Neutral Citation [2012] IEHC 552

THE HIGH COURT

[2012 No. 570 COS]

IN THE MATTER OF LOST WEEKEND LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 1990

BETWEEN

ANDREW BERGIN AND ANTOINETTE BERGIN

APPLICANTS

AND

LOST WEEKEND LIMITED (IN LIQUIDATION)

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 18th day of December, 2012.

The application

1. This application was initiated by an originating notice of motion which was issued on 16th October, 2012 and was returnable for 12th November, 2012. In it, the applicants sought the following orders:

> (a) an order pursuant to s. 280 of the Companies Act 1963 (the Act of 1963) declaring as invalid the purported appointment of Jason Sheehy (Mr. Sheehy) as liquidator of Lost Weekend Limited (the Company); and
>
> (b) an order pursuant to s. 277 of the Act of 1963 appointing Frank Wallace, FCA (Mr. Wallace) as liquidator of the Company for the purpose of the winding up of the Company or such other person as the Court should see fit.

The factual basis of the applicants' application

2. The application was grounded on the affidavit of the first named applicant (Mr. Bergin), which had been sworn as long ago as 26th July, 2012, but which was filed on 16th October, 2012.

3. The applicants claim to have *locus standi* to seek the relief claimed on this application on the basis that they are jointly a creditor of the Company to the extent of at least €120,493. In his grounding affidavit Mr. Bergin explained that the Company, while it was trading, had been operating in Wexford and that it combined an interior design service with the supply of very high-end furniture and pieces, predominantly Scandinavian in origin. The directors of the Company were Declan Moloney (Mr. Moloney) and Emily Maher (Ms. Maher). In the first half of 2010 the applicants agreed to join together in a joint venture with Mr. Moloney and Ms. Maher to establish a similar business in the Dublin Metropolitan area. Mr. Bergin has exhibited "Heads of Terms", which appear to have been signed by the parties over a year later, on 15th September, 2011. That document stated that its purpose was to set down on paper the terms that had been agreed between the parties in relation to an investment in Lost Weekend Design Limited (Design). It stated that the document confirmed the terms on which the parties had been operating since the initial monies were advanced, although it did not specify what the initial monies amounted to. It appears from the document that the investor was to be "A Squared". However, Mr. Bergin did not refer to "A Squared" in his affidavit.

4. The circumstances in which the applicants had advanced monies to Mr. Moloney and Ms. Maher, as deposed to by Mr. Bergin, were that Mr. Moloney represented to Mr. Bergin that the shop and design business in Blackrock, County Dublin, which were to be the subject of the joint venture, should be ready to trade in September 2010. Mr. Moloney further represented to Mr. Bergin that, in order to guarantee the delivery of stock to the Blackrock business by September 2010, stock orders would need to be placed with specialist furniture suppliers in the months of April, May and June 2010. However, the company which was to be incorporated to conduct the joint venture, Design, had not yet been incorporated. It had neither a bank account nor credit facilities, and was not registered for VAT. In order to resolve the quandary, Mr. Moloney suggested that the orders for stock for the Blackrock business should be placed in the name of the Company. The applicants agreed to a proposal that they would advance a specific sum of money to the Company for the sole and single purpose of placing a stock order on behalf of Design, that the Company would act as a conduit and transfer the stock to Design and that at no stage would the Company have any claim over the stock ordered with the applicants' money.

5. The terms on which advances were made by the applicants were recorded in Memoranda of Understanding, which were executed by the applicants and by Mr. Moloney and Ms. Maher in relation to each advance of money for a purchase of stock. Most of the Memoranda of Understanding have been exhibited. They were all in the same form. The first was executed at the end of April 2010 at a time when, apparently, the new joint venture company was to be known as Lost Weekend Dublin Limited. All of the subsequent Memoranda of Understanding which have been exhibited were apparently executed in the last quarter of 2010. Each memorandum records that on a specific date it was agreed that the applicants would advance a specified sum of money to the Company so that an order for stock to that value could be placed by the Company on behalf of the new venture, Design, which had not been formally established. The memorandum provided that it had been agreed that the ownership of the stock would reside with the new entity at all times and that the Company would have no claim over it at any stage. In the event that Design should fail to come into being, the ownership would revert to the applicants.

6. The applicants' case is that sums totalling €356,750 were advanced to the Company for the acquisition of stock for Design on the basis agreed between the applicants, on the one hand, and Mr. Moloney and Ms. Maher, on the other hand.

7. Design is currently being wound up as a creditors' voluntary winding up, which commenced in June 2012. Mr. Wallace is the liquidator of Design.

8. The basis on which the applicants contend that the Company is indebted to them in the sum of at least €120,493 as deposed to by

Mr. Bergin is that he has been advised that the sums aggregating €356,750 advanced by the applicants to the Company as a conduit for the acquisition of stock for Design were not expended by the Company solely for the purpose agreed between the parties, because the Company only transferred stock to the value of €236,257 to Design. In this connection, Mr. Bergin, in his grounding affidavit, relied on a letter dated 24th July, 2012 from Mr. Wallace to the applicants' solicitors, Clarke Jeffers & Co. In that letter Mr. Wallace certified that the directors of the Company, namely, Mr. Moloney and Ms. Maher, had stated that they had transferred stock in the amount of €236,257 to Design but that they did not keep a list of the stock. Mr. Wallace further confirmed that that figure was shown in the balance sheet of the Company as at 10th November, 2010. The Abridged Financial Statements of the Company for the period from 1st February, 2010 to 10th November, 2010, as audited by Finbarr Gahon & Co., Incorporated Public Accountants & Registered Auditors, which have been filed in the Companies Registration Office (CRO), have been exhibited by Mr. Bergin. The balance sheet shows a figure of €236,257 in respect of stock. It also shows a figure of €356,750 in respect of creditors. In a further letter of 24th July, 2012 from Mr. Wallace to the applicants' solicitors, which has also been exhibited by Mr. Bergin, Mr. Wallace has set out how he arrived at the figure of €120,493 as being owed to the applicants from the Company. In summary, that figure was arrived at by deducting the sum of €236,257, representing the value of the stock which the directors of the Company claim they transferred to Design, from €356,750, being the aggregate of the sums advanced by the applicants to the Company. Mr. Wallace signed that letter as liquidator of Design (in voluntary liquidation).

9. Mr. Bergin averred that the Company ceased trading in or around 10th November, 2010.

The liquidation of the Company

10. Mr. Bergin has exhibited notices which were published in the Sun on 30th May, 2012 and in the Irish Daily Star on the same day, giving notice pursuant to s. 266(2) of the Act of 1963 that a meeting of the creditors of the Company would be held in the Marine Hotel in Dun Laoghaire on 6th July, 2012 at 9am. The notice was dated 28th May, 2012 and was expressed to be "By Order of the Board". No notice of the creditors' meeting was served on the applicants as creditor in accordance with s. 266.

11. As regards what happened at that meeting, in his grounding affidavit, Mr. Bergin relied on the contents of a letter dated 13th July, 2012 from Mr. Wallace to the applicants' solicitors. Mr. Wallace intended attending at the meeting on behalf of the applicants, accompanied by a solicitor. However, he met with Mr. Moloney and Ms. Maher at the hotel prior to the meeting. Mr. Moloney denied that the applicants were a creditor of the Company and contended that they were not entitled to vote at the meeting. Mr. Wallace and the solicitor were excluded from the meeting.

12. The only other factual matter deposed to by Mr. Bergin in his grounding affidavit was that, after the meeting, the solicitor who had accompanied Mr. Wallace was informed that Mr. Sheehy had been nominated by the Company as liquidator and that his nomination had been approved by the body of creditors. However, Mr. Bergin exhibited an e-mail dated 26th July, 2012 from Mr. Sheehy to the applicants' solicitors which stated that he had not been in attendance at the creditors' meeting, that he did not consent to act as liquidator, that he had received an e-mail on 13th July, 2012 from Mr. Moloney stating that his services as a liquidator would not be required, and that subsequent to the creditors' meeting he had been contacted by an official from the Revenue Commissioners inquiring if he was appointed liquidator to the Company and he had confirmed that he was not. He reiterated in the e-mail that he was not the liquidator of the Company.

Hearing on return date

13. When this matter came before the Court on the return date, 12th November, 2012, there was no appearance on behalf of the Company or its directors, Mr. Moloney and Ms. Maher, although the proceedings had been served on all of them. However, service on Mr. Moloney and Ms. Maher, who were not named as notice parties, was stated in the covering letter to be as a matter of courtesy. Having heard counsel for the applicants, it appeared to me that there was a big issue as to whether the Company was in liquidation or not. A search in the CRO on 11th November, 2012 gave the designation of the Company as normal. I adjourned the application to consider the matter. In the meantime, the applicants' solicitors helpfully contacted the Revenue Commissioners in consequence of which, when the matter was next listed before the Court, there was an affidavit sworn on 14th November, 2012 by Tom O'Brien of the Insolvency Unit of the Revenue Commissioners before the Court, in which Mr. O'Brien, who was in attendance at it, outlined what happened at the intended creditors' meeting on 6th July, 2012.

Mr. O'Brien's affidavit

14. Mr. O'Brien averred that he attended at the creditors' meeting of 6th July, 2012. The only other attendees at the meeting were Mr. Moloney and Ms. Maher, whom he described as both creditors and directors of the Company. Mr. O'Brien averred that before the start of the meeting Mr. Moloney informed him that he was unable to contact Mr. Sheehy, who was the members' nominee for liquidator. Mr. O'Brien did not oppose the proposed appointment of Mr. Sheehy. Mr. Moloney asked Mr. O'Brien whether they should wait for Mr. Sheehy's attendance or proceed with the meeting in his absence. Mr. O'Brien replied that he would prefer to have Mr. Sheehy present. Eventually the meeting commenced at approximately 9.15am, but without the attendance of Mr. Sheehy.

15. Mr. O'Brien averred that during the meeting he asked who was taking minutes. Ms. Maher then began to take notes. Mr. O'Brien further averred that the directors told the meeting, which, in reality, was Mr. O'Brien, that the Company had begun trading on 1st April, 2010 and had ceased trading in or about February 2011. The Company had not been liquidated earlier because they had hoped that business would improve.

16. If the directors of the Company had put "a full statement of the position of the Company's affairs, together with a list of the creditors of the Company and the estimated amount of their claims" before the meeting of creditors, as they were obliged to do by virtue of s. 266(3) of the Act of 1963, the statement of affairs has not been put before the Court. Mr. O'Brien made some averments in relation to what the directors told him at the meeting. I propose concentrating on what he has averred was said to him about stock. He has averred that it was stated by the directors that the Company's stock was sold to Design, of which Mr. Moloney and Ms. Maher were also directors, and that Design was in liquidation. The Company's indebtedness to the Revenue Commissioners arose from the sale of the stock to Design. The directors told Mr. O'Brien that money collected in respect of VAT was used to pay some day to day expenses of the Company. Mr. O'Brien also averred that he was informed by the directors that "the €365,750 loan in the filed February/November 2010 accounts was money for the purchase of stock". He further averred that a "new set of accounts for the period 1st April, 2010 to 31st March, 2011", which were unsigned, was produced by the directors and that the loan did not appear in those accounts.

17. At the meeting, the directors proposed Mr. Sheehy as liquidator and Mr. O'Brien did not oppose his nomination. On that basis, he assumed that Mr. Sheehy was appointed liquidator and he requested his details and he was given Mr. Sheehy's phone number.

18. After the meeting he was approached by Mr. Wallace and the solicitor who was accompanying him to discuss the meeting, but he declined to discuss it.

Subsequent involvement of the directors of the Company

19. Having considered Mr. O'Brien's affidavit, in the context of the CRO search which designated the Company as "normal", and being concerned that there may have been a breach of the Act of 1963, in particular, of s. 143 or s. 252 or both, I adjourned the application to 26th November, 2012 and I directed that the solicitors for the applicants notify Mr. Moloney and Ms. Maher that their attendance was required before the Court on 26th November, 2012.

20. Counsel, instructed by Hunter & Co., Solicitors, appeared on behalf of the Company on 26th November, 2012. An affidavit sworn by Mr. Moloney on 26th November, 2012 was put before the Court. In that affidavit Mr. Moloney averred that he had been informed that the Company should be legally represented in these proceedings. The Company had ceased trading in March 2011. However, he averred that the Company was not in liquidation, in that no resolution of the members had been passed as required by the provisions of the Companies Acts 1963 – 2012 to put the Company into liquidation, notwithstanding that the directors sought to convene a creditors' meeting for the purposes of appointing a liquidator in July 2012. He also averred that the directors proposed convening a creditors' meeting on 10th December, 2012, but elsewhere in his affidavit it was stated that the Company proposed to rectify the situation on 17th December, 2012. Mr. Moloney also averred that it was the directors' preference that an independent and unconnected person be appointed as liquidator, other than Mr. Wallace, whom it was averred had previously acted for Design with regard to its financial affairs and had considerable dealings with the Company and had "access to all its financial information and dealings". Mr. Moloney also averred that he does not believe that the applicants are creditors of the Company, rather they are creditors of Design, referring to the Memoranda of Understanding. In short, his position was that the Company "simply facilitated in the ordering process". Mr. Moloney denied that he ever told Mr. Wallace that the applicants were creditors of the Company. He also exhibited a copy of a letter of 9th November, 2012 from the Company's former solicitors, McKeever Rowan, to the applicants' solicitors, which had asserted that the applicants were not creditors of the Company and that Mr. Sheehy was not appointed liquidator of the Company. I assume that that letter had not reached the applicants' solicitors by the first return date, 12th November, 2012. Otherwise, it should have been brought to the Court's attention.

21. As regards Mr. Sheehy's involvement, Mr. Moloney averred that he was introduced to Mr. Sheehy as a possible liquidator by Clarke Jeffers & Co., Solicitors, who previously acted on behalf of Design. Mr. Moloney averred that he met with Mr. Sheehy who said he would act as voluntary liquidator and told Mr. Moloney to proceed to call a creditors' meeting. As regards Mr. Sheehy's failure to turn up at the creditors' meeting, Mr. Moloney averred that he spoke to Mr. Sheehy subsequently and that he was told that there was an accident at the farm of his family and he was unable to attend. In any event, Mr. Moloney's position was that his new solicitors had pointed out that the Company could not have appointed a valid liquidator, as no general meeting of the members had been held "to pass an ordinary resolution as is required".

22. Three affidavits were filed in response to Mr. Moloney's affidavit, namely:

(a) an affidavit sworn by Mr. Bergin on 29th November, 2012, which was more argumentative than factual and which, in reality, contained no new factual information;

(b) an affidavit sworn by Mr. Wallace on 29th November, 2012, which I will consider below; and

(c) an affidavit sworn by Mr. Sheehy on 3rd December, 2012, which I will also consider below.

23. Mr. Wallace, in his affidavit, made a series of allegations against Mr. Moloney and Ms. Maher, for example:

(a) that they had not been co-operative in the provision of information to allow him to progress the orderly winding up of Design;

(b) that the business affairs of Design and the Company appeared to have been operated in a manner where the common directors, that is to say, Mr. Moloney and Ms. Maher, did not adequately distinguish between the two companies or at all;

(c) that the total value of stock ostensibly transferred from the Company to Design in the amount of €236,257 was not recorded in the books of account of Design;

(d) no VAT invoice was raised in relation to any transfer of stock in the amount of €236,257 from the Company to Design; and

(e) that the books of account of Design were kept "in an extraordinarily poor fashion".

Mr. Wallace averred that Mr. Moloney had told him directly that the figure of €356,750 recorded as a loan in the final audited accounts of the Company represented the money provided to the Company by the applicants and that Mr. Moloney had transferred the stock recorded in the books of the Company to Design in the amount of €236,257. Mr. Wallace also averred that he was directly told by Mr. Moloney and Ms. Maher that the Company ceased to trade on or about 10th November, 2010, when Design commenced trading. Mr. Wallace averred that his appointment as liquidator of the Company offers the best chance of disentangling the affairs of Design and the Company in a manner which will facilitate the proper and orderly winding up of both companies in the most efficient and timely manner.

24. Mr. Wallace averred that his only involvement in a professional capacity in relation to either the Company or Design prior to his appointment as liquidator of Design was in relation to the compilation of a report pursuant to the instructions of Michael Higgins, Chartered Accountant, whom he averred was dealing with the parties prior to the commencement of the winding up of Design. Mr. Wallace averred that he is "independent, unconflicted and unconnected".

25. Finally, Mr. Wallace drew the Court's attention to the fact that Mr. Moloney and Ms. Maher are the sole directors of a company which was incorporated on 19th September, 2012 under the name "D. E. Lost Weekend Interiors Limited" and he exhibited a CRO search to corroborate that averment. That is, indeed, a rather disturbing feature of this case.

26. Mr. Sheehy, in his affidavit, also contradicted the averments in Mr. Moloney's affidavit in relation to his involvement with the Company. Mr. Sheehy averred that, although he is unable to recall with absolute certainty whether he gave specific advices about passing a resolution of the members to wind up the Company to Mr. Moloney at their meeting on 1st June, 2012, he believes that his "simple depiction of the process" included the absolute necessity of duly convening an EGM of the members of the Company to pass the two necessary resolutions to wind up the Company by reason of its insolvency and to nominate a liquidator. Mr. Sheehy emphatically averred that he never agreed to act as liquidator of the Company, or considered attending the creditors' meeting or indicated to Mr. Moloney that he would attend the creditors' meeting on 6th July, 2012. He has averred that he certainly did not say

to Mr. Moloney at any stage during their brief acquaintance that there was an accident at the farm of his family and that this was the reason he was unable to attend the creditors' meeting on 6th July, 2012.

27. Mr. Moloney swore a further affidavit on 3rd December, 2012, which was put before the Court when the matter was next before the Court on that day. Mr. Moloney persisted in his contention that the applicants are not creditors of the Company. He persisted in his contention that the Company was not in liquidation and averred that it was proposed to put it into liquidation on Monday, 10th December, 2012. He exhibited a range of e-mails from Mr. Sheehy to him. He asserted that Mr. Bergin owned "Design" and that he and Ms. Maher merely worked on his behalf. He expressed the belief that Mr. Wallace would be "a wholly inappropriate party" to appoint as liquidator of the Company suggesting that, because of his involvement with Design, he is conflicted.

Position adopted by the Revenue Commissioners

28. The Revenue Commissioners were represented at the hearing on 3rd December, 2012 by counsel. Counsel told the Court that the Revenue Commissioners were one of the biggest creditors in the statement of affairs, the debt due to the Revenue Commissioners being in the region of €92,000. I reiterate that the statement of affairs is not before the Court. Counsel informed the Court that the Revenue Commissioners were supportive of the Company being wound up in a creditors' voluntary winding up because that would be a more cost efficient approach than a winding up by the Court. Further, the Revenue Commissioners were supportive of the appointment of Mr. Wallace as liquidator. It was submitted that the Court could give the liquidator liberty to apply to court in relation to any issue which arose in the creditors' voluntary winding up.

The law and its application

29. The two sections of the Act of 1963 invoked by the applicants, s. 280 and s. 277, apply where a company is being wound up other than by the Court, that is to say, either in a creditors' voluntary winding up or a members' voluntary winding up. Under s. 280(1) the Court, on an application by the liquidator or any contributory or creditor, may determine any question arising in the winding up and there is expressly conferred on the Court all or any of the powers which the Court might exercise if the company was being wound up by the Court. Section 280 is a type of "umbrella" provision. What the applicants in this case set out to procure was the removal of Mr. Sheehy as liquidator, on the assumption that he had been appointed, and the appointment of Mr. Wallace in his place. There are specific provisions in the Act of 1963 in relation to the removal and appointment of liquidators and, accordingly, I am of the view that those specific powers must be invoked in such circumstances.

30. Apart from s. 277, there are two provisions in the Act of 1963 dealing with the appointment of a liquidator in a voluntary winding up. Section 259(1) relates to a members' voluntary winding up and provides that, if a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may fill the vacancy. In other words, what is envisaged is that all of the members of the company will have a say in the appointment of the liquidator. Section 270 relates to a creditors' voluntary winding up and provides that, if a vacancy occurs by death, resignation or otherwise in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill the vacancy. In other words, a meeting of the creditors has to be convened and all of the creditors will have a say in the appointment of the liquidator. It is worth recalling, as is set out in the annotation on s. 270 in MacCann and Courtney Companies Acts 1963 – 2009 that, by virtue of s. 301A of the Act of 1963, any creditor who has a connection with the proposed liquidator must make known the connection to the chairman who must, in turn, disclose the fact to the meeting before any resolution is put to the creditors for the appointment of the proposed liquidator.

31. If it were the case that I was satisfied that the Company is being wound up and that there is no liquidator acting, I would not consider it appropriate to appoint Mr. Wallace as liquidator on the application of the applicants. I would refuse the application and direct that a creditors' meeting be held.

32. However, the fundamental controversy in this case is whether the Company is being wound up at all. On the evidence, I am satisfied that it is not being wound up in accordance with the provisions of the Act of 1963.

33. Section 251(1)(c) of the Act of 1963 provides that, where a company in general meeting resolves that it cannot by reason of its liabilities continue its business and that it be wound up, that is one of the circumstances in which a company may be wound up voluntarily. The first step in that process is that the members must pass an ordinary resolution declaring that the company is unable to pay its debts as they fall due. Where such a resolution is passed, there is an obligation on the company to give notice of the resolution by advertisement in the CRO Gazette, and non-compliance with that provision is a criminal offence. It has been averred by Mr. Moloney that in this case the Company did not pass an ordinary resolution declaring the Company unable to pay its debts at a meeting of the members of the Company on the day of or the day preceding the creditors' meeting, which occurred on 6th July, 2012. I find it incomprehensible that Mr. Moloney and Ms. Maher did not follow the correct procedure in relation to the Company, given that Design, of which they were the directors, had gone into liquidation the previous month.

34. Counsel for the applicants submitted that, if the Court was not happy to conclude that s. 251 had been complied with by the members of the Company, as a fallback, the Court could assume that there had been an informal unanimous decision of the members to wind up the Company which, by reference to the decision in *Re Duomatic Ltd.* [1969] 2 Ch. 365, was sufficient. As I consider that there was no adequate discussion of the *Duomatic* principle, or the corresponding *Buchanan* principle derived from the decision of the Supreme Court in *Buchanan Ltd. v. McVey* [1954] I.R. 89, in the submissions of the parties, I find it necessary to be cautious in expressing a view on the submission made on behalf of the applicants. However, I have had regard to the helpful up to date commentary on the *Buchanan* principle in Courtney on *The Law of Companies* (3rd Ed., 2012) at para. 14.093 *et seq*. In my view, it is reasonable to conclude that, in enacting s. 251(1)(c) and s. 252 of the Act of 1963, the Oireachtas did not intend that falling back on the *Buchanan* principle would obviate the requirement of full compliance with those provisions. Those provisions are clearly designed to protect not only the existing members and the existing creditors of the Company, but also members of the public, to use a neutral term, engaging with the Company, for example, a person paying a deposit on a very high end item of furniture of Scandinavian origin, which he or she is ordering. In order to protect the broad range of stakeholders which those provisions are intended to protect, it clearly is the case that there must be a resolution in writing which acknowledges the insolvent status of the Company and which is publicised by advertisement in the CRO Gazette.

35. Apart from being satisfied that, by reason of the requirements of s. 251 and s. 252 not having been complied with in the case of the Company prior to 6th July, 2012, a finding cannot be made that the Company is being wound up, I have also concerns about the validity of the purported creditors' meeting held on 6th July, 2012. A properly convened creditors' meeting would be subject to regulation by the provisions of Order 74 of the Rules of the Superior Courts 1986 (the Rules). Rule 66 of Order 74 provides that a meeting may not act for any purpose, except the election of a chairman and the adjournment of the meeting, unless there are present or represented thereat, in the case of a creditors' meeting, at least three creditors entitled to vote or all the creditors entitled to vote, if the number entitled to vote shall not exceed three. As the statement of affairs produced by the directors of the Company has not been put before the Court, I do not know how many creditors there are and, in particular, I do not know whether

Mr. O'Brien's averment that Mr. Moloney and Ms. Maher are creditors is correct. I surmise that the Revenue Commissioners were not the only creditor. Therefore, even if the Company was in liquidation, a question mark would hang over the validity of the meeting of 6th July, 2012.

Conclusion

36. For the reasons outlined above, I consider that the applicants' application was misconceived. In summary, the Company was not in liquidation when the application was made and heard. Even if it had been, and even if I was satisfied that the applicants are a creditor of the Company, it would not have been appropriate, there being no liquidator of the Company, for the Court to appoint a liquidator nominated by and on the application of one creditor. The Revenue Commissioners only appeared on the hearing of the application because of the attitude adopted by the Court.

37. Having regard to the foregoing, it is not necessary to make any determination as to whether the applicants are creditors of the Company. Indeed, in the light of the serious conflict on the affidavit evidence, it would be impossible to resolve the dispute between the applicants and the directors of the Company in that regard. In due course, when the Company is wound up, as it must be, it will be up to the applicants to prove for the debt which they claim is due to them by the Company in the winding up.

38. A liquidator of a company fulfils his role in a fiduciary capacity and that has to be taken into account when addressing an allegation of conflict of interest. In this case, the issue as to whether Mr. Wallace is conflicted is moot, given the finding that, when the application was brought and when it was heard, the Company was not in liquidation, and it is unnecessary, and would be inappropriate, for the Court to express a view on it.

39. It would be remiss of the Court not to deprecate the behaviour of Mr. Moloney and Ms. Maher in relation to the Company, which has been in flagrant breach of the Act of 1963. It will be for the liquidator, when the Company is wound up, to take the appropriate steps in relation to that behaviour.