THE COURT OF APPEAL

[2015 No. 373]

Ryan P.
Peart J.
Costello J.

IN THE MATTER OF THE COMPANIES ACT 1963 – 2014 AND IN THE MATTER OF SECTION 139 OF THE COMPANIES ACT 1990 AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT 1963

BETWEEN

TUCON PROCESS INSTALLATIONS LIMITED

(IN VOLUNTARY LIQUIDATION)

APPELLANT

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on 13th July, 2016

1. The first issue arising in this appeal is the issue of the locus standi of the appellant to maintain the proceedings. The second issue concerns whether or not electronic payments into the company's overdrawn bank account by third parties prior to the commencement of the voluntary winding up of the company ought to be returned to the company pursuant to the provisions of s. 139 of the Companies Act 1990.

Factual background

2. The company operated a current bank account at the branch of the respondent at O'Connell Street, Limerick. On 20th April, 2012, the board of the company resolved to place the company in voluntary liquidation and on 21st April, 2012, it advertised that a meeting of the creditors of the company was to be held on 4th May, 2012. It was common case that on 23rd April, 2012, the respondent was aware of the fact that the company intended going into voluntary liquidation as of 4th May, 2012.

3. The resolution to wind up the company was passed at the meeting on 4th May, 2012, and Mr. Anthony Fitzpatrick was appointed liquidator of the company. The respondent ruled off the company's bank account on 4th May, 2012, in accordance with the request of the liquidator.

4. Between 25th and 30th April, 2012, three electronic funds transfers were made by debtors of the company to the company's overdrawn bank account – the sum of €1,947 was lodged to the account by way of electronic funds transfer on 25th April, 2012, the sum of €3,769 was lodged to the account by way of electronic funds transfer on 27th April, 2012, and the sum of €18,178.50 was lodged by way of electronic funds transfer to the account on 30th April, 2012. The total effect of the lodgements was to reduce the company's overdraft from €40,400 to approximately €16,000.

5. The liquidator was of the view that the sums were properly the property of the company in liquidation as the retention of the monies by the respondent in reduction of the company's overdraft had the effect of preferring the respondent over the other creditors of the company. On 22nd November, 2012, he issued an equity civil bill against the respondent in his capacity as liquidator of the *company "for and on behalf of the Company (in voluntary liquidation)."* He sought a declaration that the sum of €23,894.50 was the property of the liquidator in his capacity as liquidator of the company and an order that the sum be lodged to his account together with damages and interest and costs. These proceedings were discontinued as proceedings brought by a voluntary liquidator in the name and on behalf of a company are required to be brought in the High Court.

6. The appellant instituted these proceedings by way of an originating notice of motion dated 13th October, 2014, seeking a declaration that the monies in question were the property of the creditors of the appellant and directions pursuant to s. 280 of the Companies Act 1990 as to how to secure the return of the sum to the liquidator of the appellant for the benefit of the creditors of the liquidation. In the alternative, an order was sought pursuant to s. 139 of the Companies Act 1990 directing the respondent to pay over the sum to the liquidator forthwith. Directions pursuant to s. 280 of the Companies Act 1963 were also sought as to whether additional proceedings were necessary to recover the monies.

7. The respondent defended the proceedings on two bases. Firstly, it argued that the appellant, the company in voluntary liquidation, had no *locus standi* to bring proceedings pursuant to s. 139 of the Companies Act 1990. Secondly, it argued that no order ought to be made pursuant to s. 139 as there was no disposal of company property such as to perpetrate a fraud on the company or its creditors or its members.

The relevant statutory provisions

8. The principal relief sought in these proceedings is an order pursuant to s. 139 of the Companies Act 1990. This provides:-

> *"(1) Where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that—*
>
> *(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and*
>
> *(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members,*

the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit.

(2) Subsection (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which section 286 (1) of the Principal Act applies.

(3) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application."

The appellant also seeks directions pursuant to s. 280 of the Companies Act 1963 which provides as follows:-

"280.—(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

During the hearing of the motion the appellant relied upon the relevant provisions of s. 231 of the Companies Act 1963 which provides as follows:-

"The liquidator in a winding up by the court shall have power, with the sanction of the court or of the committee of inspection—

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company".

By virtue of the provisions of s. 276 of the Act of 1963, these powers apply also to the liquidator of a company in a creditors' voluntary winding up and may be exercised without obtaining the sanction of the court or the committee of inspection.

Locus standi

The appellant's submissions
9. In the High Court, Hunt J. held that the appellant did not have locus standi to maintain the proceedings. The appellant argued that, pursuant to s. 231(a) and s. 276 of the Companies Act 1963 the liquidator had power to bring legal proceedings in the name and on behalf of the company. He submitted that this is what occurred in this case and that he had authority to bring the proceedings on the basis of these statutory provisions. The appellant argued that the High Court erred in law in finding that the nomination of specific parties as potential applicants in s. 139 expressly precludes an application being brought pursuant to the section by a party other than those specified in the Act. It was submitted that whereas s. 231 and s. 276 of the Companies Act confers status on a liquidator to bring legal proceedings, s. 139 of the Companies Act 1990 and s. 280 of the Companies Acts 1963 refer to the liquidator as a category of persons who can bring such applications. He argued that the respondent was not prejudiced by the fact that the appellant rather than the liquidator brought the proceedings and submitted that the appellant was prejudiced by the failure of the respondent to bring a motion in the proceedings to determine the issue of *locus standi*.

10. In addition, the appellant sought two new reliefs which were not previously sought in the High Court. Firstly, if the company lacks locus standi to bring proceedings pursuant to s. 139 of the Act of 1990, it seeks an order directing repayment of the sums claimed in these proceedings to the solicitors for the liquidator. Secondly, it seeks a declaration that the liquidator has locus standi to bring the application in the name and on behalf of the company.

The respondent's submissions
11. The respondent submitted that the learned trial judge was correct in his construction of the provisions of s. 139(1) of the Act of 1990 and s. 280 of the Act of 1963. In each case the application is that of a liquidator, creditor or contributory of a company which is being wound up. Counsel referred to the decision of the Supreme Court in *Southern Mineral Oil Ltd. (In Liquidation) v. Cooney* [1997] 3 I.R. 549 which was relied upon by the learned trial judge in his judgment. In the Supreme Court, Lynch J. was considering the terms of s. 297A and s. 298 of the Act of 1963 and s. 138 of the Act of 1990. Those sections provided:-

"[T]he court, on the application of the receiver, examiner, liquidator or any creditor or contributory of the company, may, if it thinks it proper to do so…

The court may, on the application of the liquidator, or any creditor or contributory, examine the conduct of…"

At p. 568 of the report Lynch J. stated:-

"None of these statutes provide that the application may be brought by the company in receivership or examinership or liquidation. They provide that the application shall be brought by the receiver or examiner or liquidator, as the case may be, and in all cases the application may also be brought by any creditor or contributory of the company in question. Nor do the provisions of O. 74, r. 49 of the Rules of the Superior Courts lend any support to bringing the application in the name of the company in receivership, examinership or liquidation.

The Revenue Commissioners are the real applicants in the proceedings brought against the respondents by the notice of motion dated the 18th August, 1994. In these circumstances it seems to me that it is wrong that they should be enabled to shelter against liability for the respondents' costs if the respondents succeed in the substantive trial of the motion by bringing the proceedings in the names of the two companies who have no assets. On my reading of ss. 297 and 298 of the Companies Act, 1963, under which these proceedings are brought neither the Revenue Commissioners nor the liquidator is entitled to bring them in the name of the companies.

I would therefore dismiss the appeal but I draw attention to the probable need to apply to the High Court for a ruling as to whether or not it is necessary to join or substitute the liquidator and/or the Revenue Commissioners as applicants and if so whether or not such an order should be made in this case."

Keane J. expressly agreed with the judgment of Lynch J. on this point.

12. The respondent also relied upon Messrs. MacCann and Courtney's commentary in *Companies Acts 1963 – 2012* (Dublin: Bloomsbury Professional, 2012) and their notes on s. 231 of the Act of 1963. At p. 490 it is stated:-

> *"Where the proceedings are being taken or defended by the liquidator in the name of the company rather than in his own name, he has no personal liability for any award of costs that may be made in favour of the other party to the litigation, at least provided there has been no personal impropriety on his part. The costs will, however, rank as a cost or expense of the winding up and will rank ahead of the liquidator's own remuneration. Nevertheless there are certain statutory causes of action that must be taken by the liquidator in his own name, such as fraudulent or reckless trading proceedings under CA 1963, s. 297A, misfeasance proceedings under CA 1963, s. 298 and proceedings under CA 1990, s. 204 to impose personal liability for failure to keep proper books of account, which must be taken by the liquidator in his own name. As regards such proceedings, the adverse litigant is entitled to look to the liquidator personally to meet any award of costs, albeit that the liquidator has a right to be indemnified out of the assets in the winding up."*

13. The respondents submit that while s. 139 is not listed in one of the examples given by Messrs. MacCann and Courtney, there is no valid distinction to be made between those sections cited and s. 139 and the decision of *Southern Mineral Oil Ltd. (In Liquidation) v. Cooney* ought to be applied in respect of s. 139 as well as ss. 297A and 298.

14. The respondent also submits that this accords with the jurisprudence in England in relation to the equivalent sections under the relevant English legislation.

15. The respondent submitted that the provisions relied upon by the appellant (in particular s. 231 of the Act of 1963) are of no relevance to the specific statutory remedy relied upon by the appellant for the purposes of bringing its proceedings. It submitted that s. 231 is concerned with the liquidator's powers to bring actions in the name of and on behalf of the company. It submits that this is where the relevant cause of action vests in the company. However, neither s. 280 of the Act of 1963 nor s. 139 of the Act of 1990 vests any cause of action in the company. These provisions provide for statutory applications (in the case of s. 280) and a statutory cause of action (in the case of s. 139) that can only be pursued by a liquidator, creditor or contributory of a company and not by the company itself. The respondent submits that s. 231 does not purport to vest in the company a cause of action which, by some of the other provisions of the company code, is vested not in the company itself but in a liquidator, creditor or contributory of the company.

16. The respondent also submitted that even if the respondent was not prejudiced by the fact that the appellant rather than the liquidator brought the proceedings- which it did not concede- this could not confer a standing on the appellant which it did not enjoy. It was no answer to its lack of standing.

The decision on the first issue

17. The learned trial judge stated at p. 3 of his judgment:-

> *"In the case of an application brought pursuant to a statutory provision, regard must be had to the plain and ordinary meaning of the words of the statute in determining questions such as standing. The nomination of specific parties as potential applicants expressly precludes such statutory applications being brought by a party other than those specified by the legislature, otherwise the precise words used to legislate for classes of applicant would be deprived of ordinary meaning. As the company is not specified by either statutory provision as being an appropriate applicant, it has no standing to seek relief under either of the statutory provisions invoked in this application."*

He relied on the persuasive authority of *Southern Mineral Oil Ltd. (In Liquidation) v. Cooney* and in particular the passage quoted above. At p. 5 of his judgment he stated:-

> *"As they represent a correct and precise statement of the law on the legal issue arising in this case, the application herein should be dismissed on the basis that neither of the sections invoked by the applicant is available to it in circumstances where it is not within the category of applicant specified by either of the statutory provisions in question."*

18. I am of the opinion that the learned trial judge was correct in his application of the law. I find the judgment of Lynch J. in *Southern Mineral Oil Ltd.* to be compelling and, while it is not strictly binding upon this Court, I believe it should be followed in construing s. 139 of the Act of 1990. I am also persuaded by the argument of the respondent that s. 231 of the Act of 1963 does not vest in the company a cause of action which, by some other provisions of the company code, is vested in a liquidator, creditor or contributory of the company. It follows that where the legislature has taken the trouble to specify the parties who may bring an application under s. 139 it is not open to this Court to extend locus standi to a party upon whom it has not been conferred by the express words of the statute.

19. The appellant pointed out that in *Le Chatelaine Thudichum (In Liquidation) Ltd. v. Conway* [2010] 1 I.R. 529 and *Devey Enterprises Ltd. v. Devey* [2012] 1 I.R. 127 applications were brought by the liquidators of the companies on behalf and in the name of the companies for relief pursuant to s. 139 of the Act of 1990 rather than by the liquidators and no issue was taken with the locus standi of the companies in those cases. It is apparent from a consideration of those judgments that the issue of locus standi was not drawn to the attention of the court and it did not form part of the decision in either case. It follows that these judgments are not authority for the proposition that the appellant has locus standi to bring an application pursuant to s. 139 of the Act of 1990.

20. I conclude that the appellant does not have locus standi to maintain these proceedings. For the reasons given above, it follows inexorably that this Court cannot grant a declaration that the liquidator has locus standi to bring the application in the name and on behalf of the company.

Section 139 of the Companies Act 1990

21. The learned trial judge dealt with the merits of the application lest he be wrong in his conclusion on the issue of *locus standi*. He rejected the application based upon s. 139 and his decision on the merits of the application was also appealed. As the matter was fully argued, notwithstanding the fact that the proceedings must be rejected due to the lack of standing of the appellant, nonetheless I will consider the second ground of the appeal.

The appellant's submissions

22. The appellant urged that the Court should exercise its discretion pursuant to s. 139 to direct the respondent to pay the sums the subject of these proceedings to the solicitor for the liquidator on such terms or conditions as the Court sees fit. He argued that the

receipt of the funds by way of electronic transfer and the reduction of the company's overdraft by the respondent in crediting the receipts to the account amounted to the disposition of property of the company the effect of which was to perpetrate a fraud on the company, its creditors or members. It was submitted that the three payments into an overdrawn bank account had the effect of preferring the respondent bank over the other creditors of the company and that this was sufficient to satisfy the requirement of fraud in s. 139(1)(b). Hunt J. concluded that a simple payment to an unsecured creditor when the company was insolvent would not, without more, trigger the operation of the section. He found that additional ingredients were necessary to trigger the application. It was submitted that this was incorrect and that the fact that the three payments were made to an overdrawn bank account had the effect of preferring the bank over other creditors of the company and that this was sufficient to satisfy the threshold of fraud set out in the section.

23. The appellant relied upon the decision of Murphy J. in *Le Chatelaine Thudichum (In Liquidation) Ltd. v. Conway*. Murphy J. stated at para. 19:-

> *"before it can make an order under s. 139, the court must be satisfied that all of the following criteria are met:-*
>
> *(i) there was a disposition;*
>
> *(ii) of company property;*
>
> *(iii) the effect of the disposition was to perpetrate a fraud either on the company, its creditors or its members."*

At para. 20 he stated:-

> *"Insofar as the meaning of the term disposition is concerned, the section is drafted in very broad terms apt to encompass almost any kind of transaction."*

At para. 35 he held:-

> *"the fraud criterion in s. 139 of the Companies Act 1990, merely requires that the company, its creditors or members be deprived of something to which it is, or to which they are, lawfully entitled (Courtney, The Law of Private Companies, (2nd ed., 2002, Dublin) at para. 27.093). I would adopt this proposition as a correct statement of the law."*

He concluded at para. 41:-

> *"I am satisfied that the disposition in favour of the respondent had the effect of perpetrating a fraud on the applicant in depriving it of its assets, and on the creditors in diminishing the pool of assets available for distribution upon liquidation. The creditors were thus denied the possibility of having a portion of the debts owed to them repaid, and were accordingly deprived of a benefit to which they were lawfully entitled."*

24. The appellant also relied upon the decisions of Finlay Geoghegan J. in *Kirby (as Liquidator of Citywest Hire Ltd.)(In Liquidation) v. Petrolo Ltd. & Anor.* [2014] IEHC 279, Laffoy J. in *Devey Enterprises Ltd. v. Devey* and Charleton J. in *Kennington (as Official Liquidator of Leo Getz Trading Ltd.)(In Liquidation) v. McGinley* [2014] IEHC 356.

25. The appellant argued that there was a disposition of company property and the effect of the disposition was to deprive the company and its creditors of something to which it and they were entitled. This was sufficient to bring the transactions within the scope of s.139 and Hunt J. was incorrect in law in not so holding.

26. It was argued that s.139 was analogous to s. 218 of the Act of 1963. Section 218 applies to companies that are wound up by the court. It provides:-

> *"In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."*

The appellant submitted that, just as dispositions of the company effected during the interval between the presentation of the petition to wind up the company and the order of the court to wind up the company could, if not avoided by the provisions of s. 218, result in some creditors being preferred over the general body of creditors and thus offending the pari passu principle, likewise dispositions made by an insolvent company which subsequently goes into voluntary liquidation could have the effect of preferring one or more creditors over the general body of creditors. This also would offend the *pari passu* treatment of creditors and therefore s. 139 should be held to apply to dispositions of company property to creditors made at a time the company was insolvent. It was sufficient to bring a transaction within the scope of the section that the company was insolvent at the time it disposed of property because any such disposal must mathematically have the effect of reducing the assets available to the creditors of the company should it go into insolvent liquidation.

The respondent's submissions

27. The respondent submitted that the learned trial judge had correctly found that s. 139 of the Act of 1990 had no application where the respondent had operated the appellant's current account in the ordinary course of business prior to the operative date of the creditors' winding up and that, absent proof of other circumstances, the receipt of ordinary third party payments by the respondent could not be regarded as being equivalent to a fraud upon the appellant company, its members or other creditors. It was submitted that as s. 139(2) does not apply to transactions falling within s. 286(1) of the Act of 1963 that this suggests that s. 139 was enacted to deal with quite different circumstances to those pertaining where a payment is made to one creditor in preference to the general body of creditors and with the intention of preferring that creditor. Such payments still fell to be considered under s. 286 of the Act of 1963. It follows that unless there is an intention to prefer that creditor over other creditors, such a payment will not be invalidated.

28. It was submitted that for s. 139 to apply it must be demonstrated that the transaction impugned has had the effect of perpetrating a fraud on the company, its creditors or members. It accepted that there was no requirement to prove an intention to defraud but it emphasised the distinction between the mere making of a payment on the one hand and a fraudulent disposition on the other hand. It was urged that the learned trial judge had full regard to the relevant authorities as appears from his judgment. It was clear from the decisions in *Le Chatelaine Thudichum (In Liquidation) Ltd. v. Conway, Devey Enterprises Ltd. v. Devey and Kirby (as Liquidator of Citywest Hire Ltd.)(In Liquidation) v. Petrolo Ltd. & Anor.* that in each of these cases there was a diversion of company

property to a third party who had no entitlement to it. Hence the effect of the transfers or dispositions was to perpetrate a fraud on the companies in question within the meaning of the section.

29. It is clear from the case of *Kirby (as Liquidator of Citywest Hire Ltd.)(In Liquidation) v. Petrolo Ltd. & Anor.* that Finlay Geoghegan J. took the view that the payment of monies to suppliers (*i.e.* creditors) of the company should be excluded from the order under s. 139. She made a clear distinction between Petrolo as a recipient (which had no entitlement to receipt of the monies) on the one hand and creditors (namely the suppliers and employees) of the company on the other hand and only ordered the return of monies that were both wrongly diverted from the company and retained by Petrolo for its own use and benefit in circumstances where Petrolo had no entitlement whatsoever to receive those monies. The respondent submitted that s. 139 was not directed at circumstances where a payment is made to an unsecured creditor at a time when the paying company is insolvent.

30. The respondent contrasted s. 139 with the provisions of s. 218 of the Act of 1963 relating to payments made after the presentation of a winding up petition and prior to the order winding up the company. It pointed out that there was no equivalent provision in the Companies Act which invalidates or calls into question payments made prior to the holding of a creditors' meeting in the context of a proposed voluntary winding up. Furthermore, s. 218 applied to transactions effected after the commencement of the winding up of the company. The appellant here sought to apply the section by analogy to transactions which occurred prior to the commencement of the winding up and this was incorrect in law.

31. It noted that the learned trial judge correctly found as a fact that neither the appellant nor the respondent had any input into the receipt of any of the third party payments in question. They were all received prior to the commencement of the liquidation and therefore the fact that the respondent was on notice of a fact that it was intended to place the company in voluntary liquidation as of 4th May, 2012, is no avail to the appellant.

Decision on the second ground

32. At p. 6 of the judgment, Hunt J. considered s. 139 of the Act of 1990. He stated:-

> *"This section provides an addition to the provisions of the 1963 Act. It is described as a power of the court to order the return of assets which have been improperly transferred. s. 139 effectively provides that where the court is satisfied on the application of a liquidator, creditor or contributory that company property was disposed of with the effect that such disposal perpetrated a fraud on the company or its creditors or members, it may make various orders in respect thereof on a 'just and equitable' basis. It also provides that s. 139 does not apply to transactions to which s. 286 of the 1963 Act applies.*
>
> *Consequently, the availability of relief under this section requires proof of a disposal of property accompanied by the effect of the perpetration of a fraud on the company, or its creditors or members. It does not require proof of an intention to defraud, merely that the impugned transaction has that effect."*

33. Having considered each of the authorities referred to above he stated at pp. 7-8 of his judgment:-

> *"The principles to be discerned in relation to s. 139 from these cases are that improper dispositions or misapplications of company property will be caught by the section, but payments or dispositions in favour of creditors or employees for the benefit of the company concerned will not be included in an order made under the section. A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section. It is not the case that every otherwise lawful payment made by an insolvent company to a legitimate unsecured creditor will automatically amount to a fraudulent disposition. The type of additional ingredient necessary to trigger the application of the section is illustrated by the features of the cases listed above."*

He went on to consider the case of in *Re Frederick Inns* [1994] 1 I.L.R.M. 387 where the Supreme Court made a distinction between payments made for the benefit of the four companies in liquidation and payments made for the benefit of six other related companies. He held that this was entirely consistent with the approach subsequently taken by the High Court in cases under s. 139. He held at p. 8:-

> *"Two basic principles emerge from this collection of authorities. Firstly, the purpose of this section is to address and correct situations where company property has been diverted for improper purposes, to the detriment of the company, its members or creditors. Secondly, the 'just and equitable' provision in the section prevents ordinary payments to creditors or suppliers which accrue to the benefit of the company, as opposed to any third party, from being regarded as being tantamount to a fraud on the company, its members or other creditors."*

34. In my opinion Hunt J. correctly stated the principles to be derived from the previous cases dealing with applications pursuant to s. 139 of the Act of 1990. A careful reading of *Le Chatelaine Thudichum (In Liquidation) Ltd.* reveals that it is not authority for the proposition that any disposition of company property which has the effect of reducing the assets of the company available to its creditors without more is automatically captured by s. 139 of the Act of 1990. It is important to note that after para. 19, cited above, where Murphy J. identified the criteria to be met before the court could make an order under s. 139, he stated at para. 20:-

> *"Insofar as the meaning of the term disposition is concerned, the section is drafted in very broad terms apt to encompass almost any kind of transaction. For our purposes it is clear that the company, acting through Mr. Thudichum, gave the respondent possession of the stock and cash involved in the transaction. On the date of that transaction the company was insolvent and the respondent, with the co-operation of the applicant, resumed control of the premises together with all stock and cash thereon, and resumed trading in the ordinary course. This appears sufficient to come within the ambit of the section. The court must then consider and decide what the extent of the company's stock was at the time of the transaction." (Emphasis added)*

He makes clear that entry onto the company premises and the taking of possession of a cash sum and the entire stock of the insolvent company in lieu of rent owed was sufficient to bring the disposition within the ambit of the section. It is in this context that his approval of Courtney, *The Law of Private Companies*, 2nd ed. (Dublin; Tottel, 2002, para. 27.093) is to be seen. The full quote from para. 27.093 reads:-

> *"It should be noted that an applicant under CA 1990, s.139 is not required to prove an intention to defraud, a difficult and problematic proof at the best of times. Rather, what is required to be shown is that the effect of a disposal was to perpetrate a fraud on the company, its creditors or members. It matters not what the object or intention was if the effect is to perpetrate a fraud and it is thought that when this provision is finally subjected to judicial interpretation that*

the courts will not require evidence of subjective intent to defraud on the part of the company's controllers. It must, however, be shown that the effect of the disposal was to perpetrate a fraud. In this context it is submitted that by 'fraud' is meant the diversion of property from the entity or person who is lawfully entitled to it. An example would be where a company was owed money for goods or services rendered by a third party and that third party's payment was diverted away from the rightful recipient, the company, to another person or entity. Equally, a gratuitous disposition of company property in favour of, say, its controllers would have the effect of perpetrating a fraud on the company. Because company property is just that, 'company' property, the circumstances in which the effect of a disposal will be to perpetrate a fraud on members and creditors will be more rare than where the effect is to perpetrate a fraud on the company. In the case of members, the diversion of a dividend, properly declared before it was paid would be to perpetrate a fraud on members. As to creditors, an example of what is envisaged under this section might be where a creditor has acquired an equitable or beneficial interest in property belonging to a company and that property is disposed of to another person."

35. The learned trial judge in *Le Chatelaine Thudichum (In Liquidation) Ltd.* summarised this paragraph as depriving the company, its creditors or members of something to which the company or they are lawfully entitled. However, Courtney in fact argued that fraud in the context of s. 139 meant the *diversion of property* from the entity or person who was lawfully entitled to it. It seems to me that this distinction is crucial in order to establish the element of fraud required by the section. The construction contended for by the appellant effectively erases the requirement to establish fraud from the section if fraud can be established by proof of the effect of the disposition *and no more*. Such a construction means, in effect, that all dispositions of an insolvent company of whatever kind must be construed as fraudulent within the meaning of s. 139. I cannot accept that this is a correct construction of the section or indeed correctly represents the ratio of the decision in *Le Chatelaine Thudichum (In Liquidation) Ltd*.

36. The construction advanced by the appellant is contrary to the decision of Laffoy J. in *Devey Enterprises Ltd. v. Devey*, a case relied upon by the appellant. At para. 21 of the report she quotes with approval from Courtney at para. 27.096 as follows:-

"There is a distinction between fraudulent preferences and fraudulent dispositions, as Warner J. observed in In re Clasper Group Services Ltd [[1989] B.C.L.C. 143 at p. 148] when he said:-

> *'…there is a distinction between a payment to a creditor as such and a payment which, albeit made to a person who is a creditor, is a sheer misapplication of the company's money.'*

Section 139… does not apply to fraudulent preferences, which are addressed by… s. 286. Section 139 can be analysed by counter reference to the limits of s. 286… Accordingly it is irrelevant for the purposes of s. 139 that the company was insolvent at the time of the disposition or that it was made a creditor, or that the disposition was made within a certain time frame. There needs only be a disposal where the effect is to perpetrate a fraud on the company, its creditors or its members."

The appellant's argument was that the transactions had the effect of reducing the assets available to the creditors of the company and therefore fell within the scope of s. 139 precisely because at the time of the transactions the company was insolvent (and indeed that the respondent was on notice of the intention to wind up the company). This is precisely the argument that Laffoy J. held was irrelevant to the application of s. 139. I accept that Laffoy J. was correct in her construction of s. 139 and therefore the argument of the appellant cannot be correct.

37. It is common case that neither the company nor the respondent had any involvement whatsoever in the transfers by the company's creditors into the company's bank account. The monies were received in the ordinary course of business. It cannot be said that receiving the monies amounted to a fraud on the part of the respondent. Likewise it cannot be said that reducing the company's overdraft could amount to a fraud on the company. The appellant could not point to a case where s.139 applied to a payment made to a creditor to whom money was due. It is difficult to see how it could amount to a fraud on the creditors of the company even if the company was insolvent at the time and the account was overdrawn. Notwithstanding the fact that the company was insolvent and that the respondent was on notice of the fact that the company intended to place the company in voluntary liquidation on 4th May, 2012, there was no guarantee that this in fact would occur. Rhetorically one asks, what was the bank manager to do with the receipts? In my judgment it is impossible to discern any fraud in relation to what occurred.

38. Furthermore, the construction advanced by the appellant introduces a huge degree of uncertainty in relation to the workings of overdrawn company bank accounts as well as to many payments made in the ordinary course of business. This uncertainty is undesirable, unnecessary and contrary to the provisions of the Companies Acts. The Companies Acts are clear that transactions in the ordinary course of business (not amounting to fraudulent preferences) between a company and its creditors at arms length will not be avoided or set aside if they occurred prior to the date of the commencement of the winding up the company. In the case of a voluntary winding up, this is upon the date of the passing of the resolution and the appointment of the liquidator. It does not relate back to some uncertain date allegedly equivalent to the date of the presentation of a petition for the winding up of a company by the court.

39. In essence, the appellant's arguments in this regard amount to a submission that a provision analogous to s. 218 of the Act of 1963 should apply to pre-commencement of liquidation transactions where the winding up is otherwise than by the court or that s. 139 should be construed as such. The argument is that payments made in the ordinary course of business and dispositions of the assets of the company in the run up to the resolution to place the company in insolvent voluntary liquidation are automatically captured by s. 139. This means that any person who appears to have the use, control or possession of the property or proceeds of the sale or development thereof may be ordered by the court to deliver the property or pay a sum in respect of it to the liquidator of the company on such terms or conditions as the court sees fit.

40. This construction of s. 139 is without merit. First, s. 218 does not apply to voluntary liquidations. There is no equivalent provision in the very extensive code of company law applicable to voluntary liquidations. This Court cannot in effect legislate by filling what counsel for the appellant described as a *lacuna* in the legislation.

41. Second, even if s. 218 could be applied by analogy to a voluntary liquidation, s. 218 is confined to payments made after the commencement of the winding up. The fact that the doctrine of relation back applies so that the date of the commencement of the winding up of a company by the court is the date of the presentation of the petition and not the date the order is made should not obscure this essential fact. On any version of the events in this case the transactions occurred prior to the winding up of the company. Even if there was substance in the submission that s. 218 should apply by analogy to voluntary liquidations or should be applied as an aide to the construction of s. 139, this cannot avail the appellant on the facts of this case.

42. Accordingly, for the reasons advanced, I dismiss the second ground of appeal also.