**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 70

**No. 2015/15**

**Peart J.**
**Hogan J.**
**Mahon J.**

**IN THE MATTER OF EDEN FURTHER EDUCATION LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012 AND IN THE MATTER OF ORDER 74 RULE 71 OF THE RULES OF THE SUPERIOR COURTS AND SECTION 277(2) OF THE COMPANIES ACT 1964**

**BETWEEN/**

**KEITUMETSE MOTSUMI**

**PLAINTIFF/APPELLANT**

**AND**

**ANTHONY J. FITZPATRICK (IN HIS CAPACITY AS LIQUIDATOR OF EDEN FURTHER EDUCATION LIMITED IN VOLUNTARY LIQUIDATION)**

**FIRST RESPONDENT/APPELLANT**

**AND**

**FAKIR HOSSAIN**

**SECOND RESPONDENT/APPELLANT**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of March 2015**

1. This is an appeal from the judgment of Donnelly J. in the High Court delivered on 12th of December 2014. The appeal itself concerns the interpretation of two specific sub-rules contained in Ord. 74 of the Rules of the Superior Courts 1986 (as inserted by the Rules of the Superior Courts (Winding-up of Companies) 2012 (S.I. No. 121 of 2012)) concerning the appointment of a liquidator at a meeting of creditors in a voluntary winding-up. As will be seen, this exercise also necessarily involves an analysis of the relevant provisions of ss. 266 and 267 of the Companies Act 1963 ("the 1963 Act") and an examination of how these provisions inter-act with the relevant provisions of Ord. 74.

2. It is first necessary to set out the relevant provisions of ss. 266 and 267 of the 1963 Act.

**Sections 266 and 267 of the 1963 Act**

3. Section 266(1) provides:

> "(1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors at least 10 days before the date of the said meeting of the company."

4. Section 266(2) provides:

> "The company shall cause notice of the meeting of the creditors to be advertised once at least in 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situate."

5. Section 267(2) provides:

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

6. Section 267(3)(as inserted by s. 47 of the Company Law Enforcement Act 2001) provides:

> "If at the meeting of creditors mentioned in s. 266(1) a resolution as to the creditor's nominee as liquidator is proposed, it shall be deemed to be passed when a majority, in value, of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution."

7. Prior to the change effected by s. 267(3) of the 1963 Act (as amended), Ord. 74, r. 62 required that the creditors' resolution be passed by a majority in both number and value. Section 267(3) now requires that only a simple majority in value of the creditors is required. It will be noted, however, that s. 267(3) refers to creditors *simpliciter* and no distinction is drawn between creditors with liquidated and unliquidated claims.

**Order 74, rr. 68 and 71**

8. It is next necessary to set out the relevant provisions of Order 74. Ord. 74 deals with the winding up of companies generally. Part X of Ord. 74 deals with general meetings of creditors and contributories in a winding up by the Court and in a creditors' voluntary winding up. Ord. 74, r. 68 provides as follows:

> "A creditor shall not vote in respect of any unliquidated or contingent debt or any debt the value of which is not ascertained, nor shall a creditor vote on any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him therein of every person who is liable thereon antecedently to the company and against whom an adjudication ordering bankruptcy has not been made, as security in his hands and to estimate the value thereof, and for the purposes of voting but not for the purpose of dividend, to deduct it from his proof."

9. Ord. 74, r. 71 deals with the admission and rejection of proofs for the purposes of voting at a creditors' voluntary winding up meeting. Ord. 74, r.71 provides that:

> "The Chairman should have power to admit or reject a proof for the purposes of voting but his decision shall be subject to appeal to the Court. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditors to vote subject to the vote being declared invalid in the event of the objection being sustained".

**The background to this appeal**

10. We can now turn to consider the background facts to this appeal. The applicant, Ms. Motusmi, is a Botswanian national who enrolled as a student in an undergraduate business administration course which was to be provided by Eden Further Education Ltd. ("Eden"). The course in question actually started in November 2013, although it had been scheduled to start in September 2013. Ms. Motsumi had paid Eden the sum of €2,575 by way of tuition fees in respect of 52 weeks of tuition. Unfortunately for Ms. Motsumi, Eden ceased to trade on 1st May 2014, with the result that there was still some 26 weeks of tuition outstanding, the benefit of which she was deprived.

11. Regrettably, Ms. Motsumi was by no means the only student in that situation. Nearly all of them were non-EU international students who had paid significant sums to Eden for tuition purposes. There were, however, some institutions who, to their credit, were willing to provide voluntary assistance to these students in their desperate plight. A non-profit organisation, the Irish Council for International Students ("ICIS") - which is a representative and advocacy body for international students – became actively involved in tending to the needs of these students following the abrupt termination of Eden's affairs.

12. An officer of ICIS, Mr. Colin Tannam, availed of specialist advice given under a voluntary assistance programme operated by the Bar Council as to the manner in which a large number of international students could be represented at the creditor's meeting. As a result of this, Mr. Tannam agreed to attend the creditor's meeting on foot of the proxy forms signed by some 216 students.

**The issues raised at the creditors' meeting**

13. The creditor's meeting itself was held pursuant to the provisions of s. 266 of the 1963 Act on 23rd May 2014 at a hotel premises in Lucan, Dublin 20. There is, in fact, little disagreement as to what happened at the meeting. The meeting was chaired by the second respondent, Mr. Fakir Hossain, who was a director of Eden. The other director, Mr. Hossain's wife, did not attend the meeting.

14. The meeting was told that Eden had resolved that it should be wound up as a creditors' voluntary liquidation. It was further proposed that the second respondent, Mr. Fitzpatrick, be appointed as liquidator and that the liquidator should be authorised to make payment of his fees on account pending the conclusion of the winding up. Eden's statement of affairs was presented to the meeting.

15. There then followed some four hours of questioning. In addition to Mr. Tannam, a Mr. Damien Hand represented the Dublin City Council in respect of its claim for rates and the Revenue Commissioners were represented by a Mr. Thomas McManus. As Donnelly J. noted in her judgment, there were two major issues before the meeting. First, which parties were entitled to vote as creditors? Second, what was the status of the various creditors for which Mr. Hussain held proxies?

16. So far as this latter category was concerned, this included a debt of €34,000 due to the financial controller, Mr. Alsi Shariz, in respect of commission payments payable on the recruitment of Middle Eastern students. (There is a dispute about the correct name for Mr. Shariz. Since nothing turns on this and to avoid confusion, I intend to describe him as Mr. Shariz). A further sum of €32,000 was due to a Mr. Cedric Gombwa in respect of students he had recruited from Malawi.

17. A large sum (€322,750) was also said to be have been due to Chillout Ventures Ltd., a company with common directors as Eden. Mr. Hussain was the secretary of both companies. The debt claimed by Chillout Ventures related to accommodation services provided by that company, along with the monetary sum which was triggered by the operation of the penalty clause in the case of the premature termination of the contract.

18. Mr. Hossain himself also claimed to be a creditor by reason of a director's loan of some €71,600 which he provided to Eden. Another company, Mind Leaders Ltd., was treated as a creditor in the sum of €52,850.

19. The claims of three other creditors, namely, the Revenue Commissioners. Dublin City Council and those of the students were, to some extent or another, in dispute, both at the meeting and in these proceedings. These claims will be examined presently in more detail.

**The claims of the other creditors**

20. The Chairman allowed all of the creditor claims for which he held proxies (namely, Messrs. Hossain, Gombwa and Shariz, along with two other companies, Mind Leaders and Chillout Ventures). That figure came to €639,281 in value and those votes were all cast in favour of the appointment of Mr. Anthony J. Fitzpatrick as liquidator.

21. All the other creditors voted in favour of Mr. Declan de Lacey as liquidator, with the total votes amounting to €250,869 in value. The chairman then declared that Mr. Fitzpatrick was elected liquidator. It is important to state that the chairman also disallowed student claims in the sum of €337,205 and a claim of €98,846 claimed by Dublin City Council in respect of rates.

**The High Court judgment**

22. The present application was commenced by notice of motion dated 6th June 2014. The principal relief claimed was an order pursuant to Ord. 74, r. 71 allowing the appeal of the applicant against the decision of the chairman of the creditors' meeting to disallow certain proofs and to admit certain proofs.

23. Following a three day hearing in November 2014, Donnelly J. delivered a reserved judgment on 12th December 2014 in which she held that the chairman had wrongly disallowed the significant parts of the claim of both the students and the Dublin City Council. Had these votes been properly allowed (subject to a minor adjustment of the student claims), then the figure for Mr. de Lacey would have

come to €686,920, so that he should have been properly elected as liquidator if these votes had been properly allowed at the meeting.

24. Donnelly J. accordingly allowed the appeal and directed that Mr. Fitzpatrick be replaced as liquidator by Mr. de Lacey. Both Mr. Hussain and Mr. Fitzpatrick have now appealed to this Court against that decision.

**The voting rights of the creditors**

25. Perhaps the first question which arises is the entitlement of a creditor to vote. I propose at this juncture to deal with the issues which arise under Ord. 74, r. 68 because this is the manner in which the issue was principally dealt with by Donnelly J. in the High Court. As we shall presently see, however, there are aspects of r. 68 which cannot be easily aligned with the provisions of s. 267(3) of the 1963 Act (as amended) and it is these latter provisions which will later call for separate consideration.

26. Ord. 74, r. 68 provides that a creditor shall not vote in respect "of any unliquidated or contingent debt or any debt the value of which is not ascertained." It is clear that the claims of the two of the classes of creditors who wished to vote for Mr.de Lacy – namely, the Revenue Commissioners and Dublin City Council – were all in respect of liquidated claims. But was the value of these claims "ascertained" in the sense in which the term is used by Ord. 74, r. 68?

27. The context of Ord. 74, r. 68 is of some importance. It must be recalled that those creditors voting for a liquidator at such a meeting will typically be unsecured creditors, since as rr. 68 and 69 make clear, the holder of a security who votes for a liquidator will generally be deemed to have forfeited the protection of that security. Not surprisingly, therefore, the holders of a security will generally stand back from this aspect of the liquidation process, preferring, therefore, to keep their security intact.

28. The context of r. 68, therefore, is to afford the unsecured creditors the right to choose the liquidator of their choice based on the value of their claim. At this stage of the liquidation, the status and extent of such claims is likely to be unclear and, in some cases at least, doubtful. The reference to "ascertained" must, therefore, be understood in this context. It cannot mean "ascertained" in the sense of judicially ascertained, since it would be quite unrealistic to expect the creditor to prove the debt at a creditor's meeting in the same manner as if he or she were doing so in a court of law. This is particularly so given that such meetings are often convened at short notice and in circumstances which may well take the creditor somewhat unawares.

29. The rule of interpretation as to context, namely, the principle of *noscitur a sociis* ("known by its companions") reflects the fact that words do not necessarily have fixed and unalterable meanings, but rather that they "derive colour from those which surround them": *Bourne v. Norwich Crematorium* [1967] 1 W.L.R. 691, 696, *per* Stamp J. It follows, therefore, that the requirement that liquidated debts must be ascertained must be understood against this general context. The reference to "ascertained" must accordingly be understood as a reference to a specific sum that is capable of ready assessment and calculation, often by reference to documents such as the statement of affairs prepared by the company or unpaid invoices, payment records, tax assessments and other statutory demands to which the creditor can readily point.

30. Indeed, the statement of affairs may often be regarded as a useful starting point for this exercise, given that s. 266(3) of the 1963 Act itself provides that for the purposes of the meeting, the directors of the company shall:

> "(a) cause a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of the creditors to be held as aforesaid…."

31. The very fact that a particular debt is itemised in the statement of affairs amounts, therefore, to an acknowledgement – at least for voting purposes – that this sum is in fact due. This is not to suggest that the chairman is necessarily bound by this figure, as, for example, the creditor may be able to supply documentary material which would tend to show that the sum is greater than that estimated by the directors in the statement of affairs. Nevertheless, the very fact that a particular debt has been included in the statement of affairs must, in view of the language of s. 266(3) of the 1963 Act, be regarded as a strong indicator that such a debt has been "ascertained" for the purposes of Ord. 74, r. 68.

32. Of course, the fact that the particular sum may (or may not) be deemed to be admissible for voting purposes as an ascertained liquidated debt could not be dispositive of the ultimate question as to whether that particular sum is actually due to the creditor: all that this means is simply that by reference to the documentary proofs which are have either been supplied by the creditor or are otherwise available to the chairman at the meeting such a sum would appear, on the balance on probabilities, to be due by the company to the creditor: see generally *Re Centrum Products Ltd.* [2009] IEHC 572, *per* Laffoy J.

33. It is true that, as Herbert J. observed in *Re Ladaney Ltd.* (in voluntary liquidation) [2014] IEHC 438, the term "ascertained" normally imports the meaning of either "known" or "made certain", citing *Sidebottom v. Sidebottom* L.R. 5 P & D 365 for this purpose. But there is no fixed rule to the effect and any, accordingly, the suggestion that "ascertained" as used by Ord. 74, r.68 must mean "known" or "made certain" as might happen in the course of judicial proceedings is negatived by the context, since this would not only be unworkable, but would also be at odds with the underlying objectives of the rules governing the voting procedures. Inasmuch as Herbert J. may have suggested the contrary in *Ladaney*, I note that in the judgment in that case which has just been delivered this morning by Finlay Geoghegan J., this Court has allowed the appeal from that decision.

34. This conclusion is not altered by reason of the existence of an appeal to the High Court. The purpose of such appeal is to ensure that the votes of the creditors with readily ascertainable claims should properly be reckoned for voting purposes, even if for this purpose "the court is required to make some sort of determination on the substance of the dispute": see *Re Jim Murnane Ltd.* [2009] IEHC 412, [2009] 3 I.R. 368, 279, *per* Laffoy J.

35. Against this background, therefore, we can now proceed to examine the individual disputed claims namely, those of the Revenue Commissioners, Dublin City Council and the students.

**The claims of the Revenue Commissioners**

36. So far as the Revenue's claim was concerned, the debt actually allowed by the chairman was €60,166, which was the sum stated to be owed to the Revenue in the statement of affairs. Shortly after the meeting the Revenue sent a further demand by way of assessment in the sum of €257,931. This sum related to the treatment for tax purposes of certain consultant lecturers. Revenue argued that they should be treated as employees are therefore subject to PAYE and PRSI. This was an issue which had been in dispute since the latter part of 2013 and was to be the subject of an audit. The liquidator duly appealed that assessment. Donnelly J. noted that the assessment had not been made by the date of the meeting, adding:

> "…without further details as to the terms and conditions of the lecturers' working commitments, it is impossible for the

> Court to make a determination as whether the directors should have been aware that the Revenue would make the assessments that they did. Thus, it seems to me that there was also some real dispute as to a particular tax treatment of so-called consultant lecturers. I am not satisfied that...the Court can attribute any of the subsequent debt raised by the Revenue for the purposes of voting."

37. I agree with Donnelly J. that inasmuch as the statement of affairs prepared for the meeting the company had acknowledged a debt of some €60,166 to the Revenue Commissioners in respect of unpaid income tax and pay-related social insurance contributions, this sum was clearly "ascertained" in the sense already described.

38. The other claims advanced by the Revenue Commissioners did fall not in this category, since the estimate of further sums due (totalling €257,938 in respect of income tax and PRSI) was by way of an estimated assessment which, critically, *post-dated* the creditor's meeting and the appointment of the liquidator. The very fact, therefore, that this additional sum was only quantified by the Revenue *after the date of the meeting* meant that this additional – and admittedly disputed - sum could not properly have been allowed by the chairman for voting purposes. There was, accordingly, no "proof" of this additional sum available at the date of the meeting in the sense understood by Ord. 74, r. 71.

**The claims of Dublin City Council**

39. Turning next to the claim for rates by Dublin City Council, the company's statement of affairs produced at the meeting indicated that the company was in debt to the Council in the sum of €122,097 in respect of property occupied by it at 6-7 Burgh Quay, Dublin 2. This, in fact, was sum the amount which was allowed by the chairman for voting purposes. As it happens, the Council had raised a rates bill in February 2014 in the sum of €220,943 which was payable in two moieties, with the second payable on 1st July 2014.

40. Mr. Hand was appointed proxy by the Council for the purpose of attending at the creditors' meeting. At that meeting the chairman had stated that the rates liability had been assumed by a third party. Mr. Hand confirmed his instructions and informed the chairman that the council maintained its claim. As far it was concerned, no change of occupier had been furnished to the Council. These rates were accordingly still due and payable in accordance with the valuation list by a reference to the occupier recorded there. Mr. Hand asked the chairman to admit the claim of €220,943 under Ord.74 of the Rules of Superior Courts, but the chairman refused.

41. So far as the liquidator was concerned, he maintained that the lease had been surrendered by Eden to the landlord, the Irish Aviation Authority, on 20th May 2014. The surrender of the lease was noted and accepted by the IAA by email dated 29th May 2014. The liquidator further drew the High Court's attention to the fact that by letter dated 13th June 2014 the Council had accepted a figure of €130,634 as the figure for rates then due in the light of that surrender of the lease by the liquidator. In her judgment, Donnelly J. noted that while the chairman had claimed as of the date of the meeting that the lease had been surrendered, she observed "that the surrender of the lease had not been accepted at the date of the meeting". Donnelly J. concluded:

> "The rate was due as from the date it was made, that is 7th February 2014….The rate was due and owing at the date of the meeting. In any event, the surrender had not been agreed for the date of the meeting. It is also the case that an agreement by a third party to take over a liability cannot detract from an occupier's liability. The County Council can agree if it wishes to forego the matter of rates, particularly where it is agreeing a preferential rate. Those kinds of agreements are made for practical purposes in the course of liquidations. I am quite satisfied that the date of the creditors' meeting the full rated due of the debt was due and owing to Dublin City Council. That debt was an ascertained debt. For all these reasons, that debt should have been counted for voting purposes."

42. As already noted, a bill for rates was raised by Dublin City Council in February 2014 in the sum of €220,943 in respect of Eden's occupation of the premises at Burgh Quay. The statement of affairs acknowledged that a sum of €122,097 was payable and that was the amount which was allowed by the Chairman. For his part, the liquidator maintained that the sum which should properly have allowed was €130,634 which was the sum which the Council agreed was due following its acceptance in June 2014 that the lease had been surrendered by the liquidator.

43. It is, however, clear that, irrespective of any subsequent surrender of the lease or the fact that the occupier ceased to occupy the hereditament during the course of the financial year, the occupier is liable to pay the rate for that year once it has made. Section 29(1) of the Local Government Act 1946 (as inserted by s. 45 of the Local Government Act 1994) accordingly provides:

> "29. (1) A rating authority shall immediately prior to, or as soon as may be after, the beginning of each local financial year, make one rate for the whole financial year (upon the hereditaments liable for rates according to the valuation of each hereditament in the latest valuation list transmitted by the Commissioner of Valuation at the time of adoption of estimates of expenditure) and shall collect such rate in equal moieties, one such moiety for each half year of such local financial year."

44. Accordingly, the general principle remains that, as explained by Lavery J. in *Carlisle Trust Ltd. v. Dublin Corporation* [1965] I.R. 465, 468:

> "A rate is struck for the service of a particular year and remains payable irrespective of the changes to the hereditament during that year, but the account is closed on both sides at the end of the rating year."

45. In the present case, therefore, this means that the liability to pay the rates remained unaffected by any subsequent developments in the course of the financial year. There is earlier authority – in the context of very similar statutory language - to the effect that if an occupier ceases occupation within the first half of the year, he is nonetheless liable for the whole rate, for while the rate is payable in moieties, the rate is not divisible into two halves: see *McDermott v. McMorrow* (1904) 38 ILTR 200, 201, *per* Palles C.B.

46. It followed, therefore, that once the company was in rateable occupation for even part of the rating year, it was nonetheless liable to pay the entire bill for rates for that financial year. Even though the lease was surrendered during the course of the first half of the year, this was irrelevant to its ultimate liability to the Council.

47. As a consequence, therefore, as the entire sum for rates (€220,943) had been levied and determined in February 2014, this was, accordingly, an "ascertained" sum. It ought to have been accordingly allowed in full by the Chairman for voting purposes.

**The claims of the students**

48. The company's statement of affairs indicated that the sum due to student creditors was €57,933. This sum represented the claims of students who had paid in advance for the course but who had yet to travel to Ireland.

49. The 216 students who were represented by Mr. Tannam were principally in a different category, as a significant majority of these were students such as Ms. Motsumi who had paid their fees for a full course, but which course was now interrupted by the fact that Eden had just gone into liquidation. There were 190 students in that situation. The other 26 students were students who had paid for courses in advance, but these courses had yet to commence at the date of the meeting.

50. The value placed by Mr. Tannam on these claims at the meeting was €337,205. It subsequently transpired that two of these claims related to accommodation and not to tuition (€7,250). Another claim for €6,800 was withdrawn because the student was dissatisfied with the quality of the course and did not wish to continue at Eden, even if the tuition had been provided. This reduced the student claims to €326,358.

51. These claims were, however, disallowed by the chairman on the basis that the company had a no refunds policy. There was obviously no basis for the disallowance of the claims on that particular basis. The no refunds policy was plainly intended to apply only where the student in question was dissatisfied with the course. It could not apply – and the liquidator has belatedly accepted this – where the course was simply not provided or, for that matter, not properly completed by the company.

52. Even if the policy purported to exclude a refund even in the case of a fundamental breach of contract, such a term would be plainly void as contrary to s. 39(b) and s. 40(1) of the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act"). Section 39(b) of the 1980 Act provides that it is an implied term of every consumer contract of this kind that the provider will supply the service with due skill and diligence. Section 40(1) of the 1980 Act further provides that while such an implied term can be overridden by an express term to the contrary, the express term must be both "fair and reasonable" and it must also have been specifically brought to the attention of the consumer. Such an exclusion of liability would be manifestly unfair to the consumer because it would effectively mean that the students could be required to pay (what was doubtless for them) large sums of money with no recourse at all in the event that the course was not provided or properly completed by the company.

53. The real question, however, is how the claim of the students should be characterised. It must be recalled that so far as 190 of the students are concerned, the course had been interrupted and they had not received their full contractual entitlements. In these circumstances, the contract had been simply partly performed, so that the students' action was one for damages for breach of contract and not for debt or for some fixed sum.

54. The distinction between liquidated and unliquidated claims was exhaustively analysed by Peart J. in *Motor Insurers Bureau of Ireland v. Hanley* [2006] IEHC 405, [2007] 2 I.R. 591. In that case Peart J. approved ([2007] 2 I.R. 591, 601) the definition of liquidated demand contained in the following extract from Bullen and Leake *on Precedents of Pleading* (8th. ed.,1924):

> "The words 'debt or liquidated demand' in Ord. III, r. 6 are not restricted to cases in which a fixed amount was expressly agreed to by the parties when they entered into the contract; they includes cases in which the plaintiff is entitled to be paid according to prices current in the trade or to the scale of charges recognised in his profession……Whenever the amount which the plaintiff may recover depends upon all the circumstances of the case and on the conduct of the parties, so that it can only be fixed by a judge and jury, the damages are unliquidated and the case is not within the rule."

55. In the present case the amount of the claims of the 190 students whose studies were interrupted will depend on the circumstances of the case and the conduct of the parties. These are claims for damages for breach of contract, the entitlement to which can ultimately be determined only by a judge alone. In these circumstances, based on the test articulated with approval by Peart J. in *Hanley*, these claims cannot properly be regarded as liquidated claims.

56. The position of the other 26 students who had paid for courses in advance, but whose courses had not even started at the date of the liquidation are in a different category. In that situation there had been a total failure of consideration and insofar as their claim is for a refund of the fees paid, that claim must be regarded as a liquidated claim.

**Unliquidated claims and s. 267(3) of the 1963 Act**

57. This brings us to the most difficult aspect of this appeal. Can the 190 students with an unliquidated claim for damages against the company be regarded as "creditors" for this purpose? This issue arises because while Ord. 74, r. 68 purports to exclude creditors with unliquidated claims from voting at a meeting of creditors, s. 267(3) of the 1963 Act makes no such distinction.

58. While there are features of the drafting of both s. 266 and s. 267 which are not, perhaps, the most satisfactory or the easiest to follow, the general tenor of the statutory scheme is as follows. Section 266(1) of the 1963 Act envisages that there will be a meeting of creditors following due notice having been given to creditors and s. 266(2) provides for the advertising of such a meeting in daily newspapers. This meeting must be held either on the same day or immediately after the meeting of the company resolving that the company should be wound-up.

59. Section 267(1) of the 1963 Act envisages that a liquidator may be nominated by either the company or the creditors at their respective meetings. If different persons are nominated as liquidator by both the company and the creditors, then the person nominated by the creditors shall be the liquidator. If no person is nominated by the creditors, then the person nominated by the company shall be liquidator.

60. Section 267(2) of the 1963 Act then provides that where different persons are nominated as liquidator then an application may be made to the Court for an order directing who the liquidator shall be. The appeal procedure regulated by Ord. 74, r. 68 must be regarded as giving effect to the right to apply to court envisaged by s. 267(2).

61. It is, of course, the meeting of the creditors which directly concerns us in this appeal. It is important to note that s. 267(3) of the 1963 Act does not distinguish between creditors with liquidated and unliquidated claims, as it refers simply to creditors. While there was no challenge in these proceedings to the vires of Ord. 74, r. 68, the court is nonetheless faced with a direct conflict between the provisions of s. 267(3)(which simply refers to creditors by value) and r. 68 which confines the voting entitlement of creditors at a creditors' meeting to those with liquidated claims the value of which has been ascertained.

62. Admittedly, the 1963 Act does not define the term "creditor". But it is clear that s. 267(3) uses the term "creditor" in the same sense as that term is employed in s. 266(1) with regard to a meeting of creditors. A creditor with an unliquidated claim or a claim which is otherwise unascertained would clearly be entitled to attend such a meeting. It is clear from the term of s. 283(1) of the 1963 Act that all such creditors are entitled to prove their debt in a winding-up. There is, moreover, a strong presumption that a word has the same meaning throughout a particular enactment: see, e.g., *BUPA (Irl.) Ltd. v. Minister for Health and Children* [2008] IESC 42, [2012] 1 I.R. 442,447 *per* Murray C.J.

63. In these circumstances, I find myself obliged to conclude that the term "creditor" in s. 267(3) includes creditors with unliquidated claims. In these circumstances, inasmuch as there is an apparent conflict between the language of s. 267(3) and Ord. 74, r. 68, the provisions of the statute must necessarily prevail.

64. That, however, is not the end of the matter because s. 267(3) of the 1963 Act nevertheless envisages that the liquidator shall be the person nominated by the majority "in value" of the creditors voting on the resolution. This Court must, where at all possible, seek to ascribe a meaning to this sub-section so that it can work effectively. Yet the statutory scheme did not provide for any mechanism whereby a value can be fairly or objectively ascribed *at this juncture* to the unliquidated claims of creditors. By contrast, for example, in the context of the admissibility of proof against the company in a winding up s. 283(1) requires that a "just estimate" be made *at that point in the liquidation* of all actual or contingent claims against the company, including unliquidated claims.

65. In the absence of any such mechanism – such as that contained in s. 283(1) of the 1963 Act – whereby the value of unliquidated claims could be assessed or estimated, it will be all but impossible for the person chairing the meeting of creditors to ascribe a "value" to many unliquidated claims, save, perhaps, where the company itself has already made an estimate of the claim in the statement of affairs or where there are other special circumstances which lend themselves to the ready assessment at this preliminary stage of the value of the claims in some objective fashion.

66. In the present case there was, unfortunately, no method whereby the Chairman could have ascribed a "value" to the claims of the 190 students with unliquidated claims. In these circumstances, the Chairman of the meeting was correct in disallowing these claims for voting purposes.

**Conclusions**

67. What, then, is the overall conclusion to be reached having surveyed the individual disputed claims? I have determined the Chairman was wrong in refusing to admit the entirety of the Council's rates claim, so that an additional sum of €98,846 ought to have been allowed. Critically, however, I have held that the claims of the 190 students were properly disallowed for voting purposes by the Chairman at the creditors' meeting. I have reached this conclusion not because the claims were unliquidated claims, but rather because irrespective of that status, there was no mechanism whereby the "value" of these claims within the meaning of s. 267(3) of the 1963 Act could have been objectively ascertained in these circumstances and for this purpose.

68. This latter conclusion is of some importance, because it is clear that unless the claims of the 190 students should have been accepted by the Chairman of the creditor's meeting for voting purposes, the majority of votes in value at the meeting would have been in favour of Mr. Fitzpatrick. It follows, therefore, that in the light of that conclusion that these votes were properly excluded, Mr. Fitzpatrick should be deemed to have had the majority of votes in value at the meeting of the creditors of the company.

69. In these circumstances, I would accordingly allow the appeal against the order of Donnelly J. and set aside her order. I would instead declare that at the meeting of the creditors of the company held on 23rd May 2014 the majority in value of the creditors voting at that meeting voted for the appointment of Mr. Anthony J. Fitzpatrick as liquidator. It follows, accordingly, that Mr. Fitzpatrick should be deemed to have been duly elected as liquidator for that purpose in accordance with s. 267(3) of the 1963 Act (as amended).

Peart J.: I agree with the judgment of Hogan J.

Mahon J.: I also agree with that judgment.