THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 169

Record No. 2017/367

Peart J.
McGovern J.
Costello J.

IN THE MATTER OF DECOBAKE LIMITED

AND
IN THE MATTER OF THE COMPANIES ACT 2014.

BETWEEN/

PAUL COYLE AND MARGARET COYLE

APPELLANTS/DIRECTORS

AND

DENIS MCHUGH

PETITIONER/RESPONDENT

AND

DECLAN DELACY LIQUIDATOR OF DECOBAKE LIMITED NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 25th day of June, 2019.

1. On the 29th June, 2017 a petition was presented for the winding up of Decobake Limited ("the company") and on the same day Gilligan J. appointed Mr. Declan DeLacy provisional liquidator to the company. On the 24th July, 2017 the High Court (Keane J.) made an order that the company be wound up and various ancillary orders. He refused an application for a stay by the appellants. The appellants appealed the judgment and order of the 24th July, 2017 and this is my judgment in respect of that appeal.

Grounds of Appeal
2. There are eight grounds of appeal set out in the notice of appeal, they are:-

> (i) that the petitioner was required to obtain leave of the court pursuant to s. 678(1)(b) of the Companies Act, 2014 prior to proceeding with the petition presented on the 29th June, 2017.
>
> (ii) The trial judge erred in deeming service good of the notice issued pursuant to s.570 of the Companies Act 2014 on the 3rd May, 2017, served on the 4th May, 2017.
>
> (iii) The trial judge erred in failing to take due cognisance of the wishes of the creditors and contributories of the company pursuant to s.590 not to have the company wound up.
>
> (iv) The trial judge erred in deeming the company to be insolvent in all the circumstances.
>
> (v) The trial judge erred in law in failing to act proportionately in making an order winding up the company in circumstances where the appellant had tendered payment via his solicitors in excess of the amount demanded by the petitioner/respondent and any other creditors' claims who were present in court on the 24th July, 2017.
>
> (vi) The trial judge erred in law by failing to take cognisance adequately of the accountant's report exhibited by the first appellant which showed the company to be solvent.
>
> (vii) The trial judge erred in law in failing to exercise his discretion not to make the winding up order and by disregarding the interests of the company and its forty employees and its contributories.
>
> (viii) The trial judge erred in law by relying upon the provisional liquidator's report to conclude *inter alia* that the company was insolvent in circumstances where the provisional liquidator stated that he could not make a complete adjudication on the financial status of the company.

3. The company and the appellants were represented by a solicitor, Mr. Maher, who applied on the 30th June, 2017 to have the provisional liquidator removed and then subsequently by Mr. Herbert Kilcline solicitor and Mr. Ronnie Hudson BL. They appeared on behalf of the company and the appellants at the hearing of the petition on the 24th July, 2017 and signed the notice of appeal, which was also signed by senior counsel.

4. Thereafter, the appellants progressed the appeal without the benefit of legal representation. The appellants filed written

submissions and presented oral submissions together with a speaking note which attempted greatly to widen the scope of the appeal. It is important therefore to note the limited circumstances in which an appellate court may consider a new point on appeal which was not raised in the High Court.

Scope of the Appeal
5. In *Lough Swilly Shellfish Growers v Bradley* [2013] 1 IR 227, O' Donnell J. held:-

> *"there is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with the consequent effect on the evidence already given (as in KD (otherwise C) v MC [1985] IR 697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News Limited v Galway County Council [Unreported, Supreme Court, 25th July 1997]);or, for example where a party sought to make an argument which was diametrically opposed to that which was had been advanced in the High Court and on the basis of which the High Court case had been argued and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retains the power in appropriate cases to permit the argument to be made."*

This statement of principle is binding upon this court.

6. The second point to bear in mind is that new evidence may not be adduced on appeal against a final order save with leave of the court. Leave must be sought in advance of the hearing of the appeal by way of a notice of motion and a grounding affidavit setting out the special grounds which would justify this Court granting the party special leave to adduce the further evidence in question.

7. In light of these principles, I propose to consider the eight grounds of appeal raised in the notice of appeal. If it is necessary, I shall then consider the further arguments advanced by the appellants outside the scope of their notice of appeal.

Was it necessary for the petitioner to make an application pursuant to s.678(1)(b) of the Companies Act, 2014 pursuant to Order 74, r. 83 of the Rules of the Superior Courts prior to proceeding with the petition?
8. Section 678 of the Companies Act 2014 provides as follows:-

> "(1) When in relation to a company—
>
> *(a) a winding-up order has been made,*
>
> *(b) a provisional liquidator has been appointed, or*
>
> *(c) a resolution for voluntary winding up has been passed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."*

9. The ground of appeal refers to subparagraph (c) but it is clearly an error and in fact it was intended to refer to subparagraph (b). When the argument based upon s.678 of the Act of 2014 was raised in the High Court, the trial judge rejected the argument on the basis that the pre-existing winding up petition was not an action or proceedings against the company within the meaning of s. 678(1) of the Act of 2014. Given the fact that a provisional liquidator had been appointed to the company on the 29th June, 2017 on foot of the petition which the petitioner sought to move, I can see no basis upon which it could be said that such a petitioner was required to obtain relief pursuant to s. 678(1) in order to proceed with the petition.

10. Counsel for the appellants argued in the High Court that O. 74, r. 83 of the Rules says that an application under *inter alia* s. 678 should be made by a motion on notice in case of a court ordered winding up and by way of an originating notice of motion in a voluntary winding up and so on its face the rule required the petitioner to bring a notice of motion to seek leave to proceed with the petition. This is not what the rule requires. The rule specifies the means by which applications as are required to be brought under the Act of 2014 shall be brought. It does not impose an obligation to bring an application where none exists. The submission ignores the fact that the act of appointing a provisional liquidator presupposes that the petition upon which the provisional liquidator was appointed will proceed to be adjudicated upon.

11. I agree with the trial judge and reject this ground of appeal.

Was the service of the 21-day letter dated the 3rd May, 2017 properly served in accordance with s. 570 of the Companies Act, 2014?
12. Section 570 specifies the circumstances in which a company is deemed to be unable to pay its debts. It provides as follows:-

"For the purposes of this Act, a company shall be deemed to be unable to pay its debts—

(a) if—

> *(i) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 then due, has served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and*
>
> *(ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor […]"*

What is referred to as a 21-day letter of demand must be served on the company by leaving it at the registered office of the company. The registered office of the company in this case is, Claddagh Cottage, Hortland, Donadea, Naas, County Kildare. As the principal basis for the appeal was that there was no valid demand properly served on the company in accordance with the requirements of s. 570, I shall set out in detail the findings of the High Court.

13. On the 5th May, 2017 Mr. Conor Byrne swore an affidavit as follows:-

(1) I duly served Decobake Limited at the registered address of the company, Claddagh Cottage, Hortland, Donadea, County Kildare with the original notice pursuant to s. 570 of the Companies Act, 2014 by delivering said notice into the post box of the premises Claddagh Cottage, Hortland, Donadea, County Kildare at 1.30 pm on Thursday the 4th May, 2017.

(2) Prior to service of the said notice I confirmed the address by reference to the land registry map pertaining to same and cross referencing same with Eircode relevant to the said property. In addition, I determined from local enquiries that the premises was Claddagh Cottage."

14. The trial judge concluded that the averment was "*more than sufficient to establish the necessary proof*."

15. He then went on to determine whether the averment was somehow undermined. He noted that the first named appellant said that he did not receive it. The trial judge said that the issue was not whether the appellant, a director of the company, received the relevant demand. The question was whether the demand had been served on the company by leaving it at the registered office of the company.

16. He then considered the affidavit of Ms. Amy Coyle, a daughter of the appellants, who stated that she was sceptical of Mr. Byrne's averment as to how he was able to locate the registered office of the company because she says she conducted an exercise where she consulted a number of websites, at least one of which was referred to by him, and failed with assistance of those websites to identify the particular property concerned. The trial judge said :-

"I have to say that evidence goes no further than to establish that Ms Coyle was unable to replicate personally the exercise that Mr Byrne has solemnly sworn he successfully engaged and doesn't operate to dissuade me that service was effected properly in accordance with the requirements of the section."

17. He also referred to the averment of Ms. Emily Coyle who confirmed that she resided at the address and was present in her home on the 4th May, 2017. The trial judge said he was content to accept that for whatever reason Ms. Coyle failed to apprehend that service had been affected but that did not dislodge his primary and fundamental finding that the demand was properly delivered in accordance with the requirements of s.570.

18. The issue for this Court is whether the trial judge erred in his conclusions and findings. In that regard it is relevant to consider further evidence which was before the High Court and which was not expressly referred to in his *ex tempore* judgment. The supplemental affidavit of the petitioner sworn on the 19th July, 2017 referred to the application by Mr. Maher, solicitor acting for the company and/or its directors on the 30th June, 2017 seeking to set aside the appointment of the provisional liquidator the previous day. He averred that in moving the application the solicitor for the company confirmed that he had no criticism to make of any of the documents placed before the court at the time of the appointment of the provisional liquidator. The application to appoint a provisional liquidator was grounded upon an affidavit sworn by the petitioner on the 28th June, 2017 which averred at para. 24 as follows:-

"I say that on the 4th May 2017, I cause to be served on the company, by leaving same at the registered office thereof, a demand under its hand calling on the company to pay the said sum of €57,326.87 within 21 days from service and confirming that failure to pay the said demand would constitute an act of insolvency and would, inter alia, entitle your petitioner to present a winding up petition."

A copy of the demand was exhibited together with the affidavit of service of Mr. Conor Byrne cited above. The averment that the company had no criticism to make of any of the documents placed before the court at the time of the appointment of the provisional liquidator has never been contested or explained.

19. Secondly, Mr. Paul Beausang, solicitor for the petitioner, swore an affidavit on the 21st July, 2017. At paras. 7-11 he stated:-

"7. At paragraph 11 of the affidavit Mr Coyle appears to contend that the company did not receive the 21-day notice pursuant to s.570 of the Companies Act 2014, although, he does not specifically aver that it was not left by hand at the company's registered office. I beg to refer to the affidavit of Conor Byrne, summons server, when produced, confirming that the 21-day notice was so served.

8. I say and believe that a copy of the 21-day notice was also furnished by email to Mr Coyle by this firm on 4 May 2017. I beg to refer to a copy of the relevant email upon which marked with the letters and number "PB3", I have signed my name prior to the swearing hereof.

9. I say and believe that on 24 May, 2017, some weeks after the service of the 21-day notice, a gentleman who was unknown to me entered my office in Sandyford, Dublin 18 holding an envelope upon which was written the words "Delivered to the wrong address". I say and believe that this gentleman's demeanour was aggressive and he stated, "This letter was delivered to the wrong address". When the envelope was opened by my secretary I realised it contained the 21-day notice served by hand to the company's registered office. My secretary looked at the gentleman and in my presence said as follows:- "You can tell him it was served…we have done our homework." The gentleman replied, "I won't be telling him anything" and left the office. I beg to refer to a copy of an attendance prepared by my secretary of the said conversation upon which marked were the letters and numbers "PB4", I have signed my name prior to the swearing hereof.

10. I say and believe that, having regard to the aggressive demeanour of the gentleman in question, to the fact that it is highly unusual for a stranger to a letter delivered to the wrong address to return that letter by hand to the sender, and to the company's history of seeking to evade court proceedings by claiming on spurious grounds that it was not given notice of same, I believe that the gentleman who returned the document in question was an associate of Mr. Coyle who had been procured to return the document and claim that it had not been served.

11. I say and believe in light of the said encounter I spoke to Conor Byrne, summons server, who confirmed that he had delivered the letter by hand to the company's registered office. I say and believe that Mr. Byrne then took the precaution of writing to this firm elaborating upon the precise circumstances in which the document was delivered. I beg to refer to the said letter from Mr. Byrne upon which are marked the letters and numbers "PB5" I signed my name prior to the swearing hereof."

20. The letter from Mr. Conor Byrne was dated the 9th June, 2017 and after describing what was set out in his affidavit of service he elaborated as follows:-

> *"When I initially arrived at the premises, I noticed that there were two dwellings which shared the same entrance way, one of which is Claddagh Cottage and the other of which is another property. I have enclosed a photograph (photograph 1) which shows the entrance way. I made enquiries at the time with a neighbour who confirmed that the smaller dwelling on the site was Claddagh Cottage although the dwelling does not show any name plate.*
>
> *Claddagh Cottage itself is shown in another photograph which I also enclose (photograph 2). As you can see from the photograph there is a letter box for Claddagh Cottage. Unfortunately, when I attempted to insert the 21-day notice in the letter box I discovered that it was screwed shut. However, I had a screwdriver on my person and I took the opportunity to unscrew and open the letter box and then place the 21-day notice into the letter box. I can only conclude that the individual who returned the 21-day notice to your office obtained it from the post box or was furnished with it by another person who obtained it from the post box."*

21. Three affidavits were sworn on behalf of the company by the second named appellant, Ms. Emily Coyle and Ms. Amy Coyle on the 24th July, 2017, three days after Mr. Beausang swore his affidavit. None of them made any reference to the fact that the letter box to Claddagh Cottage had been screwed shut and then was unscrewed. Given that this was not only the registered office of the company but also the home of one of the deponents, it would have been truly remarkable if no one had noticed that a letter box which apparently was screwed closed on the 4th May, 2017 was no longer so closed. It is also worth noting that in the affidavits which stated that the notice had not been received, no deponent referred to the fact that the letter box was screwed shut and in the normal way would have hindered delivery of the notice.

22. For the case of completeness, I should recall that when questioned during the hearing of the appeal as to whether he had received the email of the 4th May, 2017 from Mr. Beausang enclosing the 21-day notice, the first named appellant stated that he had configured his emails so that all emails from Mr. Beausang would be treated as spam and so the court is to infer that he deliberately ensured that he could not and did not receive the email of the 4th May, 2017.

23. In those circumstances, in light of this additional information which was before the trial judge but which was not expressly referred to in his judgment, I am quite satisfied that he made no error in finding that the demand was delivered in accordance with the requirements of s. 570(a)(i) of the Act of 2014.

24. On appeal, the appellants argued that if delivered in the manner described by Mr. Byrne in his letter, exhibited by Mr. Beausang, it rendered such delivery unlawful as it amounted to the interference with the fixtures of the property of the registered address of the company which was also a private dwelling.

25. Section 50 of the Act of 2014 requires that a company "*shall at all times have a registered office in the State to which all communications and notices may be addressed*". The company is required to give details of its registered office to the Company Registration Office and it is required to notify the Registrar of any change in the situation of the registered office within fourteen days. Section 51 of the Act of 2014 provides that a document may be served on a company by leaving it at, or sending it by post to, the registered office of the company. Subsection (2) provides that "*for the purposes of this section, any document left at or sent by post to the place for the time being recorded by the Register as the situation of the registered office of a company shall be deemed to have been left at or sent by post to the registered office of the company notwithstanding that the situation of its registered office may have changed*."

26. All of this underscores the importance of a company having a registered office at which parties seeking to serve documents upon the company may serve the documents. The company may not seek to frustrate these statutory provisions by having a registered office at which it is not possible to deliver documents because the company has, as in this instance, screwed closed the letter box to the registered office. On this ground alone I would dismiss this ground of appeal.

27. Counsel for the petitioner submitted that the question of whether the summons server committed a criminal offence on the date of the service of the 21-day notice is a matter for separate criminal proceedings against that party and it is not a matter that falls to be considered in the context of these proceedings. He relies upon the judgment of *Grant Thornton v. Scanlon* [2017] IEHC 648. Gilligan J. struck out a plea in the defendant's counterclaim which advanced an allegation in relation to trespass by a summons server on the basis that it had no connection whatsoever with the subject matter of the plaintiff's claim against the defendant. I agree with the decision of Gilligan J. The alleged unlawful actions of Mr. Byrne in serving the 21-day notice does not mean that the court may not accept his evidence that the notice was, in effect, delivered in accordance with the provisions of s.570 of the Act of 2014.

28. It was further argued that as the petitioner is a rates collector appointed by warrant he may only serve documents in accordance with his statutory powers. These specify the manner in which he is to serve documents. It was argued that, therefore, he could not serve a document in accordance with the provisions of s. 570 as this was *ultra vires* his powers.

29. This argument was not raised in the High Court and is not in the notice of appeal. It is an entirely new point which ought to have been raised in the High Court if the company or the appellants had wished to advance the point. It would offend the principles in *Lough Swilly Shellfish Growers* if this court were to entertain this point. For this reason, this argument must be rejected.

30. Having said this, I feel that it is worth stating that, in my opinion, the point is without substance. The petitioner is a judgment creditor. The appellants accept that the debt is due. The purpose of s. 570 is to enable a creditor of a company to establish that the company is unable to pay its debts as they fall due so that it may proceed to have the company placed in liquidation. The deeming provision avoids a detailed, contentious hearing on a petition to wind up a company in relation to its solvency, where a creditor may be severely hampered by insufficient evidence as to the affairs of the company. This applies to all creditors of the company. There is no reason to believe that a judgment creditor who happens to be a rates collector may not avail of the provisions of this general statutory provision which applies to all creditors. This is not to be confused with, or elided with, the protections afforded to ratepayers under the relevant legislation which provides that statutory demands of a rates collector must be served in accordance with the specific statutory requirements applicable to that regime.

Failure to take account of the wishes and contributories pursuant to s. 590 of the Act of 2014.

31. The reference to s. 590 is clearly an error as this section deals with the date of the commencement of a voluntary winding up. It is presumed that the reference is to s. 566 of the Act of 2014 which provides that:-

> *"566(1) The court may, as to all matters relating to the winding up of a company, have regard to the wishes of the*

creditors or contributories of the company, as proved to it by any sufficient evidence

…

(3) In the case of creditors, regard shall be had to the value of each creditor's debt."

32. The section is permissive, not mandatory. A court is not obliged to follow the wishes of the creditors or contributories of the company. In this case, some creditors supported the winding up of the company, as was noted by the trial judge. The appellants, as contributors and, arguably, as creditors, opposed the liquidation. The trial judge was entitled, in the exercise of his discretion, to weigh the fact that the creditors opposing the petition were also the sole shareholders and directors of the company, while those who supported the petition were unrelated creditors including a former employee who had the benefit of a WRC award, and a bank. The petition was also supported by one of the landlords of the company, though the appellants were adamant that he was not in fact a creditor of the company. In those circumstances it was a matter for the discretion of the trial judge. It is also important to note that, where a creditor petitions for the winding up of a company and the creditor satisfies the court as to the proofs necessary to obtain such an order, that creditor is entitled to an order winding up the company *ex debito justitiae*, subject to certain exceptions which do not apply in this case as discussed below. In my opinion, there was no error by the trial judge in relation to the provisions of s. 566 of the Act of 2014.

Did the trial judge err by deeming the company to be insolvent in all the circumstances?
33. Section 570 of the Act of 2014, which I have quoted above, provides that for the purposes of the Act, the company shall be deemed to be unable to pay its debts if a demand in writing for a sum exceeding €10,000 has been served on the company by leaving it at its registered office, and the company has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. The trial judge held that a demand in writing requiring the company to pay a sum exceeding €10,000 had been duly served on the company by leaving it at the registered office of the company. It was common case that the company had not paid the sum within the 21 days and indeed had not paid it prior to the presentation of the petition or the hearing of the petition.

34. Various efforts were made on behalf of the company and/or the appellants to secure or compound for the debt but they failed to do so "*to the reasonable satisfaction of the creditor*" as is required by the section. In those circumstances the trial judge was correct to conclude that the company must be deemed to be unable to pay its debts within the meaning of s. 570 of the Act of 2014. He did not and was not required to conclude more than that because under s.569 of the Act of 2014 a company may be wound up by the court if the company is unable to pay its debts. The Act requires that a petitioner prove that a company is unable to pay its debts and the trial judge correctly applied the appropriate test and so found. He was not required, in addition, to satisfy himself that the company was otherwise, and in addition, insolvent (i.e. that the reason it did not pay its debts as they fell due was not because it could not do so but because it chose not to do so). That being so, the fourth ground of appeal, as drafted, is misconceived. This ground of appeal must be dismissed.

Did the trial judge err by failing to act proportionally in making a winding up order in circumstances where the appellant had tendered payment via his solicitors in excess of the amount demanded by the petitioner/respondent and any other creditors' claims who were present in court on the 24th July, 2017?
35. This ground of appeal begs the question as to what, in fact, was offered by the company/appellants. The petitioner submitted to the trial judge that offering to pay the sum due after the presentation of her petition for winding up is not a defence to a winding up petition: the appropriate action is to pay the debt before the petition is presented. That is the purpose for affording a 21-day notice period for payment. Further, the report of the provisional liquidator to the court indicated that there were quite a number of other creditors some of whom had indicated that they were willing to take over the petition in the event that the debt of the petitioner was paid and there were other creditors in court who supported the petition.

36. The trial judge refused to adjourn the matter to afford the company/appellants the opportunity to discharge sums due to the petitioner and/or other creditors on the basis that it was too late and it seemed to the trial judge that there was uncontroverted evidence that other creditors exist who may or may not want to take over the petition.

37. This is a matter entirely within the discretion of the trial judge and an exercise of discretion which this court would be very slow to overturn. The trial judge was entitled to have regard to the fact that the uncontroverted evidence was that the petitioner had been seeking to recover rates due to Dublin City Council which had remained unpaid since 2012. At para. 7 of his affidavit sworn on the 20th July, 2017 the first named appellant acknowledged the three District Court decrees grounding the petition and said that the reason the company did not discharge its rates obligation was because it had temporary cash flow difficulties. He said he "*now realise[s]*" that the company should have paid the sum. At para. 8 he refers to deteriorations between the company and the petitioner following an attempt by the Sheriff to execute a warrant on the 14th December, 2016. He averred that "*at all times the company was in a position financially to pay the rates but chose not to pending the resolution of the disputes. However, I believe the company is not being honourably treated by a State organisation which ultimately chose to act in a disproportionate manner by presenting the petition herein but at the same time I now acknowledge we should have paid the rates."* At para. 9 he accepted "*the polarised positions of each side were the obstacle to resolving the matter*". It is thus clear that it was the company's position that it could have discharged the sums but chose not to. This was expressly accepted by counsel for the company and the appellants when he acknowledged that the debt was due and sought further time to pay the debt.

38. Further, it was open to the trial judge to have regard to the fact that, having concluded that the 21-day notice was in fact left at the registered office of the company, nonetheless the first named appellant averred "*if we had received the 21-day letter of demand the company would have discharged he [sic] payment sought as averred to by the petitioner. Throughout the 21 days since the purported service of the demand letter the company had the funds to discharge the petitioner's claim*."

39. In the light of this evidence and in light of the fact that three creditors, including an employee who had an unsatisfied award of €16,000 by the WRC, and a bank were supporting the petitioner, and indicating that they might take over the petition in the case of the employee, it was entirely within the discretion of the trial judge to refuse to adjourn the matter than to afford the company time in which to reach an agreement with the petitioner.

40. The issue of proportionality simply does not arise in the circumstances. If the trial judge is satisfied that the proofs are in order, then the petitioning creditor is entitled to an order *ex debito justitiae* and the company failed to satisfy the trial judge that there was any reason why the order should not be made. I would dismiss this ground of appeal.

Did the trial judge err by failing to take cognisance adequately of the accountant's report exhibited by the first appellant which showed the company to be solvent?

41. This ground of appeal fails to appreciate the significance of the provisions of s.570 of the Act of 2014. This is a deeming provision. Once the requirements of subparagraph (a) have been satisfied (as they were in this case) then there is no need for the trial judge to make an assessment as to the solvency, or otherwise, of the company. The Oireachtas has provided that where a company has been deemed to be unable to pay its debts pursuant to s.570 then the court may wind up the company pursuant to s.569. The trial judge was therefore correct to say that it was unnecessary in those circumstances to enter into a protracted or significant consideration of the arguments concerning the company's level of solvency.

42. The trial judge noted the submission of counsel for the company, that in the exercise of its residual inherent jurisdiction one of the matters to which the court ought to have regard is the extent to which the company is or is not insolvent. In this regard the trial judge held as follows:-

> *"On that point there is a conflicting evidence on affidavit … I don't really have to discriminate between the conflicts that appears on the affidavits that have been delivered, save to say that the more cogent evidence is certainly that filed on behalf of the petitioner, in relation to at the very least very grave or fundamental concerns regarding the company's solvency. In circumstances where I note but remain entirely unpersuaded by the averments made in the case advanced on behalf of the contributories, that one of them the director of the company, despite the fact that the company was in a position to discharge all of the relevant debts, the company is, in fact, solvent, simply elected for identified reasons to refuse, fail or neglect to discharge that debt. The reality is that debt, together with a number of other debts due from the company or shortly due from the company remain undischarged."*

43. The trial judge expressly refrained from attempting to resolve conflicts that appear on the affidavits in relation to the solvency of the company. He relied upon the averments I have referred to from the affidavit of the first named appellant. In reality, these were of far greater significance than a contested argument that the company was or was not solvent. Given that a creditor who is owed a debt is to be entitled *ex debito justitiae* to a winding up order, the discretion of the court to refuse to wind up the company will only be exercised sparingly and where good cause is shown (*re Burren Springs Limited* [2011] IEHC 480). The dispute on affidavit in relation to the solvency of the company in light of the other facts before the court falls very far short, in my view, of a basis for exercising this discretion, which should be exercised sparingly, and falls far short of showing good cause. Therefore, this ground of appeal must fail.

Did the trial judge err by failing properly to exercise his discretion not to make the winding up order in disregard of the interests of the company and its forty employees and its contributories?

44. The trial judge referred to the argument that the company had an interest in maintaining ongoing litigation and that the interests of the employees of the company were at risk if a winding up order was made. The trial judge noted that the liquidator was at present seeking to trade the company and indicated that it was not for him to make any prediction as to what decisions the liquidator might make in the future. Therefore, it seemed to him that they were not factors relevant to be taking into account in the exercise of the court's discretion in relation to whether or not to order the company to be wound up.

45. The trial judge was correct in noting that it would be a matter for the liquidator whether or not to pursue any existing litigation maintained or defended by the company. The fact that a company is put into liquidation does not mean that meritorious actions brought by the company will automatically be discontinued. It may be in the interest of the creditors of the company, in the view of the liquidator, that it should continue to pursue the litigation. I see no error by the trial judge in the exercise of his discretion on this ground.

46. Likewise, I see no error in his assessment of the position of the employees of the company. It is a most unfortunate fact that frequently the employees of a company placed in liquidation are necessarily made redundant. If this fact were to be the basis for the court exercising its discretion to refuse to place a company in liquidation it would amount to driving a coach-and-four through the provisions of the Act of 2014 in relation to the winding up of companies. The Oireachtas have made provisions for the preferential treatment of employees and their outstanding claims in respect of companies in liquidation. This is a clear indication that the fact that employees necessarily may be made redundant following on the liquidation of their employer company is no reason to refuse, in appropriate cases, to order the winding up of such employer companies. Accordingly, this ground of appeal likewise fails.

Did the trial judge err by relying upon the provisional liquidator's report to conclude inter alia that the company was insolvent in circumstances where in the same report the provisional liquidator stated he could not make a complete adjudication on the financial status of the company?

47. This ground of appeal is without merit. I have already quoted the decision of the trial judge in relation to the issue of the company's insolvency and he made no reference to the report of the provisional liquidator. Therefore, the ground of appeal is factually incorrect. Secondly, the purpose of a provisional liquidator reporting to the court is so that the court may consider that report. It makes a nonsense of the provisions if the court is not entitled to have regard to the report.

48. In relation to the premise in this ground of appeal, that the provisional liquidator stated that he could not make a complete adjudication on the financial status of the company, it is necessary to consider precisely what the provisional liquidator reported to the High Court. At para 5.7 of his report he stated:-

> *"[T]here are serious deficiencies in the company's accounting books and records, such that the provisional liquidator formed the view that it would not be possible to ascertain the company's financial position* ***therefrom****. (emphasis added) … To assist the High Court in considering the petition…the provisional liquidator has taken steps aimed at ascertaining the extent of the company's assets and liabilities,… and the results thereof is detailed sections 7 and 8 hereof."*

49. At para. 10 of his report the provisional liquidator noted that at the date of his appointment the following sums were due for immediate payment by the company and the creditors concerned appeared unwilling to forbear. They were the Collector General: €98,491, Allied Irish Banks PLC: €58,783, Lee O'Mahony (a landlord): €95,572, Targeted Investment Opportunities ICAV: €35,979, a former employee who had the benefit of a Work Relations Commission award of €16,000, and Three Ireland (Hutchison) Limited who had commenced proceedings for the sum of €1,953. The aggregate of their debts amounted to €306,778 while the balance due in the company's bank account came to €45,512. On that basis, it appeared to the provisional liquidator that the company did not have funds sufficient to discharge its debts as they fell due.

50. It should be noted that the provisional liquidator recorded that Allied Irish Banks, Lee O'Mahony, Targeted Investment Opportunities ICAV and the former employee had each written to him to indicate their support for the petition to wind up the company.

51. In light of the details of his report, it cannot be said that the trial judge erred in having regard to it or that he ought, by reason of

the terms of that report, to have exercised his discretion not to order that the company be wound up. Therefore, this ground of appeal also fails.

Written submissions on behalf of the appellants

52. In their written submissions the appellants identify twenty-one issues which they say arise on the appeal. Some quite clearly cannot arise in respect of the order to wind up the company on the 24th July, 2017. Thus, Issue 4, which relates to the hearing before Gilligan J. on the 30th June, 2017, forms no part of this appeal. Similarly, there is no appeal in respect of the appointment of the provisional liquidator, and accordingly Issues 6, 7 and 8 in their written submissions cannot arise as they relate to the appointment of the provisional liquidator. Issue 14 alleges there was a breach of confidential information in Court 3 on the 28th April, 2017. This cannot be raised as an issue in this appeal. Issue 16 refers to an alleged, unlawful attempt of the petitioner to seize goods of the company on the 14th December, 2016. The issue of the legality or otherwise of those actions clearly do not form part of this appeal.

53. Issues 1, 2 and 3 relate to the conduct of the hearing in the High Court on the 24th July, 2017. The appellants alleged they were not afforded due process and a fair hearing. The appellants have never denied that they were aware of the fact that the petition was listed for hearing on the 24th July, 2017. On the 30th June, 2017 a solicitor appeared in court seeking to set aside the order appointing the provisional liquidator. Accordingly, it is undeniable that the appellants had more than three weeks' notice of the application. They were represented by a solicitor and counsel. While an application on their behalf was made to adjourn the petition, it was not done so on the basis of a want of notice but rather to afford the company time in which to discharge the debt due to the petitioner, and/or to allow for an application to be brought to court for leave by the petitioner to continue with the petition once a provisional liquidator had been appointed on the 29th June, 2017.

54. It is clear from the transcript that the hearing was an extensive one and counsel for the company advanced the arguments he saw fit to raise on behalf of the company, and the appellants, and they were duly ruled upon by the trial judge. A sometimes robust exchange between the trial judge and an experienced counsel does not to my mind amount to a failure to afford the appellants a fair hearing. In the premises, it cannot be said that the appellants failed to receive due process or a fair hearing and this ground of appeal must be rejected.

55. Secondly, it is argued that the appellants had no opportunity to respond to the provisional liquidator's report to the trial judge on the 24th July, 2017. This is in no way discriminatory nor gives rise to any ground of appeal. Provisional liquidators report to the court on the progress of the provisional liquidation on the date the petition is listed for hearing. The report is prepared for the court and it is prepared so as to be as up-to-date as possible. In this case, as is entirely normal, the provisional liquidator's report was prepared up to the 24th July, 2017 and was given to counsel for the petitioner, counsel for the company and appellants, and the court on the morning the petition was listed for hearing. It is not intended to be an *inter partes* document requiring a response or defence by the appellants. This ground for appeal must be rejected as being without merit.

56. The third argument is that there is a lack of procedural safeguards within the Companies Acts 2014 "*to protect their interests*". This is unstateable as a ground of appeal. The court is required to apply the provisions of the Companies Act 2014. The appellants argue in their written submissions that once appointed, an official liquidator may act in such a way as to fail to protect their rights, but that is not something that any court could presume in advance and certainly cannot form the basis of an appeal against the order to wind up the company in the first place.

57. Some of the issues raised challenge the motive of the petitioner in petitioning to wind up the company. It is to be noted that the company and the appellants acknowledge that the sum sought is due and owing. The argument presupposes that the proceedings are not to recover this (now) undisputed debt but are for an improper ulterior purpose. Given that the petitioner is a rates collector for Dublin City Council, this allegation is somewhat surprising and requires particularly close scrutiny.

58. The petitioner is a rate collector appointed by Dublin City Council to collect local authority rates falling due from the occupiers of rateable premises situate in Dublin City. The company carried on the business of supplying baking supplies, baked goods and similar products from retail premises at 3-4 Bachelors Walk and 26 Bachelors Walk, Dublin 1, as well as a warehouse property and retail store at Clane Business Park, Clane, County Kildare. The company failed to pay the local authority rates in respect of the two Dublin properties for several years up to 2017. The petitioner issued summary proceedings before the District Court in respect of the company's indebtedness on foot of statutory demands for the payment of the local authority rates. On the 2nd May, 2015, the petitioner was granted a decree/warrant for execution by a judge of the District Court for the Dublin Metropolitan District in respect of local authority rates due for earlier years in respect of the premises amounting to €13,878.30, inclusive of costs. The company applied to set aside the decree and that application was struck out on the 22nd November, 2016. The petitioner issued two further sets of summary proceedings in respect of additional local authority rates on the two Bachelors Walk premises. Those proceedings were listed for hearing on the 22nd November, 2016 when the court granted decrees/warrants for execution against the company in respect of one summons in the sum of €27,020.37 together with costs in the amount of €470.10 and in respect of the second summons in the amount of €15,488 together with costs in the amount of €470.10. Thus, the petitioner was a judgment creditor of the company on the 4th May, 2017 when he issued his statutory demand pursuant to s.570 of the Act of 2014 and he was a judgment creditor of the company when the petition was issued on the 29th June, 2017. On the 27th June, 2017 (two days before the presentation of the petition) an application to set aside the decrees of the 22nd November, 2016 was dismissed.

59. Despite this history of seeking to recover the arrears of rates due, and which the appellants and their counsel accepted were due and owing, the appellants argued that the petition was presented for an improper ulterior motive. When questioned by this court, the appellants identified the alleged ulterior motive as preventing the company from continuing with cases involving the petitioner and the company. As those cases consisted of the company seeking to resist the payment of the debt it admits was due and owing in respect of the rates, and in respect of which the petitioner was a judgment creditor, this is completely unsustainable. The trial judge was entirely correct to say that it was very readily and simply distinguishable from the case of *Re Genport Ltd* [1996] IEHC 34. The trial judge correctly held that there was merely a bare assertion that the rates collector was pursuing an ulterior motive in seeking an order winding up the company in circumstances where it had failed to discharge its rates for a very considerable period. The trial judge pointed out that no attempt had been made to substantiate the claim and that no proposed ulterior motive had been identified to him.

60. At Issue 9, the appellants alleged that the ulterior motive was to forestall the appellants from initiating proceedings against him in relation to the alleged unlawful acts of the petitioner in relation to the Sheriff seeking to execute a warrant on the 16th December, 2016.

61. This is an entirely fresh allegation which was not advanced in the High Court. It is not possible to advance that argument now on

the basis of the principles in *Lough Swilly Shellfish Growers*. There was no evidence whatsoever advanced before the High Court that such proceedings had been initiated, or threatened, or that the petitioner was aware of the fact that such proceedings were being contemplated. Furthermore, any such proceedings ought properly to be directed against the Sheriff who was executing the warrant in question, rather than the petitioner and accordingly this argument, even if admissible, is unsustainable.

62. It was alleged that the petitioner "*did work in concert with the landlord of the Clane premises and the landlord of the 26 Bachelors Walk premises*". There was not a shred of evidence before the High Court to substantiate this bare allegation. It was not advanced by the appellants in their own affidavits nor was it argued by their counsel before the High Court. It simply cannot properly be raised in this court at this stage of the proceedings.

63. The appellants make unsubstantiated allegations of misrepresentation and fraudulent misrepresentation. In relation to misrepresentation, they allege that facts were misrepresented and material evidence omitted or kept from the court. The misrepresentation identified was that the liquidation was not about the payment of a debt but was based upon the ulterior motive of two parties, the petitioner and the landlord of the premises in Clane, County Kildare. I have already confirmed my agreement with the trial judge's conclusion that the allegation that the petition was pursued for an ulterior motive was no more than a bare assertion without any substantiating evidence to support it. It therefore follows that any claim that there was a misrepresentation by failing to disclose such alleged ulterior motive likewise is unsustainable.

64. In relation to the alleged fraudulent misrepresentation, the appellants say that the petitioner failed to disclose to the court in his *ex parte* application on the 29th June, 2017 that the service of the 21-day notice was unlawful and that there were serious irregularities surrounding it. The affidavit of service of Mr. Byrne was before the court on the 29th June, 2017. Insofar as the appellants' case is that at the hearing of the *ex parte* application to appoint a provisional liquidator, the court ought to have been informed of the fact that service was effected by means of unscrewing the letterbox of the registered office of the company, I do not agree. For the reasons already set out above, I do not accept that the company was entitled to close its letterbox in this fashion and the petitioner was entitled to serve the 21-day notice in the manner in which he did. Any question about the legality of the acts of the summons server in so acting, is not a matter which can detract from the fact that the notice pursuant to s. 570 of the Act of 2014 had been served. I reject this ground of appeal.

65. Finally, it is said that the petitioner was not entitled to act upon the warrants of the District Court or the 6-day notices as proof of the debts which grounded the petition herein. The appellants claimed that there was no jurisdiction in the District Court to hear the matters which it dealt with in May 2015, November 2016 and June 2017 on a variety of grounds or to issue the warrants or the 6-day notices. They argue that the warrant of 2015 had expired in November 2016. They submit that all other courts thereafter dealing with the case did not have jurisdiction either, and that all orders issued pertaining to this matter and any other related matters are void and voidable. They submitted that the presentation of a petition to wind up the company was *ultra vires* the petitioner.

66. These are all entirely new matters which were not raised in the High Court and which may not be raised now on appeal. They are points which, if they had any merit, it was open to the company and appellants to raise on any number of occasions in the District Court, and at least twice in the High Court (30th June, 2017 and 24th July, 2017). Furthermore, under the principles in *Henderson v Henderson* [1843] 3 Hare 100, in view of the many occasions when the matter was listed in the District Court, at no point was the jurisdiction of the District Court ever raised and it is not now open to the appellants, belatedly, to raise any point on the alleged want of jurisdiction of the District Court. Finally, given that the point raised is one which goes to the jurisdiction of the District Court, the appropriate course for the company would have been either to have sought a case stated or to have brought a judicial review.

67. More fundamentally, these points all go to the issue of whether the petitioner is a creditor of the company. The appellant accepted on affidavit and in submissions to the High Court that he is and admitted that the debt is due and owing. It follows that these arguments are *nihil ad rem*. That being so, I see no want of *vires* in a rates collector collecting rates due and admitted to be due, by all lawful means, which includes petitioning for the winding up of a company who has failed to pay rates since 2012.

68. While the appellants placed considerable emphasis on the fact that before this court they were litigants in person, it is to be borne in mind that in the High Court this was not so, and that they had the benefit of legal advice from both solicitor and junior counsel. In those circumstances it is simply not open to this court, given the principles enunciated by O'Donnell J. in *Lough Swilly Shellfish Growers* cited above to consider these arguments. That being so, the status of the petitioner for the purposes of these proceedings is as a judgement creditor and as such his entitlement to bring and pursue the petition is unimpeachable.

Conclusion

69. For these reasons I hold that the appellants have not raised any ground upon which the order of the High Court should be reversed and, accordingly, I refuse the appeal and affirm the order of the High Court.