THE HIGH COURT

[2017 No. 222 COS]

IN THE MATTER OF HARLEY MECHANICAL SERVICES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Ms. Justice Baker delivered on the 20th day of February, 2018

1. This judgment concerns the treatment of tax liabilities incurred by a company in the course of the examinership process and what consequence should flow from a breach of an undertaking that current tax returns will be filed and made.

2. By motion issued on 1st December, 2017 application was made on behalf of the liquidator of Harley Mechanical Services Limited ("the Company") for an order setting aside that part of an order made by me on 5th September, 2015 that the amount of tax due pursuant to the P30 for the Company for July 2017 be deemed to be a cost in the examinership.

3. Following the presentation of a petition on 28th June, 2017 by the Company pursuant to Part 10 of the Companies Act 2014 ("the Act"), Aengus Burns was appointed examiner of the Company on an interim basis. At the hearing of the petition on 11th July, 2017 Mr. Burns was appointed examiner.

4. At the scheduled hearing on 5th September, 2017 and because the examiner was unable to obtain funding to propose a scheme of arrangement, the protection of the court was lifted and an order was made pursuant to s. 535(2) of the Act that the Company be wound up and Mr Burns appointed liquidator. Later that day after 4pm counsel for Revenue appeared and informed me that the Company had failed to file and pay the P30 return for the period 1st July, 2017 to 31st July, 2017 due to be filed and paid by 23rd August, 2017 and in respect to which an undertaking had been given at the hearing of the petition. Revenue applied for an order that the sum due on foot of that return be treated as a priority expense in the examinership and I made an order accordingly, and gave the liquidator liberty to apply. The motion under consideration in the present judgment is the liquidator's application to set aside that order.

5. The order had the practical effect that the Revenue liabilities were deemed to be expenses in the examinership, and thus given special status, such that the relevant amount will be not available to the liquidator to deal with his costs and expenses of the liquidation and to discharge some of the liabilities to creditors.

6. The order was made *ex parte* and without the knowledge of counsel or solicitor who appeared on behalf of the examiner. The events on 5th September 2017 have given rise to the exchanges of several affidavits and the liquidator and Revenue argue that the other is to be faulted.

7. When the motion was opened by counsel for the liquidator, he first approached the matter by reference to the jurisdiction of the court to set aside an order made *ex parte* and the heightened obligation of good faith on a legal practitioner or litigant making an *ex parte* application. As the matter evolved, it became clear that Revenue did not contest the proposition that the order could be set aside and the matter then proceeded to be determined on its merits.

8. Before I consider the arguments on the merits I will deal with the allegations regarding alleged lack of candour or good faith.

The course of the hearings on 5th September, 2017

9. The transcript of the DAR recording was available for the hearing of the present motion.

10. The Company was wound up and Mr. Burns appointed liquidator in the early afternoon on 5th September, 2017, and at 16:04, as the normal court business was ending, counsel on behalf of Revenue attended and indicated that she had "omitted" to make an application earlier with regard to the treatment of the tax liability. She said she had been unable to contact counsel who appeared on behalf of Mr. Burns, but that the application was being made without any objection from the directors of the Company, or from the largest creditor, both of whom had attended at the earlier hearing. Counsel identified that the filing and payment of the relevant return had not been made, the tax due was circa €107,000, and asked that the unpaid tax be deemed to be an expense or cost in the examinership. In response to my question whether I was competent to make an order of such consequence without hearing Mr. Burns, counsel suggested, and I accepted, that I would make the order and give the liquidator liberty to apply.

11. Both parties argue that the other failed to exercise good faith in the course of the hearing on 5th September, 2017. Mr. Burns argues that Revenue failed to identify to the court that Revenue saw the making of the order as a form of sanction, and that the order made was not one that ought to have been made *ex parte*. Having reviewed the DAR, I consider that insofar as counsel for Revenue might have encouraged me to make the order, she did so having regard to the fact that the application was made during the Long Vacation, and that it was not anticipated that I would be available to hear the matter until the following week at the earliest. I had seisin of the examinership and it would therefore not have been appropriate for counsel to have sought the order before another judge. Even if the matter had been brought on notice, as a matter of high probability the matter would have been returned to my court at a later date.

12. A number of affidavits were filed for the motion and both sides levy criticism against the other. In the case of the liquidator, his counsel argues that Revenue ought to have instructed counsel early in the day, and before the order was made winding up the Company, that the tax return had not been made and argues that the circumstances that gave rise to counsel's returning to court later in the day ought not to have occurred. Criticism is also levied against Revenue for making the application *ex parte* when there was, it was argued, no real urgency in having the matter dealt with on that day.

13. For its part, Revenue levies criticism against Mr. Burns for not noticing that the P30 return had not been made and not returning to the court for directions, including directions for the termination of the examinership process, once he ascertained this position. It was argued that the examiner breached his fundamental duty to report to the court once he knew that the Company had breached its undertaking to pay current taxes as they fell due during the period of examinership.

14. Mr. Burns replies to this criticism by pointing out that he was not in control of the Company or its management as no order had been made pursuant to s. 524(7)(b) of the Act giving him executive powers. The examiner's role, it is argued, is to liaise with the Company, its management and creditors with a view to formulating a scheme of arrangement to ensure the survival of a company. The examiner must perform that function with independence, transparency and professionalism and without any obligation to any one

interested party or group.

15. I do not consider that the examiner failed to act in good faith or displayed a lack of candour. The examiner expressed a belief that up to close of business on 4th September, 2017 he believed the Company could survive as a going concern, and that a cash investment would be made which would have dealt with *inter alia* ongoing Revenue liabilities.

16. Following the appointment of Mr. Burns as interim examiner of the Company, he prepared a report on 7th July, 2017, in which he dealt, *inter alia*, with the position of Revenue and at p. 11 thereof, he stated the following: -

> "My staff have liaised with the Revenue Commissioners further by telephone and they are in the process of formalising their claim.
>
> I instructed the Company to ensure that there is an adequate provision for payment of all taxes relating to the period of examinership."

17. Mr. Burns prepared a report dated 4th September, 2017, in which he outlined, *inter alia*, the position of Revenue: -

> "My staff have liaised with Revenue further by both email and telephone with regard to the Company formalising its pre and post-petition claim.
>
> The Company has filed its pre-petition tax return with the exception of the Company's Corporation Tax return (CT 2017) for 1st January, 2017 to 28th June, 2017…."

18. In his report presented to the court on 5th September 2017, the examiner made it clear that the P30 liability remained unpaid and explained why this had happened, although the examiner mistakenly said that the return had been filed.

19. I do not accept the argument of Revenue that the examiner ought to have attended immediately at court once he became aware some time after 23rd August, 2017, that the Revenue liability had not been met. A number of factors lead me to this conclusion. The court was not in session and the examiner was entitled to assume that Revenue was aware of the tax position and would if it thought necessary make representation to the court in regard to the late returns and payment at the scheduled hearing on 5th September, 2017. I am satisfied also that the examiner did instruct the company to ensure that there was adequate provision for payment of current tax during the period of the examinership and this is clear from his report dated 10th July, 2107.

20. The failure to pay taxes was not signalled in correspondence by Revenue to the examiner. Further, the failure to pay taxes was not a failure of the examiner, but of the Company.

21. I do not accept that the examiner failed to disclose to me that the Company had been in breach of its undertaking at the hearing on 5th September, 2017. The examiner's report is clear that the Revenue liability had not been met, and I indicated to the parties that I had read and considered the report in advance of the hearing. Revenue was present in court when the order appointing the liquidator was made and made no relevant submission.

22. It is clear also that at the short *ex parte* hearing counsel had identified to me the import of the order sought and this was expressly noted by me in the course of my ruling. I do not consider that she misled me or failed to identify the nature or seriousness of the application.

23. I therefore reject the arguments that there was a lack of candour by the examiner or Revenue.

24. I turn now to consider the substance of the application.

The undertaking

25. The petition to appoint an examiner was presented by the Company and supported by the verifying affidavit of Tadhg O'Connell, a director of the Company sworn on 27th June, 2017, which contained an undertaking to discharge Revenue liabilities as they fell due during the period of protection. The undertaking is stated in the following terms in the affidavit: -

> "I say and believe that if an examiner is appointed to the Company, the Company will honour all of its current tax liabilities as they fall due during the period of protection. On behalf of the Company, I undertake that this will be done."

26. The order of 10th July, 2017 appointing the examiner contained reference to undertakings to pay current taxes and make return in the normal way, and recites that they were given by counsel for the Company as follows: -

> "The court doth note the undertakings given by counsel for the Company in relation to the discharge of its Revenue liabilities and that the outstanding returns of the Company will be made in the normal way during the period of examinership."

27. The Company has filed its post-petition P30 liabilities for June 2017, and the liability was off set against monies held by Revenue. The July P30 is not filed and the liabilities remain unpaid.

28. It was anticipated by the examiner, and he expressly noted in his final report, that the Company would have discharged the July P30 liability in advance of the scheduled court hearing on 5th September 2017 if terms of a proposed investment had been agreed, and the examiner had anticipated that some of the investment funds would be used to deal with those liabilities.

29. In the event, no terms of investment were agreed

30. The examiner's evidence is that in the eight weeks of the examinership process he had remained cautiously optimistic that an investment would be negotiated to enable him to form proposals for a scheme of arrangement. That optimism continued up to the scheduled conference call at 2pm on Monday the 4th September, the day before the matter was returnable before the High Court. At 5.15pm on that day however, it became clear that the parties could not resolve certain commercial differences and that the investment would not be forthcoming. In that context the examiner formed the view that the Company did not have a reasonable prospect of survival as a going concern and determined to seek an order lifting the protection of the court and an order that the Company be wound up.

31. The terms of the undertaking were not complied with for these reasons.

The purpose of the undertaking
32. An undertaking in the form given at the hearing of the petition is commonly sought and given by a company before an examiner is appointed.

33. The Revenue Commissioners are always on notice of a petition to appoint an examiner, and Courtney suggests in the fourth edition of The Law of Companies the courts "frequently tend to pay particular attention to the Revenue Commissioners' position on an application for the appointment of an examiner" (at para. 23.063). Where Revenue is neutral this has been interpreted as being "a sign of hope" for the ailing company, a comment made by O'Flaherty J. in *Re Cavan Christies Glass Limited* [1998] 3 IR 591 at 594. The practice has evolved that Revenue will take a neutral position when an undertaking is given that for the course of the period of protection Revenue returns will be filed and liabilities met as they fall due. Such an undertaking was given in the present case at the hearing of the petition. The giving of such undertaking is a factor that will be taken into account in the exercise by the court of its discretionary jurisdiction to appoint an examiner, a power to be exercised in the light of the fact of all the circumstances: *Missford Limited t/a Residents Members Club* [2010] IEHC, In *Re Star Elm Frames Limited* [2013] IESC 57 and In *Re Gallium* [2009] 2 I.L.R.M. 11.

34. The ability of a company to give an undertaking to continue to meet Revenue liabilities as they fall due is regarded as supporting the argument that the company is capable of surviving as a going concern in whole or in part. It also must be the case that the court would regard it as proper not to permit a company to continue to trade and collect PAYE and PRSI from employees, or VAT on services or goods, if the court could not be satisfied that the monies so collected would be transmitted to Revenue on whose behalf the relevant taxes are collected.

35. Revenue is a preferential creditor in a winding up, and the purpose of the undertaking in the examinership process is to enable a company to trade in a protected environment for a limited period without fear of a winding up petition and to give comfort to Revenue for current taxes. This is consistent with public policy and the interest of the common good in the rescue of viable companies and the saving of jobs for which the examinership legislation was promulgated.

36. The undertaking is not designed to, nor could it, supplant the legal obligations of the Company. The proffering of an undertaking does not have the effect of altering or improving the priority status of Revenue debt, and that status or priority is a matter governed by statute.

To whom and by whom is undertaking given?
37. The undertaking to met Revenue liabilities as they fall due is an undertaking given by a company unless the examiner is given executive powers in the examinership, a factor which did not arise in the present case. While I accept the argument of Revenue that the examiner does bear an onerous responsibility of candour to the court I do not accept that in the present case the examiner could be said to have breached the undertaking which was given by and on behalf of the Company.

38. It is unclear however, to whom the undertaking is given. Counsel for the liquidator argues that the undertaking is given by a company to Revenue. Counsel for Revenue argues that the undertaking is given to the court.

39. I consider that on a construction of the recital of the undertaking in the order appointing the examiner, that the undertaking is not to be understood as one given to Revenue, as an undertaking to Revenue is superfluous, does no more than confirm the existing statutory obligation and confers no new power to Revenue to enforce the statutory obligations to file a return and pay the taxes. An undertaking to the court on the other hand has a special meaning, and is to be treated for most purposes as equivalent to the making by the court of an order.

40. The undertaking was in my view given to the court.

What consequence is to flow from the breach of the undertaking?
41. The parties disagree as to the effect of the breach of the undertaking.

42. An undertaking given to the court is solemn and binding, and is frequently accepted in substitution for an order. Brightman J. in *Biba Ltd. v. Stratford Investments Ltd*. [1972] 3 All. E.R. 1041 described an undertaking as: -

> "An undertaking given to the court and embodied in the written order of the court, whereby a party undertook to abstain from doing an act, had the same effect for the purposes of R.S.C., Ord. 45, r. 5 as a judgment or order in joining that act."

43. An undertaking of an officer of the court carries a special degree of solemnity identified by Laffoy J. in the case of an undertaking given by a solicitor in *Bank of Ireland Mortgage Bank v. Coleman* [2009] 3 I.R. 699 where she stressed that the special jurisdiction of the High Court in regard to the enforcement of an undertaking was "compensatory as well as disciplinary in nature". Finlay Geoghegan J. in *Re Camden Street Investments Ltd.* [2014] IEHC 86 regarded an examiner as "an officer of the court" to which he owed duties to "act honesty, reasonably, and with the fullest candour to the court in respect of all matters which, on objective criteria, could be material".

44. Counsel for Revenue argues that the breach of the undertaking to meet Revenue liabilities which fell due entitles the court to make an order that the taxes be paid to Revenue, and the order made *ex parte* on 5th September, 2017 was no more than giving effect to what would have been done had the Company met its undertaking. It is argued therefore that the order was a proper exercise of its jurisdiction to enforce an undertaking, and that the effect of the order was to put the Company in precisely the position it would have been in had the undertaking been met and Revenue paid. The Company is grossly insolvent and Revenue argues that the basis of the appointment of the examiner and the continuation of court protection demands that the monies due on the relevant P30 return should be paid to Revenue and not retained for the purposes of the liquidation.

45. Counsel also argues that as circumstances had arisen that required the examiner to make application for directions under s. 524(5) the order made was an appropriate sanction to the examiner/liquidator for his failure to return to the court immediately upon becoming aware of the breach of the undertaking by the Company.

46. An analysis of the DAR recording of the very short application made by counsel in the late afternoon of 5th September, 2017 does not shows that the order was sought by way of exception or sanction and it is highly unlikely that any court would have made an order for the purposes of expressing its dissatisfaction or by way of sanction for breach of an undertaking without hearing the party

intended to be sanctioned. The matter was presented quite differently, and essentially on the basis that the order was "routine", although it was anticipated that there might be some objection by the examiner, who had by then been appointed liquidator.

47. No order would have been made by way of sanction on an *ex parte* basis.

48. I consider that had the breach of the undertaking or the failure of the Company to make the relevant returns been identified before the liquidator was appointed the likely result would have been the immediate removal of court protection from the Company on account of the failure of the Company to meet the precondition for the continuation of protection, but also because the failure to pay would have shown that there was no longer a reasonable prospect that the Company could have survived as a going concern. The sanction for failure would not have been a direction that the Company make and file the return, and insofar as a sanction was warranted it is a sanction to the Company which, it having failed to pay the taxes, it was no longer entitled to protection.

49. The undertaking of its nature does not offer a guarantee of payment or give current Revenue liabilities an enhanced priority, but breach may invoke the inherent jurisdiction of the court to express its displeasure or make a suitable order of enforcement. But an undertaking does not equate to certification, a statutory function reserved to an examiner. I return later to this proposition.

50. There may be cases where on application to a court in the course of the examinership process a court would, or could, give the company in examinership an opportunity to mend its hand and make the return, but it is likely that in most cases a court would express its dissatisfaction arising from the breach of the undertaking by lifting its protection.

51. The nature of the examinership process, and that arising from a breach of a solemn undertaking given to the court, engage discretionary factors and it is imprudent to state any further general proposition.

52. However, in the present case the court protection was lifted and the company would up by order of the court. For reasons I deal with later in this judgment I consider that the application was made too late.

53. But first I will deal with the argument that the impugned order is not one that may be made under that statutory scheme.

Jurisdiction to make the order deeming tax to be an expense in the examinership
54. The liquidator contends that the court had no jurisdiction under Part 10 of the Act or otherwise in its inherent jurisdiction to make the order.

55. Section 529 of the Act makes provision for the treatment of the liabilities of a company in examinership as follows: -

> "(1) Any liabilities incurred by the company during the protection period which are specified in subsection (2) shall be treated as expenses properly incurred, for the purpose of section 554, by the examiner.
>
> (2) The liabilities referred to in subsection (1) are those certified in writing by the examiner, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.
>
> (3) In this section "protection period" means the period, beginning with the appointment of an examiner, during which the company is under the protection of the court."

56. Liabilities which are by virtue of s. 529 to be treated as expenses properly incurred by the examiner and certified in writing by the examiner at the time they are incurred, are given preferential status by s. 554(3), (4) and (5) of the Act: -

> "(3) The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in subsection (4)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company to which he or she has been appointed.
>
> (4) Liabilities incurred by the company to which an examiner has been appointed that, by virtue of section 529, are treated as expenses properly incurred by the examiner shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company.
>
> (5) In subsections (3) and (4), references to a claim shall be deemed to include references to any payment in a winding up of the company in respect of the costs, charges and expenses of that winding up (including the remuneration of any liquidator)."

57. The effect of the treatment of the liabilities of a company as expenses properly incurred by the examiner and so certified by the examiner is to elevate those liabilities so that they are paid before any other claims in a receivership or winding up, and before the costs, charges and expenses of a winding up including the remuneration of a liquidator. The equivalent provision in the Companies (Amendment) Act of 1990 was s. 10 and was considered y Murphy J. in the *Re Edenpark Construction Limited* [1994] 3 IR 126, where he described it as giving "extraordinary priority" to liabilities of the company deemed to be expenses for the purposes of the section. As he put it: -

> "If sanctioned by the court such remuneration, costs and expenses are payable not merely in priority to other claims against the company concerned but in priority to those creditors who are the legal owners by way of security of the assets to which recourse may be had for the payment of such indebtedness."

58. Murphy J. explained that the provision might not seem so far reaching were it not for s. 10 of the Act which permitted the certification or deeming of certain liabilities of the company to be expenses of the examinership and accordingly to enjoy the same priority.

Perquisites to the elevation of status
59. The legislation requires that in order for liabilities to be treated as expenses of the examinership under s. 529 a number of procedural requirements are to be met.

(a) The liabilities are to be certified in writing by the examiner, under s. 529(2)

(b) The certification must be done at the time the expenses are incurred. This means that the examiner may not certify pre-petition liabilities: In *Re Edenpark Construction Limited* and the expenses must be "foreseen as occurring in the period which commenced with the appointment of an examiner and terminated with the cessation of the protection" (p. 134).

(c) The certification is to be made where in the opinion of the examiner the preferential treatment of the liabilities is required if otherwise the survival of the company as a growing concern during the protection period would be seriously prejudiced.

The role of the court

60. The court has a power to review the certification by an examiner of liabilities as expenses and this power is clear from the authorities. In In *Re Don Bluth Entertainment Limited*, Murphy J. *inter alia* considered whether the discretion conferred upon an examiner by the then relevant statutory provisions was capable of review by the court. In reliance on the decision of Costello J. in In *Re Clare Textiles Limited* [1993] 2 IR 213, he considered that the court does have a function to review the exercise by the examiner of the certification function, and that the matter was there decided.

61. As stated by Courtney in his text the opinion of an examiner is not "sacrosanct" (para. 23.102), and the court can question the act of certification. In *Re Don Bluth Entertainment Limited* Murphy said that the examiner: -

> "…it is important that an examiner should exercise great care and professional expertise in issuing certificates under s. 10 aforesaid. I would anticipate that an examiner from whom a certificate is sought would require the directors managing the business of the company to submit to him their proposals in relation to any particular liabilities which they proposed to incur and to satisfy him as to how the services or goods to be obtained would benefit the company, and in particular how they would contribute to the survival of the company 'during the protection period'."

Murphy J. refused to certify certain liabilities in the light of concerns expressed by persons who had opposed the petition relating to the motive behind the petition.

62. It is clear from the judgment of Murphy J. in In *Re Edenpark Construction Limited* that the court may scrutinise the bases on which the examiner certifies.

63. But the court has no express jurisdiction under Part 10 of the Act to deem liabilities as having the status of certified expenses and in my view there exists no standalone power to deem certain liabilities to be expenses in the examinership and entitled therefore to special statutory priority.

64. The conclusion is supported by the fact that the court is operating within a scheme which is wholly statutory in nature, but also by reference to s. 521 of the Act which give the court power to authorise the discharge or satisfaction of a pre-petition liability if the conditions in s. 521(2) are met: -

> "The court may, on application being made to it in that behalf by the examiner or any interested party, authorise the discharge or satisfaction, in whole or in part, by the company concerned of a liability referred to in subsection (1) if it is satisfied that a failure to discharge or satisfy, in whole or in part, that liability would considerably reduce the prospects of the company or the whole or any part of its undertaking surviving as a going concern."

65. The criteria that must be met for the exercise of that jurisdiction are identified and before making such order a court must be satisfied that the failure to discharge or satisfy such debt would considerably reduce the prospects of survival. The threshold is high.

66. The fact that the court has express jurisdiction to authorise the discharges of certain pre-petition liabilities in support of the examinership process, and in constrained circumstances, would suggest to me that no inherent jurisdiction exists outside the statutory scheme by which a court may deem certain liabilities to be the costs in the examinership.

67. The express power to certify or designate certain liabilities as expenses is vested in the examiner whose discretion is open to review by the court. The examiner is best placed to identify which liabilities satisfy the statutory requirements, and could be certified to ensure the continuation of the process.

68. Even without such consideration the fact that no statutory provision exists to regulate or guide the court in making a determination that certain liabilities are to be treated as expenses, would suggest that the statutory scheme does not admit of such power.

69. The court may make directions under s. 532(9) on application for directions within the statutory framework and for the purposes of the resolution of any questions arising therein but this does not create a free standing jurisdiction to make an order akin to certification and with the same effect.

70. I consider that the matter that arises in the present case must be dealt with wholly within the confines of the statutory scheme, and that counsel for Mr. Burns is correct that there is no jurisdiction in the court to make an order that has the effect of changing the normal priorities. This can be done by the certification by the examiner, and subject to review by the court.

71. I consider therefore that the court has no inherent jurisdiction outside the statutory scheme to deem Revenue liabilities to be an expense in the examinership. The inherent jurisdiction that the court undoubtedly has to police its own orders and to enforce the performance of undertakings is not one by which the court can, without more, displace the priorities in a liquidation

Was the application made too late?

72. Another factor that must bear on my consideration is that the Company was wound up by order of the court some time in the earlier afternoon of 5th September, 2017, and almost two hours later the application was made by counsel for Revenue relating to the taxes. Even were the order to be one which could have been validly made in the exercise of my jurisdiction to police the undertaking, the application came too late. The examiner no longer had a function which would have enabled him to certify the Revenue expenses under s. 529, as the examinership process had come to an end. By the time the order was sought in the late afternoon the Company was already in liquidation, and no order that the court could make could displace the priorities which by then had crystallised.

73. I also accept the argument of Revenue that the failure of the company to pay the taxes as they fell due in accordance with the obligation contained in the undertaking could have been treated as a matter that seriously prejudiced the likelihood that the company would survive as a going concern, and that the liability was one capable of being certified under s. 529 by the examiner. But the liability was not certified, and I am not satisfied at this juncture that I have any statutory jurisdiction to make an order that the liability be treated as an expense on the examinership.

74. However, I do not accept the argument made by Revenue that the power in the court to make orders relating to the payment of the remuneration and cost of the examiner under s. 554 of the Act provides such jurisdiction. As a matter of fact, in the present case the effect of the order made *ex parte* was that monies would have been paid to Revenue, and would not fall into the liquidation, with the loss of money to discharge the fees of the liquidator or other relevant creditor. While that end result might appear to be desirable in the interests of Revenue, the power of the court to make orders regarding the remuneration costs and expenses of an examiner ought not to be used to achieve a result not contemplated by another section in the Act, and the inherent jurisdiction is not to be called in aid when express statutory powers are available to meet the same mischief. No application was made under s.554.

75. The powers of the court are those determined by statute and I am not satisfied that the order made *ex parte* in the late afternoon on 5th September, 2017 was made within jurisdiction.

76. Therefore, I propose making an order setting aside that part of the order made on 5th September, 2017 by which the amount of tax due on the P30 for the Company for July 2017 be deemed to be a cost or expense in the examinership.