[2020] IEHC 196

THE HIGH COURT

[2019 No. 134 COS]

IN THE MATTER OF SJK WHOLESALE LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

MYLES KIRBY

APPLICANT

AND

GOOGLE IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 29th April 2020

Introduction

1. As liquidator of a company named SJK Wholesale Limited ('the company'), Myles Kirby moves for an order, pursuant to two identified sections of the Companies Act 2014 ('the Act of 2014'), compelling another company named Google Ireland Limited ('Google Ireland'), which provides a free email service called 'Gmail' to persons in the European Economic Area ('EEA') and Switzerland, to provide him with access to the email account associated with the email address 'sjkwholesaleltd@gmail.com' ('the email address') , and to provide him with all emails sent and received from that address, including any that have been deleted but remain accessible.

2. Google Ireland opposes the application.

Procedural history

3. An originating notice of motion issued on 16 April 2019, returnable for 13 May 2019. The motion is grounded on a short affidavit of Mr Kirby, sworn on 12 April 2019 ('the first Kirby affidavit'). Ryan Meade, whose title within Google Ireland is Public Policy and Government Relations Manager, swore a lengthy replying affidavit on its behalf on 6 June 2019 ('the Meade affidavit'). Mr Kirby swore a further short affidavit in response on 11 July 2019 ('the second Kirby affidavit').

4. The motion was argued on 11 March 2020. John Kennedy SC and Michael Donnelly BL appeared on behalf of Mr Kirby, instructed by AMOSS Solicitors. Kelley Smith BL appeared on behalf of Google Ireland, instructed by A & L Goodbody, Solicitors. I am grateful to counsel for their oral and written submissions.

The evidence

5. Although the evidence before me concerning the operation of the company and the progress of its liquidation is extremely limited, the following picture emerges.

6. Mr Kirby was appointed liquidator of the company at a creditors' meeting on 15 February 2019 with the support of the Revenue Commissioners, a significant creditor. He has exhibited the notice of that appointment, filed in the Companies Registration Office ('CRO') on 28 February 2019. None of the other documents or particulars concerning the company that, under s. 33 of the Act of 2014, must be delivered to, or issued by, the Registrar of Companies – such as the certificate of incorporation, the constitution of the

company, returns relating to its register of directors, annual returns or financial statements – has been exhibited, nor have their contents been disclosed.

7. In the first Kirby affidavit, it is averred that a person named Jawad Khan, described as a director of the company, has confirmed to Mr Kirby that the email address was operated by the company; that 'all financial information was sent from that address'; and that 'all company business was transacted through [the email address], including correspondence with Revenue, suppliers and accountants'. Mr Kirby obtained the 'log-in' details for the Google account associated with the email address from Mr Khan but, when he attempted to access the account using those details, he could not do so. It is unclear what steps, if any, Mr Kirby took to resolve that problem with Mr Khan or any other officer of the company.

8. Mr Kirby avers that, at some undisclosed time, the United Kingdom National Health Service Counter Fraud Authority ('the NHSCFA') informed him that it is conducting a 'fraud/money laundering investigation concerning the use of criminal property to fund the purchase of vehicles on behalf of the company', and he is now investigating that claim. Beyond Mr Kirby's averment to that effect, he has provided no other details of the underlying allegations or of the nature or scope of the investigations that are being conducted by him or the NHSCFA.

9. Mr Kirby has exhibited a written statement that he avers was circulated at the creditors' meeting by Mr Khan, as both a director of the company and chairperson of that meeting. A directors' estimated statement of the company's affairs as they stood on 7 February 2019 is appended to that document.

10. The written statement names four persons, including Mr Khan, as directors of the company at various times during the previous three years and two other persons as company secretary at different times during that period. It asserts that Mr Khan holds all of the shares in the company. It explains that the company had commenced trading on 7 September 2015 as an importer and seller of vehicles, and had done so successfully until an audit by the Revenue Commissioners revealed several errors in the company's accounting treatment and handling of value added tax ('VAT'), following which a sheriff seized all of its stock, forcing it to cease trading, which led the directors to resolve, on 30 January 2019, to wind the company up. The accompanying statement of affairs discloses a financial deficiency of €630,500.

11. On 15 February 2019, through his solicitors, Mr Kirby wrote to Google Ireland. In that letter, he informed Google Ireland of his belief that the company had been engaged in fraudulent activity and that those responsible might attempt to hide evidence, before requiring Google Ireland to deactivate and preserve the account associated with the email address and to provide him with full access to it.

12. Google Ireland responded by email on 6 March, stating that it only takes steps to preserve data upon being properly served with a valid legal process and acknowledging that it was open to Mr Kirby to take that course.

13. Mr Kirby wrote again on 27 March, requiring Google Ireland to provide him with full access to the email address to include all sent, received and deleted emails, and to do so by providing him with full log in details by close of business on 29 March. Google Ireland replied on 10 April, reiterating the position set out in its email of 6 March.

14. After the present motion issued on 16 April, Google Ireland wrote to Mr Kirby on 8 May. In that letter, it pointed to the requirement to respect the privacy rights of its users, which – it asserted – necessitates the utmost care when faced with a demand to produce communications. Google Ireland expressed the view that Mr Kirby had failed to provide sufficient evidence in support of his belief that the contents of the email account comprise the books, records or property of the company and suggested that, instead, he should take further action directed toward the relevant officer(s) or employee(s) of the company to obtain the information necessary to access that account, if indeed it had been operated by, or on behalf of, the company.

15. Mr Kirby replied on 9 May, maintaining that Google Ireland was ignoring the significance of the use of the company's name in the email address, before responding to the suggestion that he should consider taking action against the persons involved in the operation of the company, rather than against Google Ireland, by stating that the company's sole director was outside the jurisdiction and not cooperating with him and, later in his reply, that the company's officers were not cooperating with him. Mr Kirby's stated position was, and remains, that his rights and entitlements against the officers of the company as liquidator are irrelevant to the exercise of his asserted entitlement, in that capacity, to obtain access to the email account through Google Ireland on the basis that 'the contents of emails may contain books and records of the company and, if not, they would constitute property to which the company appears to be entitled.'

16. On 30 May, Google Ireland wrote again to Mr Kirby. In that letter, it explained that, when a standard email account is first established, the registered user is by default a natural person. That is because intending users are required to provide details including a first and last name, date of birth, and gender, in order to register and obtain log in credentials. In registering in that way, a user contracts with Google under its terms of service. The set-up process is not designed to facilitate registration by a corporate entity. Google offers a separate service, known as 'G Suite by Google Cloud', for corporate or enterprise users.

17. Thus, Google Ireland suggested, Mr Kirby should seek to identify, and proceed against, the person who is the registered user of the account. In that context, Google Ireland indicated that if, as an alternative to the application he had brought under the Act of 2014, Mr Kirby were to apply instead to this court for a Norwich Pharmacal order directing Google Ireland to provide the subscriber information associated with the account, Google Ireland, though unable to consent, would be unlikely to oppose that application.

18. On 4 June, Google Ireland wrote a further short letter to Mr Kirby, adverting to the concern he had expressed that the emails in the account may have been deleted and clarifying that, in compliance with an appropriately worded Norwich Pharmacal order, it

would be in a position to disclose (a) the status of the account and (b) the date of any change in that status, which would indicate whether the contents of the account had been deleted.

19. The Meade affidavit, sworn on 6 June, explains that, from 22 January 2019, Google Ireland took over from the separate corporate entity Google LLC as the provider of Google's 'Gmail' email service to users located in the European Economic Area ('EEA') and Switzerland, and as the data controller responsible for the personal data of those users, under specific terms of service and a privacy policy that took effect on that date. The Meade affidavit exhibits those documents.

20. Among Google Ireland's terms of service, the following may be relevant. First, where an account holder uses Google's services on behalf of a business, that business is deemed to accept those terms. Second, where a Google service allows content to be uploaded, submitted, stored, sent or received, the account holder retains ownership of any intellectual property rights that he or she holds in that content. And third, Google Ireland believes that an account holder owns his or her own data and that preserving access to that data is important, so that, if Google Ireland discontinues a service, it will give an account holder reasonable notice and a chance to retrieve that information, where reasonably possible.

21. Under its privacy policy, Google Ireland states that it will not share a registered user's personal information with companies, organizations or individuals outside Google save in a range of specifically described circumstances, such as when Google Ireland has a good-faith belief that access, use, preservation or disclosure of the information is reasonably necessary to meet any applicable law, regulation or legal process. Under the same policy, Google Ireland confirms that it will process a registered user's data when it has a legal obligation to do so, for example, if it is responding to legal process. Under the heading 'legal process, or enforceable government request', the policy states:

> 'Like other technology and communication companies, Google regularly receives requests from government and courts around the world to disclose user data. Respect for the privacy and security of data you store with Google underpins our approach to complying with these legal requests. Our legal team reviews each and every request, regardless of type, and we frequently push back when a request appears to be overly broad or doesn't follow the correct process.'

22. The Meade affidavit notes that Google Ireland must also adhere to its obligations under Regulation (EU) 2016/679 (the General Data Protection Regulation ('GDPR')) and the Data Protection Act 2018 ('the Act of 2018').

23. The second Kirby affidavit does not advance matters very far. In it, Mr Kirby avers that he has already tried to obtain the company's documentation from its directors but does not describe those efforts. Mr Kirby deposes to his concern that the company's directors may be fraudsters residing outside the jurisdiction, but does not identify those directors or the basis for that concern. Mr Kirby avers to a suspicion that the registered user of the email

account may be a director of the company who, he understands, is currently outside the jurisdiction, but does not identify that director, or the basis for that suspicion or understanding.

24. In response to Google Ireland's suggestion that a Norwich Pharmacal order might establish whether the account retains any email content, the second Kirby affidavit exhibits what appear to be printed copies of emails sent to and from the account in September and November 2018. Mr Kirby does not explain how or when he came into possession of those documents or what their significance is. Nor does he explain the basis upon which it might be inferred that the account from which the printed copies suggest those emails were sent in 2018 retains any email content now.

25. In the second Kirby affidavit, Mr Kirby undertakes to use any documentation he may obtain by court order from Google Ireland solely for the purpose of the liquidation of the company and to abide by any conditions the court might impose concerning any third-party property or data such documentation may include. Mr Kirby avers that, as an experienced insolvency practitioner, he is familiar with, and will abide by, his obligations under applicable data protection and privacy law in respect of any private or personal data he may acquire.

The order sought

26. Mr Kirby seeks:

> 'An order pursuant to s. 596(1) and/or s. 596(2) and/or s. 627(9) of [the Act of 2014] compelling [Google Ireland] to provide [him] with access to [the email address] to include all emails sent and/or received from this account and all deleted emails accessible by [Google Ireland] from this account.'

The law

27. Section 596 of the Act of 2014 provides, in material part:

> '(1) Upon the appointment of a liquidator to a company, the liquidator shall take into his or her custody or under his or her control the seal, books and records of the company, and all the property to which the company is or appears to be entitled.
>
> (2) A person who, without lawful entitlement or authority, has—
>
> (a) at the date of the appointment of a liquidator to a company, possession or control of the books, records or other property of the company, or
> (b) subsequent to such date comes into such possession or control, shall surrender immediately to the liquidator such books, records or other property, as the case may be.'

28. Section 627 of the Act of 2014 sets out in tabular form the powers conferred on a liquidator. Those powers include:

> '9. Power to–

(a) take into his or her custody or under his control all the property to which the company appears to be entitled...'

29. Section 673 of the 2014 Act provides in material part:

'(1) In a winding up of a company, on notice in writing being given by the liquidator requiring him or her to do so, any:

(a) contributory for the time being on the list of contributories;
(b) trustee;
(c) receiver;
(d) banker; or
(e) agent or officer;

of the company shall, within such period as is specified in the notice, pay, deliver, convey, surrender or transfer to or into the hands of the liquidator any money, property, books or papers which happen to be in his or her hands for the time being and to which the company is *prima facie* entitled.

(2) The court may exercise the following power:

(a) of its own motion; or
(b) on the application of the liquidator;

at any time after the appointment of a provisional liquidator, the making of a winding-up order or the passing of a resolution to wind up a company voluntarily.

(3) That power of the court is to require a person referred to in any of *paragraphs (a)* to (*e*) of *subsection (1)* to pay, deliver, convey, surrender or transfer forthwith, or within such period as the court directs, to the liquidator any money, property or books and papers in his or her hands to which the company concerned is *prima facie* entitled.'

Analysis

30. In substance, Mr Kirby contends that the effect of ss. 596 and 627 of the Act of 2014, either separately or in combination, is to mandate the court, on the summary application of a company liquidator, to exercise an implied or inherent power to require any person in possession of any books or records of the company, or any other property to which the company is, or appears to be, entitled, to surrender that property to the liquidator.

31. There are several reasons why I do not think that is correct.

32. The principal reason is that I cannot reconcile the existence of any such implied or inherent power with that of the express power created under s. 673 of the Act of 2014.

33. The power of the court under s. 673 is only exercisable against a contributor, trustee, receiver, banker, agent or officer of the company in liquidation. It can be exercised only in respect of any money, property or books and papers in the hands of such a person to which the company is prima facie entitled. It is a discretionary power, the exercise of

which is conditioned by the need to consider whether it is in the interests of justice to do so.

34. In *Re London Iron and Steel Co* [1990] BCLC 372, a decision of the Chancery Division of the High Court of England and Wales, Warner J accepted (at 375-6) the submission that the term 'to which the company appears to be entitled', first introduced in s. 98 of the UK Insolvency Act 1985 and re-enacted in s. 234(2) of the UK Insolvency Act 1986, is broader than the phrase 'to which the company is prima facie entitled', as had appeared in all earlier equivalent provisions from s. 100 of the Companies Act 1862 through to s. 551 of the UK Companies Act 1985.

35. The difference in the scope of the two terms is significant. In *Re London Iron and Steel Co* (at 375), Warner J acknowledged the view expressed obiter by Buckley LJ in *Re Palace Restaurants Limited* [1914] 1 Ch 452 that, although – under s. 165 of the Companies (Consolidation) Act 1908 – a liquidator could call upon a person to pay any money to which the company was prima facie entitled, there was nothing in that section that empowered the court or the liquidator to determine the question, once a dispute was raised. However, Warner J concluded that the use of the distinct term 'to which the company appears to be entitled' in s. 234(2) of the Act of 1986, by inviting the question 'appears to whom?', necessarily implied the answer 'to the court, on the evidence before it', thereby implying the existence of a power of the court to make that determination.

36. Under s. 673 of the Act of 2014, the power of the court to order the delivery of the property of a company to the liquidator is express, not implied; is discretionary, not mandatory; extends only to property to which the company is prima facie entitled; and may be exercised only against a contributory for the time being, trustee, receiver, banker, agent, or officer, of the company. The proposition for which Mr Kirby contends is that ss. 596 and 627 of the Act of 2014, separately or together, confer a parallel power on the court that, while merely implied, is mandatory not discretionary; extends to any property to which the company appears to be entitled; and is exercisable against the world at large at the instance of the liquidator. It is difficult to see how such a broad and unqualified, implied power, if found to exist, would not render the power expressly conferred by s. 673 of the Act of 2014 nugatory.

37. In my view, that is not the purpose or effect of those sections, either separately or together. Rather, they are more obviously intended to provide a liquidator with protection from any claim for loss or damage where the liquidator has taken, or retained, custody of property, which appears to be that of the company but is later found not to be. Figuratively speaking, they provide the liquidator with a shield, whereas s. 673 provides a sword.

38. Further, in construing the relevant provisions of the Act of 2014, it would fly in the face of the Latin maxim '*expressio unius est exclusio alterius'* (loosely translated as 'to express one thing is to exclude another') to imply an additional broad unqualified power on the court where the Oireachtas has deliberately and specifically chosen to confer a more limited, qualified one.

39. It must also been borne in mind that Warner J drew comfort (at 376) in reaching the conclusion that he did in *Re London Iron and Steel Co* from the UK Insolvency Rules 1986, which permitted an application under s. 234 of the UK Insolvency Act 1986 to be attended, in so far as may be necessary, by all of the procedural rights and entitlements associated with a full plenary action commenced by writ.

40. In contrast, Mr Kirby contends for the existence of a summary jurisdiction entitling a liquidator to an order directing any person to deliver up to him or her any property to which the company is or appears to be entitled, regardless of any dispute there might be about the ownership of that property, which jurisdiction is to be inferred from the terms of s. 596 and 627 of the Act of 2014. On Mr Kirby's case, once that implied jurisdiction is invoked, the court's function is limited to the application of that test (i.e. 'Is this property to which the company is, or appears to be entitled, whether or not that entitlement is disputed?') and there is no discretion to weigh any other factor in the balance, such as the property and privacy rights, confidentiality interests, or procedural rights of any other person potentially affected by the making of the order sought.

41. Further, on Mr Kirby's case, the court is not entitled to weigh in the balance the extent to which the order sought is reasonable or necessary, given the potential availability to the liquidator of a range of alternative reliefs in the form of the powers expressly conferred on the court under Chapter 11 in Part 11 of the Act of 2014 and the established jurisdiction to make a Norwich Pharmacal order in appropriate circumstances. Nor is the court entitled to consider whether the order sought is disproportionate in its scope or oppressive in its effect.

42. Since the implied power of the court for which Mr Kirby contends is one based solely and exclusively on the duty that s. 596 imposes upon a liquidator to take into his custody or under his control the property to which the company is, or appears to be, entitled, he submits that the question of whether any other person has an ownership, privacy or confidentiality right or interest to assert, or whether any such right or interest might be unnecessarily, unreasonably, disproportionately or oppressively affected by any order made is a 'red herring', which I take to mean an irrelevant distraction, for the purpose of the present application.

43. In support of his argument for the existence of that implied power of the court, Mr Kirby relies on certain commentary on the effect of s. 229 of the Companies Act 1963 ('the Act of 1963') in McCann and Courtney, *Companies Acts 1963-2012* (2013). In material part, s. 229(1) of the Act of 1963, which was the precursor to s. 596(1) of the Act of 2014, required a liquidator upon appointment to take into his or her custody or under his or her control all the property to which the company in liquidation was, or appeared to be, entitled.

44. In their commentary on that provision, McCann and Courtney state '[t]his section empowers the court to order the delivery up of property to which the company "is entitled" but also property to which it "appears to be entitled", thereby conferring on it jurisdiction to order the delivery up of property even though there is a dispute as to

ownership.' As authority for that proposition, those authors cite the decision in *Re London Iron and Steel Co*, already cited; Order 74, rule 91 of the Rules of the Superior Courts ('RSC'), as that rule then stood; and s. 236 of the Act of 1963, which was then in force.

45. Order 74, rule 91 of the RSC provided:

> 'Any contributory for the time being on the list of contributories, any trustee, receiver, banker or agent or officer of a company which is being wound up under an order of the Court shall, on notice from the Official Liquidator and within such time as he shall by notice in writing require, pay, deliver, convey, surrender or transfer to or into the hands of the Official Liquidator any money, property, books or papers which happen to be in his hands for the time being and to which the company is *prima facie* entitled.'

46. Section 236 of the Act of 1963 stated:

> 'The court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories and any trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to the liquidator any money, property or books and papers in his hands to which the company is prima facie entitled.'

47. It is thus evident that s. 673 of the Act of 2014 broadly combines and restates the requirements of both the old O. 74, r. 91 of the RSC and s. 236 of the Act of 1963 (whereby the court may order the delivery up to the liquidator of property 'to which the company is prima facie entitled'), whereas s. 596 of the Act of 2014 broadly restates the distinct requirements of s. 229 of the Act of 1993 (whereby the liquidator shall take into custody the property 'to which the company is, or appears to be, entitled'). On the plain words of each Act, only the former provisions relate to the circumstances in which the court may order the delivery up of property to the liquidator.

48. In considering the distinction between the scope of s. 596 and that of s. 673 of the Act of 2014 (or, for the matter, between the scope of s. 229 and that of s. 236 of the Act of 1963), the decision in *Re London Iron and Steel Co* is of no direct assistance because the UK Insolvency Act 1986, which was at issue there, contains no equivalent distinction. Under s. 144 of the UK Act of 1986, in words identical to those of s. 596 of the Act of 2014 and s. 229 of the Act of 1963 , a liquidator is to take into his custody all property 'to which the company is or appears to be entitled.' However, as already noted and in stark contrast to the relevant terms of s. 236 of the Act of 1963 and s. 673 of the Act of 2014, which each permit the court to order the delivery up to the liquidator of the property to which 'the company is prima facie entitled', s. 234(2) of the UK Act of 1986 permits the court to order the delivery up of property to which 'the company appears to be entitled.' The significant distinction identified by Warner J in *Re London Iron and Steel Co* was that between the words used in s. 234(2) of the UK Act of 1986 and those used in earlier UK

companies legislation. The same significant distinction exists *within* both the Act of 1963 and the Act of 2014. Thus, as McCann and Courtney noted in their commentary on s. 236 of the Act of 1963 (citing *Re London Iron and Steel Co*), the provisions of that section could not be availed of by a liquidator in circumstances where the ownership of the property in question was disputed. The same is equally true of the provisions s. 673 of the Act of 2014.

49. Hence, I cannot accept the proposition that s. 229(1) of the Act of 1963 or s. 596(1) of the Act of 2014 empowers the court in any circumstance to order summarily the delivery up to the liquidator of property to which the company in liquidation is, or appears to be, entitled. The only summary jurisdiction of that kind vested in the court is the one created and constrained by the provisions of s. 673 of the Act of 2014 (and, formerly, by s. 236 of the Act of 1963 in conjunction with the old O. 74, r. 91 of the RSC). Under both the Act of 1963 and that of 2014, a liquidator is authorised to take custody of any property to which a company in liquidation is, or appears to be, entitled, but the court may only summarily direct the delivery up to the liquidator of property to which the company is prima facie entitled and, even then, such direction can only be made against a person in one of a number of specified categories, each of which demonstrates a close connection with, or involvement in, the company or its affairs.

50. In opposition to Mr Kirby's submission on this point, Google Ireland urges the court to adopt instead the following analysis of the relevant provisions of the Act of 1963 (and, by implication, of the equivalent provisions of the Act of 2014) in Lynch Fannon and Murphy, *Corporate Insolvency and Rescue* (2nd edn, 2012) (at para. 5.54):

> 'It is important, in our view, to reconcile the provisions of s. 236 ('*prima facie* entitled') with the provisions of s. 229, which imposes an obligation on the liquidator to take into his custody and under his control property to which the company 'is or appears to be entitled'. Section 229 uses the term 'appears to be entitled', the term now used in the equivalent provision to s. 236 contained in the [UK] Insolvency Act 1986, which had to be considered by Warner J in [*Re London Iron & Steel*]. Where there is a dispute as to ownership, we suggest that it is open to the court to resolve this dispute in such a manner as to decide whether or not to accede to an application under s. 236 to deliver up property to the control of the liquidator. It may be necessary to determine the issue of ownership or entitlement to the property by way of plenary proceedings, but that need not preclude the court from exercising its jurisdiction under s. 236 and ordering the property to be delivered to the control of the liquidator at least pending the outcome of proceedings regarding the question of ownership of the property.'

51. In my judgment, that analysis is correct, though not directly on point here because this is not an application under s. 673 of Act of 2014, the successor to s. 236 of the Act of 1963. Of course, in order properly to bring any such application and, certainly, to succeed in it, Mr Kirby would have to be in a position to establish that Google Ireland is within one of the categories of persons covered by that section and that the material at issue is

property in the hands of Google Ireland to which the company in liquidation is prima facie entitled.

52. In that event, should any dispute arise about the ownership of that material, the court would then have to consider, in the exercise of its discretion under the section, whether or not the balance of justice leans in favour of an order directing the delivery up of the property to the liquidator, pending the resolution of that dispute in plenary proceedings. Plainly, striking that balance would entail weighing whatever competing rights and interests may be established on the evidence before the court. I do not hesitate to accept the submission of Google Ireland, on the authority of the decision of Hoffman J in the England and Wales High Court in *Re First Express Limited* [1992] BCLC 824 (at 828), that it is a basic principle of justice that an order should not be made entrenching upon any person's rights or interests without allowing that person to be heard, save where to do so would be likely to result in a greater injustice in the form of irremediable loss or damage to the applicant or the frustration of the legal process during the necessary notice period, where the court is satisfied that any loss or damage caused to the affected person by an order incorrectly made is compensable (most obviously, through compliance with the necessary undertaking to pay damages) or that the risk of irremediable loss to that person is outweighed by the risk of loss or injustice to the applicant if the order is not made.

53. As we have seen, Mr Kirby does not invoke the express power of the court under s. 673 of the Act of 2014, arguing instead that the terms of ss. 596 and 627 of that Act imply the parallel existence of a broader, overlapping power of the court, which can be invoked without allowing affected persons an opportunity to be heard, and which it is mandatory to exercise in respect of anything that is, or appears to be, the property of the company, on the apparent basis that the prompt and economical winding up of the company in the interest of its creditors and contributories displaces or outweighs all other rights and interests, including, for example, any possible privacy right or interest of the registered user of the Google account associated with the email address, whether under the Constitution of Ireland, the European Convention on Human Rights, the European Union Charter of Fundamental Rights, the GDPR or the Act of 2018. For the reasons I have already given, I do not accept that the existence of any such power can be inferred from either or both of those provisions, properly interpreted.

54. Although I do not think the argument was advanced on behalf of Mr Kirby, I should add for completeness that there is no question of the existence of an inherent jurisdiction to summarily order the delivery up of property to a liquidator. That is because, as the Supreme Court has made clear in *G. McG. v. D. W. (No. 2) (Joinder of the Attorney General*) [2001] 4 IR 1 (per Murray J. at 27), the normative value of the law and the imperative of certainty concerning the scope of the judicial function exclude the exercise of an inherent jurisdiction where the court's jurisdiction has been expressly and completely delineated by statute. In my judgment, s. 673 of the Act of 2014 expressly and completely delineates the summary jurisdiction of the court to order the delivery up of property to a liquidator in the context of the winding-up of a company.

55. Lest I am incorrect in the principal conclusion that I have reached and in order to facilitate the prompt resolution of as many issues as possible in the event of an appeal, I propose to address briefly the question of whether, on the evidence before me, I can be satisfied that the material that Mr Kirby seeks comprises the books and records of the company or is, or appears to be, the property of the company, even though – as I have already explained – I do not accept that that is the correct test to apply.

56. In considering the issue, an antecedent question unavoidably arises. What is it that Mr Kirby seeks to have delivered up to him as 'property' in the hands of Google Ireland to which the company is, or appears to be, entitled? The relief that he seeks in his motion is an order providing him with access to the relevant Google account to include all emails sent and received from the email address attached to it, including any deleted emails that can be retrieved. In the first Kirby affidavit, he avers to having 'sought to gather in all company property including documents available on the company's email account.' Later in that affidavit, he avers that he requires not just the log-in details for 'the company's email account' but also copies of all deleted emails [on that account] retained by Google Ireland, which he is prepared to receive in hard or soft copy. In the second Kirby affidavit, he avers that his position is clear; 'the contents of the email account are (or appear to be) the property of the company and/or records of the company'.

57. Section 559 of the Act of 2014 is the interpretation section for Part 11 of the Act of 2014, which deals with the winding up of companies. It defines 'property' to mean 'all real and personal property' and to include 'any right of action by the company or liquidator under the provisions of this Act or any other enactment.'

58. Thus, it is not clear whether Mr Kirby's claim is: (1) that the company holds, or appears to hold, a right of action under the Act of 2014 or some other enactment to enforce some contractual or other right to access and use the relevant Google account, which right of action is thus the property of the company; or (2) that the emails sent to and from the email address are, or appear to be, the property of the company; or (3) both.

59. The evidence that Mr Kirby relies on in support of his claim is the following. First, the email address contains the name of the company. Second, Mr Kirby was told by Mr Khan at the creditor's meeting that 'all company business was transacted through the company's email account, including correspondence with Revenue, suppliers and accountants', although the log-in details that Mr Khan provided to Mr Kirby for that account did not work. And third, Mr Kirby has exhibited documents that he describes as print-outs of emails from the account, although he has not explained how he came into possession of those documents, nor has any attempt been made to place their contents in context. They purport on their face to evidence a small number of emails sent on behalf of the company in September and November 2019 from the email address to both a United Kingdom car auction company and the Revenue Commissioners, concerning VAT refunds allegedly withheld from the company by the UK car auction company after it was contacted by HM Revenue and Customs ('HMRC') on information received from the Revenue Commissioners.

60. Google Ireland has adduced evidence that the registered user of a Google account is by default a natural person and that the process is not designed to facilitate registration by a corporate entity, so that the registered user is very likely a natural person and not the company. In response to that evidence, which he does not seek to controvert, Mr Kirby avers to his suspicion that the registered user of the account is an unnamed director of the company, currently outside the jurisdiction, although he does not explain the basis of that suspicion, or what steps, if any, he took to obtain an order: (a) for the arrest and detention of that director and the seizure or securing of that director's books and papers and moveable personal property (under. S. 675 of the Act of 2014); (b) summoning that director for examination before the court, and requiring him or her to produce to the court the relevant documents in his or her custody or power (under s. 671); or (c) requiring that director to deliver to Mr Kirby, as liquidator of the company, all of the property or books or papers in his or her hands to which the company is prima facie entitled (under s. 673).

61. Some elucidation would have been helpful in circumstances where, on the same day that Mr Kirby was appointed liquidator at the creditors' meeting of the company on 15 February 2019, he was already in a position to write to Google Ireland, informing it of his belief 'that the company was knowingly engaged in fraudulent activity' and of his apprehension 'that the people responsible for the fraudulent activity may attempt to hide evidence of their wrongdoing', before requesting it to preserve and maintain the Google account or the emails in it. It is particularly difficult, in that context, to understand why Mr Kirby relies so centrally, for the purpose of the present application, on the veracity of what he has been told by Mr Khan as a director of the company and on the statement that Mr Khan produced to the creditors' meeting that resolved to wind the company up.

62. Google Ireland submits that both the comments that Mr Kirby attributes to Mr Khan and the documents that he exhibits as print-outs of emails sent from the company account constitute hearsay evidence, inadmissible in the context of an application for what would be a final, rather than interlocutory, order against Google Ireland.

63. I do not think I have to decide that point because, in my judgment, even if the relevant hearsay evidence was admissible, the limited weight it would carry as such, and its limited scope in substance, in combination with the uncontroverted evidence that the registered user of the Google account at issue is almost certainly a human person and not the company, prevent me from being satisfied that the contents of the account comprise the books or records of the company, or that the company has, or appears to have, a right of action and, thus, a proprietary right, to access or use the account. For the avoidance of doubt, I should add that I did not understand Mr Kirby to advance, still less adduce evidence of, any claim to any intellectual property right of the company in any of the content of the Google account.

64. That leaves only the question whether the emails sent to and from the email address are property to which the company is, or appears to be, entitled. *Fairstar Heavy Transport N.V. v Adkins* [2012] EWHC (TCC) 2952, a decision of the Technology and Construction

Court of the Queen's Bench Division of the High Court of England and Wales, was a case in which a company ('Fairstar') asserted a proprietary interest in emails that had been sent and received by a person (Mr Adkins) who had been, at the material time, its chief executive officer, though not its employee. After an extensive survey of the cases, Edwards-Stuart J concluded (at [58]) that the preponderance of authority points strongly against there being any proprietary right in the content of information, including the content of an email, although he did not go so far as to say that is settled law.

65. Thus, in considering Fairstar's submission that the logic and circumstances of the modern world invite the development of a principal that the content of an email is a form of property, Edwards-Stuart J analysed what, if accepted, that proposition would entail for the ownership of such property, identifying five alternative conceptual models:

    (1) that title to any email content remains with its creator (or the creator's principal);

    (2) that title to the content of any email that is sent passes to its recipient (or the recipient's principal);

    (3) as in (1), but in addition with the recipient receiving a licence to use the content for any legitimate purpose connected with the circumstances in which the email was sent;

    (4) as in (2), but in addition with the sender receiving a licence to retain the content and to use it for any legitimate purpose; and

    (5) that title to the content of the email, once sent, is shared between the sender and the recipient and, as a logical consequence of this, is shared not only between them but also with all others to whom subsequently the message may be forwarded.

66. Having considered the implications of, and difficulties with, each of these different ownership models, Edwards-Stuart J concluded (at [69]) that there was no practical basis for holding that there should be property in the content of an email, even if it were open to him to do so, before going on to state:

> 'To the extent that people require protection against the misuse of information contained in emails, in my judgment satisfactory protection is provided under English law either by the equitable jurisdiction to which I have referred in relation to confidential information (or by contract, where there is one) or, where applicable, the law of copyright. There are no compelling practical reasons that support the existence of a proprietary right – indeed, practical considerations militate against it.'

67. On appeal, the England and Wales Court of Appeal (Mummery, Patten, Black LJJ) found for Fairstar on the quite separate basis of the agency relationship between it and Mr Adkins and, specifically, that of a principal's right to inspect and copy documents held by his or her agent acting on his or her behalf, without addressing the issue of whether there

is property in the contents of an email; *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886.

68. In the present application, Mr Kirby does not advance any case in agency. Indeed, the registered user of the account is not a party to the application. Nor has Mr Kirby brought any claim of breach of confidence, breach of contract or the breach of any intellectual property right held by the company. Mr Kirby's sole claim is that the company has a proprietary claim to either the relevant Google account or to the email content of it.

69. While, for my part, I find the analysis of Edwards-Stuart J persuasive, I do not have to decide whether email content is property for the purpose of the present judgment. Nor is it desirable that I should do so, as the point was not argued during the hearing. Suffice it to say that, even assuming email content is property for the purpose of our law, Mr Kirby has failed to satisfy me on the limited evidence he has presented that the email content of the Google account associated with the email address is, or appears to be, the property of the company, particularly in light of the uncontroverted evidence that the registered user of that account is almost certainly an unknown human person, rather than a company, and that, under Google Ireland's terms of service, a registered user retains any intellectual property rights in any content that he or she uploads, submits, stores, sends or receives using that service.

70. Finally, I express no view on whether, instead of bringing the present application, Mr Kirby should have brought, or should now bring, plenary proceedings against Google Ireland for a Norwich Pharmacal order. Nor do I express any view on whether Mr Kirby should have applied, or should now apply, for the exercise of any of the express statutory powers of the court under Chapter 11 of Part 11 of the Act of 2014 to make orders in aid of the proper winding-up of a company.

Summary and conclusion

71. In summary, I have reached the following conclusions:

    (a) There is no implied power of the court that derives from sections 596 and 627 of the Act of 2014, interpreted separately or together, nor any inherent power of the court, whereby the court must order the delivery up to the liquidator of any property to which the company is, or appears to be, entitled.

    (b) If such an implied or inherent power did exist, distinct from the more constrained express power conferred on the court by s. 673 of the 2014 Act, it could not be exercised in this case because the evidence is insufficient to establish that the contents of the Google account at issue comprise the books or records of the company, or that the company has, or appears to have, a proprietary right, to access or use the account, or that the email content of the Google account is, or appears to be, the property of the company.

72. Hence, the application is refused.