Neutral Citation: [2013] IEHC 507

THE HIGH COURT

[2011 No. 457 COS]

IN THE MATTER OF HOME PAYMENTS LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

EAMONN LEAHY

AND

EAMONN RICHARDSON (JOINT OFFICIAL LIQUIDATORS)

APPLICANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of October, 2013

1. On 24th August, 2011, Mr. Eamonn Leahy of Leahy & Company, Chartered Accountants and Mr. Eamonn Richardson of KPMG were appointed joint official liquidators of Home Payments Ltd. ("the Company"). The joint official liquidators had previously been appointed provisional joint liquidators on 5th August, 2011, on the presentation of the petition. The order for winding up was made on 24th August, 2011. In this application, the joint liquidators seek the determination of the Court as to the quantum of certain of their remuneration, legal costs and expenses and the assets or funds out of which same may be discharged. The application raises important points of principle.

2. When the application was first made, there was no *legitimus contradictor* available to the Court. At the direction of the Court, the joint liquidators put in place arrangements whereby a committee of customers (the Customer Committee) was formed. The Customer Committee was represented by solicitor and counsel, an affidavit filed by one member, Ms. Andreucetti, legal submissions filed and oral submissions made at the hearing of the application.

Background

3. The Company was a nationwide household budgeting and bill paying company which commenced trading, initially in the Dublin area, in 1963. The Company consolidated its customers' annual overheads into one fixed weekly or monthly payment, spreading payments evenly and keeping customers' household expenses on track by ensuring bills were paid on time. For this service, customers were charged a once-off registration charge and an ongoing management fee. The Company also earned interest on customer money held on deposit and dividend income from investments in shares and rental income from property investments.

4. The Company traded successfully for many years. At the commencement of the winding up, there were 2,239 customers. All customer payments were lodged into a current account (no.1) in the name of the Company held with Allied Irish Bank plc. ("AIB"). At the date of commencement of the winding up, the balance on the account was €2,089,601.59.

5. The Company maintained a ledger which recorded transactions for each customer. At the date of commencement of the winding up, this disclosed that the customers were owed a combined total of €6,667,402. The reports of the joint liquidators indicate the following to the primary causes of the failure of the Company.

6. Historically, the Company had operated with a liquidity provision of 30% which had been sufficient to pay customer bills as and when they fell due for payment. The balance of the surpluses generated from customer payments were put on bank deposit accounts until the mid-1990s. However, in 1996, there was change of policy. The Company commenced investing in property using, in part, surplus funds from customer payments but also with bank borrowings. In total, twelve properties were purchased, three of which were disposed of prior to liquidation. There were also guarantees given by the Company for liabilities of subsidiary companies. The Company was significantly exposed to the Irish property market and suffered from its dramatic fall.

7. In addition, there was a drop in customer numbers and despite cost cutting exercises by the directors, it became clear that the Company could no longer service all its loans and subsequent to negotiations with AIB, the Company presented a petition for the winding up on 5th August, 2011.

Customer Funds

8. As already stated at the commencement of the winding up, there was €2,089,601 in the Company No. 1 current account with AIB ("the Account"). Initially, AIB asserted an entitlement to set these monies off against sums due by the Company to it on other accounts including property loan accounts. In August 2011, agreement was reached with AIB that it would not maintain a claim to the monies in the Account provided the liquidator brought an application for directions as to the beneficial ownership of same. That undertaking was given and the monies transferred to the liquidation account.

9. In October 2011, with a view to avoiding the costs of a full application for directions, if there was no dispute as to the ownership of the monies, the Court directed the liquidators to take steps to identify the potential beneficial ownership of the monies. The joint liquidators di this and reported to the Court in their report of 16th January 2012 that they had been advised by Counsel that the monies held in the Account at the date of commencement of the winding up were impressed with a trust having regard to the following .

10. The monies paid into the Account were monies paid by customers to the Company for a specific purpose, namely, the discharge by the Company of certain nominated bills and only for that purpose. The Company had agreed with each customer to perform such task on his or her behalf. Upon the winding up of the Company, the purpose for which the monies had been paid by the customers failed in the sense that the Company was no longer in a position to pay the specified bills. In such circumstances, the joint liquidators were advised by Counsel that the monies in the Account were impressed with a trust, the beneficiaries of which were the customers who had paid money into the Account.

11. The joint liquidators, upon advice, also carried out an exercise to ascertain whether it was possible to identify the individual ownership of the funds standing to the credit of the Account at the commencement of the winding up or whether the funds had been so intermingled and the terms upon which they were held so breached such that it was not now possible to ascertain the beneficial owners of individual amounts in the Account. The joint liquidators set out the detailed methodology used in doing this and their results in a report to the Court of 16th January, 2012. The joint liquidators selected ten sample customers and looked at transactions, both in the customer ledger system and the Account for the period 1st October, 2011, to 4th August, 2011. The conclusion of the joint

liquidators was that by reason, in particular, of the volume of non-specific customer transactions through the Account and their review of the records of the Company, that it was not practically possible to trace individual customer entitlement to specific funds in the Account.

12. Whilst it now appears that no formal order of the Court was drawn subsequent to the presentation of the report of 16th January 2012, I am satisfied that the Court approve of the proposed approach of the joint liquidators, in accordance with the advice received from Counsel, that the monies in the Account at the date of commencement of the winding up be treated in the liquidation as funds in trust for the customers. Further, the Court at that hearing accepted the conclusions reached by the joint liquidators that by reason of the facts set out in their report, it was not practically possible to trace specific individual customer funds in the account.

13. With the approval of the Court, the joint liquidators then set about ascertaining whether the Company's own customer ledger was reliable in identifying the amount due to each of the then 2,239 customers at the date of commencement of the winding up. Each customer was written to and asked to state the sums owed to them by the Company at the date of commencement of this winding up and those responses were compared with the Company's customer ledger. In an affidavit of 17th July, 2012, Mr. Leahy set out the results of the inquiries and the joint liquidators' conclusion that the exercise demonstrated that the Company ledger could be considered as a reliable basis for determining the sums owed to each individual customer at the date of commencement of the winding up.

14. On 23rd July, 2012, the Court made an order sanctioning the payment by the joint liquidators of €1,200,000 to be distributed to the customers appearing in the customer ledger of the Company as of 5th August, 2011, *pro rata* to the amounts recorded in the customer ledger against each customer on the said date. This was intended as an initial payment to the customers out of the sum of €2,089,601.59 pending determination of the question as to whether any costs and expenses in connection with the liquidation and distribution of the said monies were payable out of the said funds.

15. The purpose of this application is, *inter alia*, to determine that very issue. In the course of the hearing, I made clear that it was my intention to make at this stage a final determination as to the amount, if any, which should be deducted by the joint liquidators from the balance of the funds held in the Account (to which I will now refer as customer monies), notwithstanding particular uncertainties remaining as to the final overall costs and expenses in this liquidation. This is so as to permit one further and final distribution. The cost of distribution to in 2239 customers requires such an approach.

16. It was agreed between the joint liquidators and the customer committee that the following are the issues for determination:-

> (i) Whether the work undertaken by the joint liquidators in relation to the reconciliation and administration of customer monies held by the Company was properly a task for the liquidator;
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> (ii) If the answer to the first issue is 'yes', whether the joint liquidators' remuneration and the fees, costs and expenses (including legal expenses) associated with such reconciliation and administration work can properly be charged to or deducted from the customer funds;
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> (iii) If the answer to each of the first two issues is 'yes', whether the Court has jurisdiction to, or should, make an order providing for the payment of the said remuneration and the fees, costs and expenses (including legal expenses) associated with such reconciliation administration work, out of the said customer funds (insofar as the assets of the company are insufficient to meet same);
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> (iv) If the Court is satisfied that there is a jurisdiction to make an order providing for payment out of customer funds and it should exercise that jurisdiction, in what sum should the said payment be fixed.

Joint Liquidators' Tasks in Winding Up the Company

17. There was no substantive disagreement on the first issue relating to the work undertaken by the joint liquidators having regard to the judgment in *Custom House Capital Ltd. (In Liquidation)* [2012] IEHC 382, and the views expressed at paras. 39 to 43 inclusive. An analogous issue arose in the winding up of Custom House Capital ltd. (CHC) which held client funds under its control but which were not part of the assets of CHC. Counsel did not submit that there should be any different approach in principle to that expressed in the judgment in *CHC.*

18. As determined therein, in my judgment, the role and duty of an official liquidator is to conduct "a proper and orderly winding up of the affairs of the Company". This appears to be confirmed by the terms of s. 249 of the Companies Act 1963. Whilst I recognise that many descriptions of the duties of a liquidator refer to the administration of the assets of the company, and in particular, their realisation and distribution of the proceeds to those entitled, I expressed at para. 41 the following view which remains my view:

> "However, it appears to me that what is required of a liquidator to wind up the affairs of a particular company will always depend upon the nature of the business or other activity conducted by the company prior to the making of the winding up order."

19. On the facts herein, the business and activities of the Company prior to the making of the winding up order included the receipt of payments to be used for a specified purpose and by reason of the making of the winding up order this purpose has failed. Consequently, the Company acting through the joint liquidators holds the monies in trust for the customers in accordance with the principles applicable to constructive trusts. Hence it appears that the joint liquidators who are required to conduct an orderly winding up of the affairs of the Company are required to carry out such work as is necessary to ensure the return of the customer monies to those beneficially entitled. On the facts herein, that work involved both the reconciliation of the customer accounts and administrative work connected with dealing with the customers and ensuring the distribution to them in a fair and equitable manner of monies to which they were collectively entitled. While some criticism was made on behalf of the customer committee of the number of hours spent and the extent of the work done in relation to the sample tracing exercise and reconciliation, it appears to me, subject to the comments made below in relation to duplication and added cost by reason of the involvement of two accountancy firms, that it was appropriate for the joint liquidators to carry out a sample exercise to ascertain whether payments made by individual customers could be traced into the funds remaining in the Account at the date of commencement of the winding up. The amounts paid in and not utilised for the payment of bills i.e. the amounts due by the Company to customers vary considerably between €1 and approximately €24,000. In general, therefore, all the work done by the joint liquidators appears to me to have been appropriate and work which it was necessary to do for the purpose of the orderly winding up of the affairs of the Company, having regard to the prior business and of the Company and its dealing with the customers and the moneys paid in by them.

(2) Jurisdiction of Court to order Payment of Costs out of Customer Monies
20. The joint liquidators submit that the Court has a jurisdiction to make an order that some or all of the liquidator's remuneration, legal costs and other expenses be discharged out of the customer monies in reliance upon its equitable jurisdiction and the approach taken by the High Court in England in *Re Berkeley Applegate (Investment Consultants) Ltd.* [1988] 3 All E.R. 71, other decisions which followed that case and the approach of the Supreme Court of New South Wales in *Re G.B. Nathan & Co. Pty Ltd. (In Liquidation)* [1991] 24 N.S.W.L.R. 674. Counsel for the customer committee does not dispute that the Court does have such a jurisdiction. However, he submits that it is a jurisdiction which should be exercised sparingly and, relies upon the principles requiring the Court to be vigilant in sanctioning liquidator's fees. He submits that under s. 244 of the Act of 1963, the Court has a discretion in relation to the priority of fees payable out of assets of the Company and challenges the priority contended for by the joint liquidators in this application.

21. In *Custom House Capital*, the same English and Australian decisions were relied upon by the official liquidator in support of the equitable jurisdiction which he sought to have the Court to exercise in that case. In the judgment, whilst I considered the law opened to me and made some observations which must be considered *obiter*, on the facts in *Custom House Capital*, I determined that CHC did not hold any of the assets at issue (segregated equities and cash funds) on trust for any of the dissenting clients. The relevant contractual documents expressly provided that CHC was not acting as trustee. Also, in that case, CHC was an investment business firm for the purposes of the Investment Intermediaries Act 1995 (as amended) and the Investor Compensation Act 1998, and, consequently, there are express statutory provisions in relation to the jurisdiction of the Court to have recourse to client funds for the payment of a liquidator's fees and expenses. The Company is not subject to those statutory provisions or any which give the Court an analogous jurisdiction. Hence, it is necessary for me to determine, for the purposes of this application, whether the Court has jurisdiction to make an order for the payment of any remuneration costs or expenses of the joint liquidators out of the customer monies.

22. In the judgment in *Custom House Capital*, I considered the English and Australian authorities to which I was referred both in that case and again this application. No submission has been made in this application which leads me to alter the views previously expressed in relation to those judgments and it therefore appears appropriate to repeat what I stated at paras. 55 to 64 inclusive of the judgment in *Custom House Capital*.

> "55. Counsel for the Liquidator primarily contends that this Court has a jurisdiction to make an order that the Liquidator's fees be discharged out of the client assets in reliance upon its equitable jurisdiction and the approach taken by the High Court in England in *Re Berkeley Applegate (Investment Consultants) Limited* [1988] 3 ALL E.R. 71, and in a number of decisions which followed that case. In that case, the company in liquidation carried on the business of receiving money from investors and then investing those monies in mortgages in the name of the company. At the commencement of the voluntary winding up, the company held a number of mortgages and sums of money. The Liquidator initially brought an application for directions as to whether the mortgages and certain sums of monies were held on trust. It was determined that the mortgages and certain sums of monies were held on trust for the investors. The Liquidator had done substantial work in relation to the mortgages and trust monies which was to the benefit of the investors. The assets of the company were considered insufficient to meet his remuneration and expenses and it was found that he was entitled to be paid out of the trust monies. Mr. Edward Nugee Q.C. (sitting as a deputy judge of the High Court) stated at p. 83:
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> > 'The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *Re Marine Mansions Co* (1867) LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v Nesbitt* (1808) 14 Ves 438, [1803–13] All ER Rep 216), and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46).'
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> 56. As appears from p. 84 of the judgment, the declaration made by the trial judge was that 'the liquidator is entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company are insufficient'. He also made clear that he was not, in that decision, deciding how the expenses and remuneration should be borne as between the company's assets and the trust assets.
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> 57. There was a subsequent application on that latter issue in which a judgment was given by Peter Gibson J., namely, *Re Berkeley Applegate (Investment Consultants) Ltd. (No. 3)* [1989] 5 BCC 803. In that judgment, he rejected the contention that any part of the expenses and remuneration which the liquidator was awarded by the Court in respect of work done in administering the trust property which the company held as trustee could be payable out of the company's assets pursuant to s. 115 of the Insolvency Act 1986. This provides:
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> 'All expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims'.
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> Peter Gibson J., at p. 805, stated:
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> > 'The point, to my mind is a short one, and largely one of first impression. Looking at sec. 115, for my part I have no doubt that the remuneration of the liquidator for administering trust assets which are not the assets of the company and the costs and expenses incurred by the liquidator, again not in getting in or paying out or distributing the assets of the company, but in administering trust assets, are outside the wording of the section. To my mind, it is clear that the section is simply dealing with the winding up of the company, involving as it does the getting in of the assets of the company, ascertaining its creditors, paying its liabilities in accordance with the statutory provisions and distributing any surplus. I do not think that on an ordinary reading 'expenses properly incurred in the winding up, including the remuneration of the liquidator' would include expenses and remuneration which the liquidator has incurred and has been awarded by the court in respect of the work he has done administering the trust property held by the company as trustee, and in my judgment the section must be construed as limited to the liquidator's expenses in, and remuneration for, dealing with assets of the company. Take the reference to the remuneration of the liquidator. There is no doubt to my mind that that does not include what the court in its inherent jurisdiction has awarded to the liquidator in respect of the work he has been doing not as liquidator but as

> trustee in administering the trust assets. Similarly the other expenses that are referred to as being incurred in the winding up cannot be expenses in relation to what are not the assets of the company'.

58. I accept that whilst the wording of s. 115 of the Insolvency Act 1986, is in different terms to that in sections 228(d) and 244 of the Act of 1963, in substance, they are similar. In this jurisdiction, the Court has jurisdiction pursuant to those sections to make orders that all expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in such priority as it directs.

59. As appears fundamental to the reasoning of Peter Gibson J. is that the work done by the liquidator in that case in administering the trust property was not work done as liquidator in the winding up of the company, and accordingly, could not be the subject of an order under s. 115 of the Insolvency Act 1986. Insofar as Peter Gibson J. expressed the view that a winding up only involves the getting in of the assets of the company, ascertaining its creditors, paying its liabilities and distributing a surplus, I respectfully disagree for the reasons already set out.

60. The broader view of a liquidator's tasks which I have taken is similar to that taken by McLelland J. in the Supreme Court of New South Wales in *Re G.B. Nathan & Co. Pty Limited (In Liquidation)* [1991] 24 NSWLR 674. In that application, the liquidator sought directions pursuant to s. 479(3) of the relevant corporation law as to whether he was entitled or bound to deal with certain monies and securities held on trust by the company for certain of its clients and as to whether the liquidator was entitled to deduct there from the costs, charges and expenses of the winding up.

61. On the latter issue, the judge considered the two English High Court judgments in *Re Berkeley Applegate (Investment Consultants) Limited* , and having referred to the extract from the judgment of Peter Gibson J. referred to above, stated at p. 688:

> 'I do not consider that the distinction between work done and expenses incurred by the liquidator in the winding up, on the one hand, and work done and expenses incurred in administering property held by the company as trustee, on the other hand, can be drawn as easily as this passage may suggest. In the first place, it is clearly the duty of a liquidator for the purposes of the winding up to identify the assets of the company, and in particular to ascertain whether particular assets under the control of the company are beneficially owned by the company or by others. Secondly, in fulfilling his function to 'do all such . . . . things as are necessary for winding up the affairs of the company . . .' (see s. 477(2)(m) of the Corporations Law and cf s 479(4)), the liquidator cannot disregard the fact that the company holds property in trust for others'.

62. The above view is closer to the view which I have formed on the facts of this application in relation to what a liquidator must do to wind up the affairs of a company than that formed by the English judges in *Re Berkeley Applegate (Investment Consultants) Limited*.

63. McLelland J. further concluded at p. 689:

> 'Where work done by a liquidator in relation to trust assets may properly be considered as having been done for the purpose of "winding up the affairs of the company", it is I think consistent with general principle that any remuneration and expenses attributable to that work be paid out of the (non-trust) property of the company in accordance with s. 556 of the Corporations Law, to the extent that there is such property available. To the extent that there is not sufficient available property, bearing in mind that generally speaking "a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property" (s. 545), it would normally be appropriate to apply the principle referred to by Deputy Judge Nugee Q.C. in the passage quoted earlier from *Re Berkeley Applegate (Investment Consultants) Ltd (In Liq)* and make an allowance to the liquidator out of trust assets. In the present case, there is nothing to suggest that there is any relevant insufficiency of available property of the company to meet the liquidator's remuneration and expenses. The evidence suggests that there are realisable assets available to the liquidator of the order of $100,000. Accordingly there is no occasion for any allowance for the liquidator's remuneration and expenses to be made from the trust assets'.

64. As appears, he held that the liquidator's remuneration and expenses for work in relation to the trust assets were first to be paid out of the company assets and it was only if they were insufficient that he would apply the principle referred to by Deputy Judge Nugee Q.C. Further, his willingness to apply the equitable principle is on the basis of an Australian statutory provision that 'a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property'. There is, of course, no similar statutory provision in our Companies Acts."

23. As previously explained, I determined in *Custom House Capital* that the Court did not have jurisdiction to make the order sought by reason of the fact that the assets in question were not trust funds and the relevant statutory provisions. By reason of that conclusion, it was unnecessary for me to determine in *Custom House Capital* whether or not the Court does have jurisdiction to make an order as is sought in this application.

24. In this application, it is agreed that the customer monies are monies held in trust by the Company (in liquidation) for the customers. At the date of the commencement of the winding up, the monies were in a bank account in the name of the Company. The joint liquidators took custody of same and by agreement with AIB, the monies were transferred to the joint liquidators' account. The joint liquidators have properly accepted that these are trust monies. They accept that the monies should be distributed to the customers. However, if the joint liquidators had either disputed the status of the customer monies or it had been determined that the matter lacked clarity and required a formal determination by the High Court, then this would have required a customer or group of customers to seek a determination from the High Court of their beneficial entitlement to the return of the monies. In doing so, they would be asking the Court to exercise its equitable jurisdiction to make a determination in their favour. This has not been done in this liquidation, in part by reason of the desire of the joint liquidators and the Court to keep legal costs to a minimum. Notwithstanding the absence of any such formal application, insofar as the Court has been giving directions or approval by way of sanction to the proposed action of the joint liquidators in relation to the distribution of the client monies, it appears that the Court must be considered as exercising its equitable jurisdiction, albeit alongside its supervisory role in a compulsory winding up. Hence, it appears to me that in accordance with the general principles set out by Mr. Edward Nugee Q.C. (sitting as the deputy judge of the High Court) in *Re Berkeley Applegate (Investment Consultants) Ltd*. cited above, that the Court has a discretion, in giving directions as to the distribution of the customer monies to the customers of the Company, to require as a condition that an allowance be made for some

costs and expenses in connection with the administration of the trust property. I also agree with his conclusion that this is a discretion which should be sparingly exercised and that the Court should have regard to the fact that if the work had not been done by the joint liquidators in this case, whether or not it would have had to have been done by some other person in order to give practical effect, *i.e.* procure the appropriate distribution, to the persons entitled to the equitable interest. Hence, on the second issue, I find that the Court has a jurisdiction and a discretion to make an order for the payment of an allowance in respect of the joint liquidators' remuneration, legal costs and expenses incurred in connection with the work done relating to the proper distribution of the customer monies. However, as appears from my next consideration, I respectfully disagree with the subsequent approach of the English High Court in *Re Berkeley Applegate (Investment Consultants) Ltd. (No. 3)* insofar as that judgment determines that work done by a liquidator in administering trust property under the control of a company in liquidation is not work done as liquidator in the winding up of the company.

25. For the reasons already set out, I have determined that the work done by the joint liquidators herein in relation to the customer monies is work which they were required to do as joint liquidators for the proper and orderly winding up of the Company. This is directly relevant to the question of how the Court should exercise the jurisdiction and discretion I have found to exist.

Exercise of Court's Jurisdiction

26. The third issue raises the question as to how the Court should approach the exercise of the jurisdiction which I have found to exist in relation to the making or an order which would permit some deduction from the customer monies for the payment of the liquidators' remuneration, legal costs and expenses. This is an issue which appears to me must be determined, having regard to the particular facts of the liquidation.

27. At the hearing of this application, the overall approach of the joint liquidators was to set out for the Court the Company assets other than the customer monies realised to date; the remuneration costs and expenses incurred to date; and the projected future remuneration costs and expenses. In relation to the latter two categories, the joint liquidators also apportioned same between what they termed "company related liquidation work" and customer related liquidation work. Counsel for the joint liquidators presented to the Court a summary financial position identifying the relevant figures and when the Court sought clarification, it was explained that the remuneration and legal costs figures were exclusive of the VAT. Those figures were in the following form:

> ***"SUMMARY FINANCIAL POSITION***
> ***Company assets***
> Realised to Date €368,917
>
> Less expenses paid out to date -€48,789 ***€320,128***
>
> ***Company related liquidation work***
> Liquidation Costs (company assets) €196,483
>
> Legal Fees (company assets) €15,857 (€212,340)
>
> ***€107,788***
>
> ***Outstanding outlay (company)*** (€15,035)
>
> Projected Costs (company) (€44,000)
>
> ***€48,753***
> ***Customer related liquidation work***
> Liquidation Costs (customer assets) €163,215
>
> Customer Related Legal Fees €20,040 (€183,255)
>
> ***Outstanding outlay (customer)*** (€3,000)
>
> ***Projected costs*** (customer) (€25,560)
>
> ***(€211,815)***
>
> ***TOTAL CUSTOMER ASSETS €2,134,516***
> ***OVERALL ALLOWANCE FROM CUSTOMERS € 163,062***
> €1,971,454"

28. In addition to the above figures, there was added an agreed sum of €10,000 for the customer committee's costs of this application. The figures suggest that there are no claims which might rank ahead of the joint liquidators costs and expenses e.g. petitioners costs.

29. As appears from the above figures, leaving aside the quantum of the remuneration sought to be approved, the approach of the joint liquidators was to seek an order of the Court which would permit them to first pay out of the assets of the Company all remuneration costs and expenses incurred in company related liquidation work, both accrued to date and projected into the future. Thereafter, insofar as there were Company assets remaining, the joint liquidators accepted that some portion of their remuneration costs and expenses incurred in doing the customer work should be paid out of the Company assets, and, insofar as they were not sufficient realisations to meet those costs, that the balance should be paid out of the customer monies. The joint liquidators produced a second set of figures in June 2013 which demonstrate that if VAT is not recoverable on the professional fees then no par of the costs relating to customer related work would on their approach be paid out of company assets.

30. The Customer Committee disputes this approach. They do so on three grounds essentially:

> (i) They dispute the priority afforded to the costs incurred in company related liquidation work and submit that pursuant to s. 244 of the 1963 Act, that the Court has jurisdiction to order the priority in which the costs and expenses should be discharged and should order that a greater portion of the costs of customer related liquidation work be paid out of the Company assets;

(ii) They dispute the overall quantum of the liquidators' fees and make some specific objections to the quantum;

(iii) They dispute some aspects of the apportionment by the joint liquidators between company related and customer related work.

31. The customer committee, through the affidavit of Ms. Andreucetti, accept that the joint liquidators have done significant work in relation to the distribution of the customer monies and do not dispute that some element of the fees should be discharged out of the customer monies but seek to have a lesser figure measured by the Court as payable out of the customer monies.

32. Section 244 of the Act of 1963, provides:

> "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just."

33. It follows from my earlier determination that the work done by the joint liquidators in relation to the reconciliation, tracing and administration of the customer monies is work done as part of their duty to conduct an orderly and properly winding up of the Company, that as the assets of the Company in this liquidation are insufficient to meet the liabilities (including projected liabilities) for costs, charges and expenses incurred in the winding up, Court does now have jurisdiction pursuant to s.244 to make orders for payment out of company assets of costs in such order of priority as the Court thinks just.

34. On the facts herein, there does not appear to me to be a just basis upon which I could accept the proposal of the joint liquidators that the costs and expenses incurred in the liquidation in relation to company or non-customer related work should, in effect, be given priority for payment out of the assets of the Company. The company related work done is work required of the joint liquidators having regard to their general and statutory obligations. Amongst the projected costs, €44,000 relates to a proposed application pursuant to s. 150 of the Companies Act 1990. The joint liquidators have not been relieved by the Director of Corporate Enforcement from their obligation to bring such an application. It does not appear to me that there is any just basis upon which company assets should be used to discharge costs associated with that work in priority to costs incurred in determining the appropriate basis upon which the customers of the Company should be returned monies paid by them to the Company for a purpose which has wholly failed. The extent of the customer related work required of the liquidators was inevitably contributed to by a lack of clear and accurate recording by the Company and use by it of customer monies in an unauthorised manner.

35. I respectfully share the general approach of McLelland J. in *Re G.B. Nathan & Co. Pty Ltd.* already set out that where, as in this instance, work is done by joint liquidators in relation to trust assets which is properly considered as having been done for the purpose of winding up the affairs of the Company, then the costs and expenses related to such work should, firstly, be discharged out of the assets of the Company and then, only to the extent that such assets are insufficient to discharge those costs in full should the Court exercise its discretion to make an order permitting a deduction from the trust monies.

36. Where, as on the facts herein, there are insufficient assets of the Company to discharge all the costs and expenses, then the Court must exercise its discretion under s. 244 of the Companies Act as to the priority in which the differing costs and expenses should be discharged out of the assets of the Company. The exercise of that discretion will depend upon the facts of the liquidation.

37. On the facts of this application, it does not appear to me that there is any basis for directing any particular priority for the differing categories of costs and expenses incurred by the liquidators in the winding up of this Company. Whilst I recognise that certain of the work done may be considered as having been done exclusively for the benefit of the customers, it is work required to be done for the proper and orderly winding up. It is of importance to note that in this application, regretfully, due to the paucity of assets in the Company, regardless of the order which the Court now makes, it is not envisaged that there be any dividend for any creditor of the Company.

38. I am also conscious that, unlike the position which appears to pertain in Australia, the joint liquidators have no other source out of which they can seek the discharge of their fees, save that they may be able to recover some or all of the costs associated with a s. 150 application from respondents against whom orders are made. . Nevertheless, that fact alone does not appear to permit the Court, in making an order as to priority which is just under s. 244, to give a priority to costs associated with non-customer related work simply because the customer funds are potentially available to discharge customer related costs.

CONCLUSION

39. Accordingly my conclusion is that the Court should exercise its discretion under s. 244 of the Act of 1963 on the facts of this liquidation by making an order that assets of the Company be used to discharge the total remuneration, costs and expenses (including all paid out, incurred and estimated) in relation to both company and customer related work in equal priority. On present facts it appears that the company assets will not be sufficient to discharge such remuneration, costs and expenses in full. In exercise of the Court's equitable jurisdiction insofar as the assets of the Company are not sufficient to discharge 100% of the total remuneration, costs and expenses (to include projected) then any unpaid percentage of the amount properly attributed to customer related work may be deducted from the customer monies prior to distribution of same.

40. To implement the above conclusion and permit a determination of the amount which may be deducted from the customer monies prior to a second and final distribution it appears the following need to be decided or estimated:

(i) the joint liquidators total claim for remuneration costs and expenses for both company and customer related work to September 2012;

(ii) an estimate of the appropriate allowance for the joint liquidators' projected remuneration costs and expenses from September 2012 to completion of the winding up ;

(iii) the probable total realisations from Company assets to include those realised to date and any projected future realisation;

(iv) from the above, determine as a matter of probability the percentage of the total allowable remuneration costs and expenses which will be discharged from the Company asset realisations actual and projected; (X%)

(v) the amount of the total allowable remuneration costs and expenses (actual and projected) to be appropriated to customer related liquidation work; (€Y)

(vi) the amount to be deducted from the customer monies; [(100-X)% of €Y]

Quantum of Liquidators' Fees

41. The joint liquidators in support of this application to determine their remuneration, costs and expenses have put before the Court relatively detailed information. Some has been provided in response to requests from the Customer Committee. The Court, in reviewing fees proposed to be charged by official liquidators, is faced with an extremely difficult task. It must always exercise a balance in ensuring it obtains sufficient information which permits it to form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation. The information presently before the Court appears sufficient.

42. The joint liquidators in this winding up have been faced with a highly unusual situation. They are dealing with approximately 2,230 customers who are, for the most part, private individuals, not business people, and who were placed in a very difficult personal situation by reason of the winding up of the Company. I am satisfied that through the arrangements made for a call centre and the direct contacts, where necessary, with one or other of the joint liquidators' offices, primarily that of Mr. Leahy, there were appropriate arrangements put in place and which, as Mr. Leahy stated in his affidavit, "endeavoured to minimise costs". It also appears to me, notwithstanding certain of the issues raised by Ms. Andreucetti in her affidavit, that for most part, the work done was necessary and that the hours involved do not appear excessive. Having said that, it does appear to me inevitable by reason of the fact that there were joint liquidators from two different firms that there was some overlap in the work done (as disclosed by the schedules) and that communication between the firms probably resulted in some additional time being charged to the liquidation which might have been avoided if there was a single liquidator or even joint liquidators from the same firm using the same staff. It does not appear to me on the figures presented that there has been any significant saving by reason of the fact that there were two firms involved, one of which is a smaller firm and where one might have expected lower overheads. Mr. Leahy's affidavit demonstrates that the charge out rates applied for persons working at different levels within his firm were applied in such a way as to reconcile with the charge out rates applied for the persons within KPMG. I recognise that the KPMG rates are discounted from their standard rates to take account of the case law relating to allowable remunerations in winding up by the Court.

43. Hence, I have concluded that there should be a reduction of 5% applied to all the liquidators' remuneration, both to date and in relation to projected costs to take account of what appears to me to have been probable additional expense by reason of joint liquidators from two different firms of accountants. This overall deduction appears more appropriate than making specific deductions in respect of some of the itemised work.

44. Subject to the above reduction, in terms of the overall fees relating to the remuneration and expenses of the joint liquidators, I do not propose making any further deductions. I have carefully considered the points made on behalf of the customer committee. Whilst I understand their concerns and what appears to them as unnecessary work, I am satisfied that the work done by or on behalf of the joint official liquidators was appropriate and necessary. In particular the tracing exercise and verification of the reliability of the customer ledger as a basis for distribution to customers was appropriate before they could make a proposal for a fair distribution to the Court.

45. The hourly rates charged by KPMG are in accordance with rates which have been and continue to be allowed by this Court in respect of prior years. I must express concern at the manner in which the hourly rates were presented from Leahy & Company, but having regard to the explanations given and the reduction of 5% already determined, I do not propose making any further overall reduction.

46. On the issue of apportionment between company and customer related work, it appears to me that the item at No. 16 on the KPMG Schedule exhibited at CC2 of Ms. Andreucetti's affidavit, having been attached to a letter dated 26th March, 2013, from Gartland Furey solicitors to O'Grady solicitors is not customer related work as it is so designated by KPMG. The description given is "[r]eview of the records and accounts of the Company to determine the misuse and misapplication of customer monies to fund investments as follows: [t]o purchase shares in public limited companies and private companies; [i]nvestment/lending in group property companies and related companies; and [i]nvestment to property assets". The time attributed is significant as it includes 67.25 hours by a senior in addition to lesser hours by the liquidator, a director and junior. It is not customer related work in the sense of being work which should be paid, or potentially part paid out of the customer monies. It is not work done for the benefit of the customers as beneficiaries of trust monies. It is, I am satisfied, work properly done by the joint liquidators as liquidators in the winding up but should be transferred to the company related work in the figures to be prepared following this judgment.

47. The Court's task in determining the appropriate figure for legal costs is even more difficult. It does not appear to me that there is anything to be gained for the customers in sending these costs to taxation as it would delay inevitably the final distribution to the customers and, in my judgment, on the figures presented and having regard to the costs of taxation, is unlikely to result in any significant reduction. This is a complex liquidation. There are a number of difficult legal questions. There have been many applications to the Court and, in my judgment, the overall legal fees proposed to be charged, both to date and into the future to finalise the winding up, appear reasonable. I form this view in particular having regard to the response to an enquiry which I made in the course of the application as to whether there was any additional sum being sought over those included in the projections for the joint liquidators' costs of this application and I was informed that there would not be any additional costs sought. The legal costs of the customer committee for this application have been agreed at €10,000 plus VAT and it was indicated that a similar figure is included in the projections for the official liquidators' legal costs. In those circumstances, I propose approving the legal fees to date and the use of the estimated costs as a basis for determining the amount of the estimated overall costs and consequent deduction to be made from the customer monies.

Conclusion

48. The decisions reached in this judgment should permit of an early determination of the amount which the Court will now permit to be deducted from the customer monies and retained as a contribution to the joint liquidators' remuneration costs and expenses. The Court cannot, on the present figures before it, determine the actual amounts. There are a number of reasons for this and in respect of which work now needs to be promptly done in order to permit the Court to determine the final figure. That work includes the following:

(i) The figures presented during the oral hearing in May were VAT exclusive. Upon enquiry, it appeared that there was an unresolved issue with the Revenue Commissioners as to whether VAT paid on professional fees was going to be recoverable. The matter was put in for mention again on 17th June, 2013, with a view to the Court being informed as to whether or not VAT would be recoverable. Whilst figures on the basis that VAT is not recoverable were presented the Court was told that the matter was not yet finalised but that the then advice of the Taxation Department in KPMG to the joint liquidators was that VAT might not be recoverable. It is hoped that the issue has by now been resolved and that the

definitive set of figures for costs to September, 2012 and definitive projected figures can be prepared.

(ii) The remuneration relating to Item 16 in the KPMG Schedule needs to be transferred from customer related work to Company related work and the totals for company and customer related work modified.

(iii) The 5% reduction in the joint liquidators' remuneration to date and in respect of projected remuneration needs to be made to the figures.

(iv) The joint liquidators need to clarify whether the realisations to date of Company's assets are the total or whether there are any future projected realisations to be included for the purpose of determining the amounts in accordance with this judgment

49. I wish to make clear that the figures to be prepared must be in accordance with the figures already presented to the Court and the only changes to be made should be those required by the decisions in this judgment

50. When the above figures are prepared by the joint liquidators, they should estimate the amount to be deducted from the customer monies in accordance with the decisions in this judgment. They should then submit the figures and their estimate to the solicitors for the committee.

51. I will put the matter in at an appropriate future date to make the final determinations and orders in accordance with the decisions in this judgment.