interim".

50. In the *Titan* case, there was what might be regarded as minimal delay having regard to the Christmas period between the creditors meeting held on 23rd December, 2002 and the issuing of the motion on 29th January, 2003. By comparison, the delay in the present case was extremely lengthy. Even if one were to disregard a period from 2nd August, 2011 until 28th November, 2011 (the date of the second named respondent's first noted email communication with the first named applicant as liquidator), there is still a lengthy delay from 28th November, 2011 until 8th January, 2015 of in excess of 3 years. Moreover, from January, 2012 the respondents in their dealings with the first named applicant had the benefit of solicitors/legal advice, yet some 3 years elapsed before the allegation of invalidity was first made.

51. In my view, the reasoning of Kelly J is not entirely without application to a case such as the present one where it is alleged that the meeting was not properly convened because notices were not sent. As Kelly J observed, "the net effect of the order which is sought here would be the same as if the liquidator were being removed under Section 267 because I am asked to substitute another liquidator for Mr. Wise, if I am to find in favour of the applicant". The consequence of the Court making an order in the present case declaring invalidity would be that either the first named applicant or another person would have to be appointed as liquidator by the Court or at a newly convened creditors' meeting. Even more relevant was Kelly J's further observation that in fixing a short time limit for the purpose of s. 267, it seemed to him that the legislature "was mindful of the developments which may take place in a liquidation and was concerned to ensure that an application of that sort should be strictly circumscribed by reference to the time prescribed. Otherwise huge uncertainty could be created." He was also influenced by the fact that the liquidator had done so much work in the weeks that followed his appointment. Kelly J felt that in the case before him, 14 days would have been a perfectly reasonable time and he concluded that "having regard to all that transpired in the meantime I am of the view that this application has not been made within a reasonable period of time".

52. An implied requirement that in the absence of any statutory time, proceedings challenging the validity of the appointment of a liquidator be brought "within a reasonable period of time" seems to the Court to be both appropriate and reasonable. It is appropriate for the reasons identified by Kelly J namely that there should be certainty as to the identity of the liquidator, and secondly that the liquidator should be permitted to get on with the work of liquidation safe in the knowledge that their appointment and position will not be challenged (otherwise than for cause shown), and in particular that they can expend company assets in the course of the liquidation and carry out work for which they will in due course be entitled to remuneration. I cannot discern in the Companies Acts any countervailing policy reason that would favour allowing such a challenge to be made at any time in the future, which is in effect what the respondents advocate when arguing that there is no long stop.

53. As to what is a "reasonable period of time", this is a flexible concept which will depend on the facts of any particular case, although in general the challenge should be brought timeously. Thus, in respect of an appeal under Order 74 rule 71 where the complainant is present at the creditors meeting, that is an important fact that the Court is entitled to take into account. Whether the applicant in such a case is correct or incorrect in relation to the admission/rejection of proofs by the chairman, he/she has sufficient awareness from and immediately after the meeting to take steps to challenge the result within a short period of time.

54. Applying a test of a "reasonable period of time" to the present case, there is no averment indicating precisely when or how the respondents first became aware of the first named applicant's appointment or that he was 'acting' as liquidator. However, the uncontested evidence is that by 28th November, 2011 the respondents were actually aware that the first named applicant was acting as liquidator of the company. If they had any surprise or concerns on first learning that fact, then that was the time to investigate the circumstances in which the first named applicant came to succeed Mr. Barry, and to consider their stance. If they had concerns,

then it was incumbent on them to address them, if necessary after a further brief period in which to take and consider legal advice. Reasonable time within which to consider their position would have included sufficient time to check public records such as the CRO and An Iris Oifigiúil, and to ask the first named applicant to show proof of the validity of his appointment. While it might not have been reasonable to expect the respondents to have initiated appropriate proceedings before the end of the calendar year 2011, in my view it would have been reasonable for a challenge to have been instituted in early 2012.

55. In considering what is reasonable, an analogy may be drawn with the time limits imposed by the Rules of the Superior Courts in respect of applications for leave to seek judicial review under Order 84. Up until 1st January, 2012, leave to seek judicial review could have been sought within 6 months of the impugned decision where *certiorari* was the relief sought, but as and from 1st January, 2012 this period was reduced to 3 months. These periods run from "the date when grounds for the application first arose" (Order 84 rule 21). This is usually the date of notification but may be the date upon which notification is actually received. On this analogy, it would have been reasonable to expect the respondents to have commenced their challenge within 6 months of 28th November 2011 (taking that as the date most advantageous to the respondents as being the first point in time when they are known to have been actually aware that the first named applicant was acting as liquidator).

56. In so far as the respondents rely on their own ignorance of the legal requirement of the 7 day notice period for creditors meetings, and therefore their lack of knowledge of any potential invalidity in the appointment until so advised by their current solicitors in the main proceeding, a couple of points should be made. Firstly, at least from late 2012 they had solicitors acting for them in their dealings with the first named applicant in respect of the liquidation of the company, and therefore had the benefit of legal advice. Secondly, as the correspondence between those solicitors and the liquidator became increasingly contentious it was incumbent on the respondents to act promptly if disputing the validity of the first named applicant's appointment. Thirdly, the main proceeding were commenced by Originating Notice of Motion dated 21st October, 2014, but this validity challenge was not intimated until 8th January, 2015, a further lapse in time of almost 3 months. During this time, the first named applicant swore several affidavits in support of the main proceeding including the application for entry to the Commercial List, yet at no time prior to the respondents' solicitors' letter of 8th January, 2015 was there any suggestion of invalidity. Accordingly, over a period of some years, including a period of some 3 months during the main proceeding, the respondents did not raise this preliminary issue despite having the benefit of legal advice.

57. The Court concludes that the challenge by the respondents to the validity of the first named applicant's appointment was not brought within a reasonable period of time. Indeed there was egregious delay. During this period of delay, the respondents were fully aware that the first named applicant was acting as liquidator and proceeding with the liquidation, requesting documentation and pursuing investigations, corresponding with the respondents and handling monies on account of VAT on new sales of apartments passed on by the respondents' solicitors, and incurring expenditure and carrying out work which would naturally entitle a liquidator to remuneration in due course. On this basis alone, it would be unjust and unconscionable to permit the respondents to pursue their challenge to the validity of the first named applicant's appointment.

Estoppel

58. The applicants rely on delay and the wider set of facts as found by me earlier in this judgment in support of their estoppel argument. Estoppel only arises if the respondents were creditors of the company at the date of appointment of the first named applicant, but were not sent notice of the creditors meeting. However, it has this in common with the delay point, namely that by raising this argument the applicants seek to prevent the respondents pleading or relying on the alleged invalidity of the appointment of the first named applicant. Estoppel can therefore be considered at this stage on assumed facts, namely that the respondents were creditors of the company on 2nd August 2011, and entitled to notice of the creditors meetings, and that no such notice was sent to them.

59. The applicants rely on "estoppel by convention" which is considered in the recent determination of Charleton J in *Ulster Investment Bank Limited v. Rockrohan Estate Limited* (Supreme Court, 26th February, 2015). At para. 23, Charleton J quoted with approval the following definition of estoppel from *Snell's Equity* (32nd Ed. London, 2010):-

> "Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."

60. Charleton J proceeded to deal with estoppel by convention in the following passage at para. 24:-

> "Estoppel may go beyond unequivocal oral or written representation. An unequivocal representation, however, is the normal situation. Very often in litigation, it is not the legal basis that is disputed, but the facts whereby estoppel is said to be founded. Facts may be asserted by one side and denied by the other. *Estoppel can arise, however, through an assumption shared by those interacting*. This does not necessarily always have to be written or spoken once the state of affairs is clear, and therefore obvious, and the parties act upon it. *For estoppel to arise, it is essential that there is conduct which establishes an objective state of affairs, whereby the party to be estopped, who would otherwise be bound by the legal relations, is placed in circumstances whereby it is clearly understood that a new state of affairs governs the rights and obligations as between the parties. This requires some demonstrable action, behaviour or representation by the party who is to be bound by the altered state of affairs*…it is insufficient, to establish estoppel, merely for the party later pleading that defence to conclude that matters must be so. There must, instead, be a foundation in the behaviour of the party who is to be estopped from asserting a legal entitlement, either pursuant to contract or otherwise. The same applies where estoppel is used not as a shield but as a sword. It would be an unwarranted and dangerous extension of the doctrine of estoppel to permit it to be one-sided; which it would be if based on bare assumption. It has always been central to the equitable principle of estoppel that it derives either from representations or from situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that circumstances may later arise whereby it would be unfair to enforce these. Where the matter is one of representation, it should be relatively simple to identify the legal term supposedly set aside thereby, and where, and in what terms, the representation had been directed in this regard. Where, on the other hand, it is a matter of both parties proceeding on the basis of a clear common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. Depending on the facts, estoppel may become operative in that situation, but only because of that common understanding." [emphasis in italics added]

61. In essence, the applicants asserted that the respondents, by their actions after becoming aware that he had been appointed replacement liquidator, accepted and assumed that he was validly appointed- an assumption common to both parties.

62. In reply, the respondents relied firstly on the proposition that because the notice requirement for the creditors meeting was a statutory requirement, there could be no room for estoppel. Reliance was placed on *Re Green Dale Building Company Limited* [1977] I.R 256. In that case Dublin County Council made a compulsory purchase order ("CPO") which was confirmed in August, 1972. Notice to treat was served on the claimant in December, 1972. Meanwhile, a third party challenged the validity of the CPO and those proceedings were dismissed by the High Court in 1975 – but it was only at that stage that the CPO became operative. On 14th April, 1975 Dublin County Council served a second notice to treat. The arbitrator stated a case for the opinion of the High Court as to whether the date for valuation was that of the first or the second notice to treat. McMahon J held that the date of service of the second notice to treat was the relevant date as the housing authority had no power to serve notice to treat before their CPO became operative. This was affirmed by the Supreme Court, and this outcome was upheld notwithstanding that the County Council had at an earlier stage represented that the first notice to treat was valid. Henchy J stated at p. 264:-

> "I agree with Mr. Justice McMahon in his opinion that, whatever be the confines of the doctrine of promissory estoppel, it has no application to this case. The general rule is that a plea of estoppel of any kind cannot prevail as an answer to a well-founded claim that something done by a public body in breach of a statutory duty or limitation of function is *ultra vires*."

63. The respondents further argue that even if the rule in *Re Green Dale* does not apply in this instance, no estoppel by convention can be established because at no point prior to January, 2015 were the respondents aware that they had a right, as creditors, to be sent notice of the meeting on 2nd August, 2011, and therefore they were never aware of the breach of their statutory rights such that they could be regarded as having waived same. In this regard, the respondents relied on the English Court of Appeal decision in *HIH Casualty & General Insurance Ltd v. Axa Corporate Solutions* [2002] EWCA Civ 1253. They say that the applicants' argument is one-sided as the respondents were not aware of their right to vote, and there could therefore have been no common understanding of the position in fact and in law capable of leading to the "mutual convention" that could found an estoppel. In factual support of this they rely on uncontroverted averments in the affidavit of the first named respondent sworn on 16th February, 2015 to the effect that neither of them are legally qualified and that they did not know and could not have been expected to know the legal requirements for the convening of a creditors meeting set out in Order 74 rule 57.

64. Mr. Aylward BL cited *HIH Casualty* as supporting this submission, and relied on the headnote, part of which reads:

> "A representor unaware that it had rights was unlikely to make a representation which carried with it some apparent awareness of those rights, and conversely a representee who was unaware that the representor had a particular right was unlikely to understand the representation to mean that the representor was not going to insist on those rights or abandon any rights unless that was expressly stated. It followed that knowledge, or the lack of it, was important when the question of whether waiver by estoppel had been established was considered."

65. The respondents also argue that the first named applicant did not place any reliance on or alter his position by reason of the conduct or acquiescence of the respondents. It was argued that there was no evidence that he had changed his position or acted to his detriment.

Decision on Estoppel

66. I am satisfied that there is no general rule that a plea of estoppel cannot be raised in a case of this nature. The *Re Green Dale* case concerned a public authority and a statutory notice, namely a notice to treat, which has far reaching significance in the context of compulsory acquisition and the assessment of compensation. Henchy J was careful to limit his comments to estoppel in the context of "something done by a public body". It seems to me that a liquidator, at any rate a liquidator appointed in a voluntary liquidation, is not a "public body", and the notice of a creditors meeting required by Order 74 rule 57 is of an entirely different character to a notice to treat. Henchy J also notes in his judgment (at p. 264) that "some modern cases…have engrafted exceptions onto the general rules so as to debar a public authority from relying on a mere irregularity of procedure which, it was held, they should in all fairness have overlooked but, as far as I am aware, the exceptions are confined to such technicalities."

67. In the *Rockrohan* case the Supreme Court applied the concept of "estoppel by convention" to prevent time running under the Statute of Limitations Act 1957 in an action to recover land on the basis that there was "a common assumption between these parties, reasonably held and based on unequivocal circumstances, that the parties would hold their hand as against each other until such time as that litigation had come to a practical conclusion one way or the other."

68. The question is therefore whether there was such a shared assumption between the first named applicant and the respondents, by conduct, spoken or in writing, upon which the parties acted, which was intended to affect the legal relations between them, sufficient to establish an estoppel.

69. The respondents say that this could only arise if they were aware of their legal right to have received notice of the creditors meeting. A closer examination of the *HIH* case gives this proposition only limited support. The claimant sought to recover indemnity from the defendant re-insurer which provided collateral for the financing of certain film projects. The defendants denied liability on the ground that both the insurance and reinsurance contained warranties as to the number of films which would be made. The claimant maintained that the breaches of warranty had been waived in that the defendants had received monthly risk management reports which made it clear that the warranted number of films would not be made – yet raised no objection until pleading breach of warranty in its defence. Thus the case was primarily concerned with estoppel by waiver in the context of an ongoing contractual relationship. The Court of Appeal rejected any estoppel, Tuckey LJ stating the Court's reasoning at p. 1061:

> *"Axa's conduct is best characterised as silence or inactivity, not in the face of a claim but in the context of a continuing contractual relationship where on the information before us it is not possible to say precisely when the breaches of warranty actually occurred."*

Estoppel by convention was argued in the alternative, but was also rejected by Tuckey LJ in the following passages on p. 1062:

> "[31]…For present purposes [counsel for the claimant] relied on what Dillon LJ said in *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia [*1990] 1 Lloyd's Rep 236 at 251:
>
> > 'The modern formulation of the question to be asked where there is a question of estoppel by convention is that the Court should ask whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment.'
>
> [32] Thus formulated it seems to me that the argument based on the estoppel by convention runs into the same

> difficulties as waiver. Mere silence, inactivity or failure to take a point cannot be enough to found an estoppel by convention…."

70. This is echoed in what Charleton J said in the passage already quoted from *Rockrohan*, that for there to be a shared assumption there must be "…some demonstrable action, behaviour or representation by the party who is to be bound by the altered state of affairs." He added "it is insufficient, to establish estoppel, merely for the party later pleading that defence to conclude that matters must be so."

71. For present purposes four aspects of estoppel by convention emerge from this case law. First, it is not necessary that the party estopped be actually aware that a *legal right* is being waived – the waiver by such party may be 'knowingly' or 'unknowingly' done in this respect – provided that such party is aware of all relevant facts and from them assumes and accepts a state of affairs. Secondly, there must be something more than acquiescence in a state of affairs in order for there to be some "assumption" which can give rise to an estoppel of this nature. There must be some conduct, something said or something written that is positive in nature, that is indicative of the shared assumption. Thirdly, this positive conduct or statement must encourage the other to act to his detriment. Fourthly – and this is the overarching principle – it must be unconscionable to allow the estopped party to rely on their legal right.

72. As to the first of these, there is no doubt that the respondents were aware of the relevant facts, namely that they were – or believed they were – creditors of the company as of 2nd August, 2011 and continued to be creditors after that time; that they did not receive notice of the creditors meeting held on that date; and that the first named applicant was acting as liquidator in succession to Mr. Barry, a fact that was known to them at least by the end of November, 2011.

73. As much was made of the respondents' claim to have been ignorant of their right to notice of the creditors meeting, some further comment is warranted. They had the benefit of solicitors at least from late 2012. The respondents were, as directors, and managers of the company's business, and by their own admission, involved in the preparation of the Directors' Estimated Statement of Affairs which led to the original appointment of Mr. Barry. They were involved in the formalities that led to the convening of the liquidators meeting on 30th March, 2010 – which of course involved giving notice to all known creditors of the company, of whom they claim to be two. Furthermore, they cannot avoid the fact that they are businessmen/developers and had involvement in other companies e.g. Ballon Construction Ltd. The Company Report at tab B in exhibit AGD1 indicates that the CRO as of July, 2014 showed the first named respondent as holding seven current directorships and having had one previous one and the second named respondent as having six current directorships. It is reasonable to infer that the respondents between them had a reasonable knowledge of the working of companies for normal business purposes. In the circumstances, their plea that they could not be expected to know of the requirement of notice to creditors for a meeting to replace a liquidator carries little weight.

74. As to the second aspect, there is ample evidence of positive acts on the part of the respondents demonstrating both acceptance and implicit approval of the first named applicant as liquidator of the company. The first recorded interaction on 27th November, 2011 which resulted, on the respondents' request, in the first named applicant providing a letter for the Labour Relations Committee confirming that he was acting as liquidator of the company. This is compelling evidence. In a similar vein is the letter from the first named respondent to the Revenue Commissioners acknowledging the first named applicant as liquidator of the company and requesting that they liaise with him directly in relation to the affairs of the company. Equally compelling is the fact that the respondents through their solicitors Sheehan & Co. engaged in extensive correspondence on behalf of the respondents with the first named applicant qua liquidator from 2012 until the commencement of the main proceeding. Even when this correspondence became contentious, and was continued between Messrs Lyons Kenny solicitors now acting for the first named applicant, the first named applicant's position as liquidator was acknowledged and never contested (see for example a letter of 27th February, 2013 from Sheehan & Co. to Lyons Kenny). Also compelling is the payment of VAT monies by the respondents to the first named applicant qua liquidator. Whether taken individually or cumulatively, all of the above were clear positive acts capable of leading to an estoppel.

75. As to whether the first named applicant acted to his detriment, it is clear that he did by continuing work on the liquidation after November, 2011, by processing the VAT monies and dealing with the Revenue Commissioners for instance. Thus, his investigations continued, he engaged experts and incurred expenditure, he made filings in the CRO, and he put in hours and carried out work that would entitle him to remuneration as a liquidator.

76. Part of the respondents' complaint is the failure by the applicants to find or produce the liquidator's file from the time of the creditors meeting on 2nd August, 2011 – in effect, the file that Mr. Barry should have kept and passed on the the first named applicant. The first named applicant responds that if the respondents had raised the validity issue promptly he might have been able to retrieve this file from Mr. Barry, who now appears to be living abroad and difficult to contact. This is a further respect in which I find that the applicants are prejudiced by the respondents' conduct and their delay in raising the issue of validity.

77. Accordingly, the respondents at all material times after they became aware that the first named applicant was acting as liquidator accepted and acknowledged his position, interacted with him and elicited his help as liquidator, and did not falter from this position notwithstanding that they had solicitors acting on their behalf and engaging with the liquidator until January, 2015. They are therefore precluded from denying the truth of their assumption, shared with the first named applicant, that he was indeed lawfully appointed liquidator of the company because to allow them to roll back on this assumption would be unjust or "unconscionable".

78. This question of unconscionability is regarded by the authors of *Spencer Barrow: Estoppel by Representation* (Feltham, Hockberg and Leech, 4th Ed, (Lexis Nexis|Butterworths, 2004), p. 16 *et seq*) as the foundation of estoppel. They refer to the decision of Deane J in *Commonwealth of Australia v. Verwayen* (1990) 170 CLR 394, at p. 440 – 1 where he said:-

> "The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimised by other people…The notion of unconscionability is better described than defined…As Lord Scarman pointed out in *National Westminster Bank plc v. Morgan*, definition "is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case." The most that can be said is that "unconscionable" should be understood in the sense of referring to what one party "ought not, in conscience, as between [the parties] to be allowed" to do….In this, as in other areas of equity-related doctrine, conduct which is "unconscionable" will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure…in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. That being so, the question whether conduct is or is not unconscionable in the circumstances of a particular case involves a "real process of consideration and judgment"…in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but likely to be inadequate to exclude an element of value judgment in a borderline case such as the present."

79. Taken at its simplest, 3 and a half years after the creditors meeting the respondents complain about lack of formal notification, yet they were actually aware of the outcome of the meeting within five months, and thereafter treated the first named applicant as if he was a lawfully appointed liquidator. They allowed him to go about his business as liquidator, they engaged with him and they availed of his status as a liquidator before the Labour Court and the Revenue Commissioners. They caused or permitted him to build up no doubt many hours of work in the conduct of the liquidation, and, as they knew or ought to have known, he incurred expenditure in engaging professional valuers and others to assist him in his work as liquidator. I also accept as correct the observation by Mr. McCarthy SC that the real motive for challenging the first named applicant's appointment is not because the respondents would have opposed his appointment if they had exercised their vote on 2nd August, 2011. Rather, it is an attempt at insistence on a legal requirement to prevent the main proceeding achieving a full hearing- indeed this is evident from the consequential orders sought in the preliminary issue and Notice of Motion where the requirements seek an order striking out the main proceeding. To permit them to claim that his appointment was invalid at this late date would be unconscionable.

80. Thus, even if the respondents are not precluded by delay alone from raising the issue of validity, the decision of the Court is that they are estopped from raising it by reason of their conduct and written representations which demonstrate a shared assumption with the first named applicant that his appointment as liquidator on 2nd August, 2011 was valid.

81. Accordingly, the Court's answer to the first issue raised on the Issue Paper is that the respondents are prevented by reason of estoppel and/or delay from challenging the appointment of the liquidator.

Consequences

82. The best record of the resolution passed at the creditors meeting on 2nd August, 2011 (the publication in An Iris Oifigiúil on 23rd August, 2011, if necessary taken in combination with the CRO filing on 15th August, 2011) shows that Mr. Barry's resignation was accepted and the first named applicant was appointed under s. 270 as his replacement. It follows that as the record is good on its face that the appointment of the first named applicant as liquidator is to be treated as valid and subsisting.

82. While the Court has carefully considered the evidence and submissions of the parties in so far as they relate to questions (2), (3) and (4) on the Issue Paper, in view of the answer to (1) it is not necessary or appropriate for the Court to decide those questions. Consequently, for the purposes of the main proceeding the first named applicant must be taken to having been validly appointed as a liquidator of the company at the meeting of creditors on 2nd August, 2011.

[1] Section 312 of the Companies Act 1963 extended the power conferred by s. 68 of the Courts of Justice Act 1936 on the Rules Committee of the Superior Courts to the making of rules in respect of the winding up of companies, whether by the Court or voluntarily. This is the source of the Authority for the rules found in Order 74.