



**THE COURT OF APPEAL
CIVIL**

**Record Number: 2022 291
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**Approved
No Redactions Needed**

**Costello P.
Noonan J.
Pilkington J.**

**IN THE MATTER OF JOE MILEY AND PARTNERS (DUBLIN) LIMITED (IN
LIQUIDATION) AND**

IN THE MATTER OF SECTIONS 25 AND 26 OF THE TRUSTEE ACT 1893

BETWEEN/

**AIDAN GARCIA DIAZ (LIQUIDATOR OF JOE MILEY AND PARTNERS
(DUBLIN) LIMITED (IN LIQUIDATION))**

APPLICANT / RESPONDENT

-AND-

**JOHN BRETT, EAMONN BRETT AND JOSEPH MILEY
RESPONDENTS**

-AND-

**EAMONN BRETT
APPELLANT**

JUDGMENT of Ms Justice Pilkington delivered on the 11th day of February, 2025

1. This is an appeal by Eamonn Brett against the judgment and order of Butler J. of 15 November and 16 December 2022 respectively.
2. It concerns proceedings brought by the liquidator of Joe Miley and Partners (Dublin) Limited ('the company') seeking the transfer of lands at Barrett Street, Ballina, Co Mayo ('the property') to the company.
3. The property is presently held in the names of John Brett, Eamonn Brett and Joseph Miley who together comprise the Brett Miley Partnership ('the partnership'). The partnership appears to have been created in about 1981 between Eamonn Brett and Joe Miley, with John Brett joining at a later stage. Butler J.'s judgment notes an apparent complex set of relationships between the partnership, the company and a number of other related companies with whom they did business¹
4. On 10 April 2017 pursuant to a creditors voluntary liquidation Aidan Garcia Diaz was appointed liquidator to the company ('the liquidator'). The partnership remains in existence.
5. The liquidator has issued two sets of High Court proceedings against John Brett, Eamonn Brett and Joseph Miley (the partnership) – the first, by way of originating summons, (2020/81COS) seeks specific orders and declaratory reliefs pursuant to ss. 596, 608 and 627 of the Companies Act 2014 ('the 2014 Act').
6. Notwithstanding that the reliefs all invoke those various sections of the 2014 Act, in reality this case has always been about the property and whether, as a matter of law, the

¹ Para. 6

company is its sole beneficial owner and if so how might title be transferred to it from the partnership, as the holder of a bare legal trust.

7. When this application initially came before O'Regan J. on 12 July 2020 she took the view that, whilst she accepted that the property should vest in the company, in order to effect such a transfer proceedings should be issued pursuant to the Trustee Act 1893 ('the 1893 Act') as opposed to the 2014 Act. The rationale for this and the issues arising pursuant to the 1893 Act are considered within this judgment.

8. Thereafter the liquidator issued a special summons on 22 July 2021 [2021/122Sp] seeking orders pursuant to ss. 25 and 26 of the 1893 Act and in the alternative the reliefs sought within the initial company law proceedings.

9. Shortly before the High Court hearing in November 2021, Joe Miley had consented to the Order(s) sought by the liquidator and agreed to execute a deed of transfer from the partnership to the company. He took no part in this litigation. The remaining respondents John Brett and Eamonn Brett ('the Bretts') were represented by the same solicitor and counsel before the High Court.

10. John Brett has not appealed the High Court judgment and is therefore bound by its terms. Eamonn Brett is the sole appellant before this Court and appeared as a litigant in person.

11. Butler J. ultimately heard this matter in the High Court. In summary, she was satisfied to make certain of the orders sought by the liquidator, specifically a declaration pursuant to s. 596 of the Companies Act 2014, together with an order pursuant to s.25 of the 1893 Act, plus other consequential orders and reliefs.

12. Within the special summons proceedings there was an exchange of lengthy affidavits. The background facts and circumstances of this case set out within those affidavits (described by Butler J. as detailed, repetitive and at times contradictory),² together with the parties' submissions to the court have been comprehensively set out within her judgment and I gratefully adopt her distillation of the facts and issues that arise for consideration in this case.

13. In my view the issues raised within this Appeal can be divided into two parts;

(a) the first is to consider whether Butler J. is correct in her finding of an alleged agreement between the partnership and the company, which in the circumstances of this case, has resulted in the company holding the entire beneficial interest in the property, with the partnership holding a bare legal interest. If this court upholds her decision on this point, only then is it necessary to consider the second issue.

(b) The second issue involves consideration of the mechanism by which, as a matter of law and particularly land and trust law, the company might be entitled to certain reliefs within ss 25 & 26 of the 1893 Act to reflect its ownership of the property.

(c) Given that the issues in both are separate and distinct I have considered each separately, both in respect of the High Court proceedings, judgment of Butler J. and this appeal. Without wishing to pre-empt matters this appellant primarily directed his arguments to the first issue and made no submissions

² Para. 6

regarding the 1893 Act. The respondent mainly focused upon the first issue in the High Court but, arising from its judgment, sought to expand his submissions on the 1893 Act before this Court.

14. Any analysis of both issues initially requires consideration of some of the background facts and circumstances giving rise to this litigation. Thereafter I consider the first issues regarding the liquidator's claim to the property as a company asset and I then proceed to consider the second issue, which primarily concerns the 1893 Act.

Background

15. The property in question comprises a residential premises and lock up shop unit at a central location in Ballina. The starting point is the contract of sale of the property to the partnership in 2006³ ('the contract'). As well as the payment of the deposit, the partnership made additional payments over the remainder of 2006 and throughout 2007, by which time the purchase price had been paid in full.

16. Thereafter the vendor had difficulties in completing the sale. He raised a complaint that the purchasers' solicitor had prepared the draft conveyancing documentation in the name of the company. As the vendor insisted upon a sale to the partnership, this necessitated revised drafting of documentation. It appears there were also certain issues as to the property's title which necessitated the furnishing of a title bond. The vendor issued specific performance proceedings, which were ultimately compromised.

³ no day or month appears on the contract.

17. In any event it was not until 2013 (a remarkable seven years after the contract in 2006) that Deeds of Conveyance and Assignment were executed, between the vendor of the one part and Joe Miley, John Brett and Eamonn Brett of the other part, for the conveyance and assignment of the property for a combined consideration of €1.1m.

18. I do not know if the property is registered or unregistered land and if or when it was registered in the names of Joe Miley, John Brett and Eamonn Brett .

The First Issue – the liquidator’s claim to the property as a company asset

High Court

19. The crux of the liquidator’s case is his contention that the company documents disclose an agreement in 2009 between the partnership and the company for the transfer of the property to it. He claims that this agreement is against a background of works undertaken by the company for the partnership on an ongoing basis which, when quantified, was satisfied by the transfer of the property in lieu of payment. He does so in circumstances where, pursuant to this alleged agreement, there has been no conveyance of the property to the company in 2009, or at any time thereafter.

20. In support of his contention the liquidator highlighted the following points;

- (a) The company was in possession of the title deeds which, upon his appointment, were handed to the liquidator by John Brett, with Eamonn Brett also in attendance.

(b) In July 2017, at a meeting of the company then in voluntary liquidation, the minutes record that Eamonn Brett advised the meeting that the property had been transferred to the company and explained that the reason for agreeing to do so was the partnership's debt to the company.

(c) Financial statements for the partnership in 2013 (the year the sale of the property was finally completed) do not list the property within its list of assets.

(d) the company accounts for 2016 list the property as an asset. The directors (which included the Bretts) and auditor of the company signed full audited accounts which reflected the property as a company asset.

(e) the company, which held the property as trading stock, sought a corporation tax deduction from a perceived reduction in its land value and submitted returns sanctioned by the company directors to the Revenue Commissioners.

(f) The liquidator also suggests that it may have suited the Bretts to argue that the property remains an asset of the partnership as it is therefore outside of the liquidation, to the benefit of the Bretts and not the company's creditors.

21. The basis of any agreement to transfer the property from the partnership to the company was strongly disputed by the Bretts. They accept there had been an initial agreement to do so, but they strongly maintain that subsequent events and their own investigations should negative any such agreement.

22. The Bretts maintain that any agreement to transfer the property to the company in 2009 arose from the company's then auditor's (referred to in the judgment as MQ) account reconciliation, which confirmed that some €2.1m was owed by the partnership to the company. They contend that the suggestion was then made by MQ and Mr Miley that the debts of the partnership should be discharged by a transfer of the property to the company, in lieu of payment.

23. The Bretts claim that MQ's reconciliation was and is seriously flawed. In doing so they also raise serious allegations as to the conduct and propriety of MQ and Mr Miley. They allege that Mr Miley misappropriated or defrauded significant sums from the company of between €5m to €7m. They say that MQ was aware of these unauthorised payments to Mr Miley but failed to disclose them to the directors of the company. At the operative time this appears to include the Bretts.

24. Before the High Court the Bretts also maintained their understanding that Mr Miley's proposal and the advices of MQ regarding the transfer of the property to the company, were only ever intended as an interim measure to reduce perceived debts due by the partnership to the company. The final paragraph of Eamonn Brett's affidavit sworn on 5th November 2021 avers that whilst he did agree to the transfer of the property that is no longer his position *'pending a full review and reconciliation of the monies allegedly owed to the Company by the Partnership and of the debt due from the Company to the Partnership'*. Once undertaken if there is a debt due to the company equal to the value of the property the Bretts confirm they will consent to the transfer of the property. In his affidavit of 6 December 2021, he again confirms his initial agreement to transfer the property but states that the Bretts were wrongly advised and that his investigations clearly show no money owing to the company and accordingly no transfer of the property should have taken place.

Again, both also averred that they only agreed to its transfer as an interim measure on the basis that a full financial investigation would be carried out (this is reiterated Eamonn Brett's affidavit sworn on 8 March 2022).

25. The Bretts continuously maintained that their financial investigations and those of their new auditors, appointed after MQ, disclosed that no monies were in fact owed by the partnership to the company in 2009, or at all. Accordingly, they contend that there is no logical rationale, nor any legal basis for the transfer of the property to the company. In doing so they also consistently highlight Mr Miley's dissipation of company monies.

26. Eamonn Brett has personally prepared a number of financial reconciliations. He makes particular reference to one he prepared in 2017, in which he seeks to set out the details of the alleged fraud. He also maintains that he refused to sign any company accounts until MQ was removed in 2016 (an earlier attempt to do so in 2009 had been resisted by John Brett). The treatment of the property in the company's annual accounts as an asset is described as an 'oversight'. He reiterates that he had provided the liquidator with his accounting evidence for what he describes as a multi-million euro misappropriation of company funds.

27. With regard to the Bretts' allegations concerning the dissipation of the company's assets, the liquidator has accepted that there has been a substantial dissipation of funds, which he confirms remains under investigation. However, he maintains, that the agreement to transfer the property in 2009 is clear and enforceable.

Judgment of Butler J.

28. Butler J. was satisfied that the partnership acquired the entire beneficial interest in the property in 2007, by which time it had paid all the purchase monies. I agree. The operative principles at that time⁴ are to be found in the Supreme Court decision of *Tempany v Hynes* [1976] IR 101 where the Supreme Court held that the purchaser of land becomes a trustee of the beneficial interest only to the extent to which the purchase price is paid. As all of the purchase price has been discharged it follows that, pending the conveyance of the property in 2013, it was held by the vendor, as trustee of the partnership's entire beneficial interest.

29. From Butler J.'s analysis of the company accounts it appears both Bretts were directors of the company for the entire period in question. It also appears that Mr Miley had been a director from 2012 to 2016 and within para. 8 of her judgment Butler J. sets out her difficulty in discerning the exact role played by Mr Miley throughout the timeline of this litigation.

30. The court noted that as the only de jure directors of the company, the Bretts, had signed company accounts from 2012 to 2016 which disclosed the property as an asset of the company and sought a revenue deduction in corporation tax, based upon the property's decrease in value, for the same period. She also notes that the partnership accounts for 2013 (the year of the conveyance and assignment of the property to the partnership) did not show the property as a partnership asset.

⁴ prior to the enactment of the Land and Conveyancing Law Reform Act 2009, but this does not affect the facts of this case as all the purchase price had been paid

31. Butler J. concludes at para 25 of her judgment that the Bretts ‘*accept that the partnership decided to transfer the property to the company and that both the partnership and the company thereafter treated the property as a company asset*’. In my view the accounts and documentation furnished to the court supports this finding.

32. She further notes the timing of the Bretts’ contention that there was no agreement to transfer the property to the company coincides with Mr Miley’s agreement to do so.

33. The trial judge then goes on to consider the allegations by the Bretts that the alleged sale agreement in 2009 was based upon some form of an erroneous premise. Or alternatively some form of conditional agreement that the transfer of the property would follow a full financial reconciliation, to determine if the alleged sums alleged were due and owing.

34. Whilst Butler J. was satisfied that by 2010 there were significant irregularities in Mr Miley’s dealings with the company and possibly also the partnership⁵, nevertheless she correctly points out that the liquidator’s case is based upon the partnership’s agreement to transfer the property to the company to meet a debt existing at a specific time. As she states at para. 15 ‘*..... an agreement to transfer property in 2009 based on amounts due from the partnership to the company at that time, cannot be treated as retrospectively invalidated because subsequently the company came to owe the partnership money (if in fact this were so).*’

⁵ Para 13 of her judgment

35. In respect of the Brett's claim, within their affidavits and submissions, that any agreement by the partnership to transfer the property was a conditional one, Butler J. found that neither party could produce any documentary evidence in support of such a conditional agreement. I agree.

36. Whilst Butler J. did comment upon a difficulty in ascertaining how the precise figure of €2.1m was calculated at para. 24 of her judgment, nevertheless she was satisfied, from the company records, that it had acted as beneficial owner of the property from at least 2012 onwards, with its accounts and tax returns within this period signed by both of the Bretts as directors of the company.

37. Butler J. makes the basis of the liquidator's claim clear as being (para 25)

'.....Rather, it is based on a deliberate decision subsequently made by the partnership (of which the Bretts were members) to transfer the property to the company (of which the Bretts were directors), inter alia, to meet an existing debt and to ensure compliance with the regulatory requirements of the Companies Act 1990, and the subsequent treatment of the property as a company asset for accounting and tax purposes.'

38. Within the same paragraph the Court concluded that, based upon these matters the partnership had made a deliberate decision to transfer the property to the company to meet an existing debt and comply with the Companies Act 1990.

39. The High Court, whilst expressing some sympathy for the Bretts with regard to the dissipation of company assets, was satisfied there was no reality to the liquidator being

obliged to conduct some independent investigation and reconciliation of the debt due to the company. The Court also noted that any misappropriation of company funds appeared to have occurred on the Bretts' watch as directors of the company (para.40). I agree.

40. In summary Butler J. was satisfied on the evidence, which she carefully considered, that the '*...beneficial ownership of the property was transferred by the partnership to the company by 2012 at the latest and that the property was treated by both the partnership and the company as belonging to the company since at least that date*' (para. 42). In my view the evidence clearly supports this finding.

41. Accordingly, she was prepared to grant the relief and vest the property in the company's name. She then moved to consider how that might be achieved and this is considered when I turn to issues surrounding the 1893 Act.

42. Butler J.'s order on this issue, in respect of granting any relief pursuant to the 2014 Act is in the following terms;

'Pursuant to section 596 of the Companies Act 2014 The Property at Nos. 4-6 Barrett Street, Ballina, County Mayo be declared as company property'

The Appeal as it relates to the First Issue

43. The High Court correctly found that the partnership became the beneficial owner of the property in 2007 and its legal owner in 2013.

44. Within para. 2 of her judgment Butler J. describes a 'striking feature' of the case is that up until November 2021 the Bretts had agreed that the property had been transferred to the

company, which was disputed by Mr Miley. However Butler J. noted that when Mr Miley indicated his agreement to transfer the property the Bretts reversed their position. On appeal Eamonn Brett takes issue with any suggestion that any change of position by the Bretts was only in response to Mr Miley's agreement to transfer the property. Whatever the reasons the views of the respective parties are clear, the fact that the Bretts had initially agreed to the transfer is well documented and thereafter in my view this issue has no additional relevance to the two issues this court must decide.

45. The next issue is therefore whether the High Court is correct in its finding that the partnership holds its interest in the property upon trust for the company. In short, was there an agreement by the partnership, as maintained by the liquidator and accepted by the High Court, for the transfer of its interest in the property to the company?

46. The primary focus of the appellant's appeal is his detailed reconciliation of the financial figures, in addition to his forensic analysis of various auditor's documents extrapolated from the exhibits to the various affidavits before the High Court.

47. Eamonn Brett trenchantly maintains that this accountancy documentation clearly discloses and indeed proves beyond doubt that there was no debt owing by the partnership to the company in 2009. Arising from this he seeks to criticise Butler J. whom he maintains failed to have proper regard to this financial documentation.

48. In addition, he again emphasises the significant level of misappropriation of company assets by Mr Miley. He levels certain criticisms against the liquidator in respect of his pursuit of these allegations.

49. He also maintains his position as set out within his affidavits before the High Court that any agreement to transfer the property to the company was only temporary pending a full reconciliation.

50. Within his Notice of Appeal the appellant restricts his appeal in that he now seeks a single Order as follows; *'A court determination that a 33% share of the property continues to be lawfully owned and registered in the name of Eamonn Brett'*.

51. It is noteworthy that the appellant now seeks to advance arguments that differ from those raised in the High Court where he had the benefit of legal representation, which he now also seeks to deprecate. The single Order he now seeks within his Notice of Appeal is not one sought previously.

52. In any event, in my view the appellant's formulation of the order he now seeks is without foundation. He does not own a one third interest in the property. It was transferred into the three names of those who constitute the partnership and any interest held in the property is a partnership asset. This application must fail.

53. The case made by Eamonn Brett before the High Court, where he was represented by solicitor and counsel, focused upon the averments in the Bretts' affidavits to the effect that any agreement to transfer the property to the company was in essence vitiated by the conduct of Mr Miley, MQ and possibly others in their assertion of a debt owed by the partnership to the company and their dissipation of company assets.

54. The appellant argues that, arising from his allegations of fraud or some form of misrepresentation, which he claims to have exhaustively documented, he was misled as to the circumstances of any agreement to transfer the property to the company and that this is sufficient to render any such agreement null and void.

55. At all times no argument was advanced by the Bretts in the High Court, or by this appellant on appeal, that any fraud had been established against the company. Any such allegations are alleged, on the appellant's own case, to have been instigated by Mr Miley and possibly the auditors MQ. In short no liability has been ascribed to the company.

56. The law on this point is clear and does not favour the appellant. The transfer of the beneficial interest in the property to the company was voidable for fraud only if the appellant could successfully show fraudulent misrepresentation by the company. That is not the case the appellant advances. As Delaney points out in her text Equity and the Law of Trusts in Ireland (5th ed) p 721;

'A contract can be rescinded at common law and equity where there has been a fraudulent misrepresentation'

57. On the facts of this case no argument has been advanced as to any fraudulent misrepresentation by the company. At all times the fraud alleged by the appellant is by Mr Miley on the company, not the company on the partnership. Therefore, as a matter of law, I cannot see on what basis the appellant seeks, if indeed he does so, to set aside the transaction.

58. As Butler J. pointed out, it is not the case that retrospective analysis, particularly that conducted by this appellant Eamonn Brett, can sustain an argument that the partnership was due no monies, to counter an agreement to transfer the asset in 2009.

59. I also note that the Bretts or this appellant at no point considered any litigation against the company pursuant to s.205 of the 2014 Act, or otherwise or in respect of seeking any dissolution of the partnership.

60. In my view the Bretts' affidavits disclose that they do not resile from their initial agreement to transfer the property, but they strongly maintain they did so on the basis of a false premise or promise in respect of any debt owed to the company.

61. In summary this court upholds the judgment of Butler J. in both her reasonings and findings that there was an agreement to transfer the property by the partnership to the company, which was part performed by the company in writing off the claimed debt owed by the partnership to the company and, as a result, the property is now therefore beneficially owned by the company and that there is no basis, even if such an agreement is established, to set it aside.

62. The only order of the High Court, outside of the provisions of the 1893 Act considered below, is as follows;

'Pursuant to section 596 of the Companies Act 2014 The Property at Nos. 4-6 Barrett Street, Ballina, County Mayo be declared as company property'

63. As Butler J. notes within para.44, this section of the 2014 Act essentially confers an entitlement upon the liquidator to take company records and provides that any person holding company property without lawful entitlement shall surrender it immediately to the liquidator. That of course may be of assistance to the liquidator but the property remains in the name of its registered owner. Any transfer of the property requires an examination of the second issue, the 1893 Act.

The Second Issue – The Application of the 1893 Act

64. Ss 25 and 26 of the 1893 Act state;

“Power of the Court to appoint new trustees.

25.—(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.

(2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

Vesting orders as to land.

26. In any of the following cases, namely:—

(i) Where the High Court appoints or has appointed a new trustee; and

(ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found; and

(iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to

convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.”

65. Before considering the possible application of ss 25 and 26 of the Trustee Act 1893 the following are the relevant findings of this Court;

- (a) The partnership acquired a 100% beneficial interest in the property in 2007. The bare legal interest remained with the previous vendor.
- (b) There was an agreement for valuable consideration in 2009 (prior to the 2013 Indentures of Conveyance and Assignment) by the partnership to transfer its interest in the property to the company. That transfer did not take place.

- (c) Thereafter, pursuant to that agreement, the beneficial interest of the partnership was held upon trust for the company (the bare legal interest remaining with the previous vendor).
- (d) By the 2013 conveyance the property was finally conveyed and assigned to the partnership.
- (e) At that point the partnership acquired a bare legal interest in the property on trust for the company, who retained its 100% beneficial interest.

The 1893 Act

66. Within her judgment Butler, J. pointed out that the submissions before her were very much directed to sections of the 2014 Act as opposed to sections 25 and 26 of the 1893 Act. At para. 55 she states: -

“Notwithstanding that fresh proceedings were instituted to include an application under the 1893 Act, this element of the application was not really teased out on behalf of the liquidator. In particular, I have had some difficulty in understanding the basis for the only argument made to me under s. 26 which focused on s. 26(2)(c) of that Act.”

67. However, Butler J. came to the view that the provisions of the Trustee Act, as initially suggested by O’ Regan, J., did provide a more appropriate mechanism than the 2014 Act, through which the property might be vested in the company.

68. For the reasons I explore below Butler J. was only satisfied to make an order pursuant to s.25. She stated (para. 67): -

“...It may be that I am being overly cautious in my approach to s. 26, but in circumstances where no submissions have been made as to the extent of the court’s

jurisdiction under s. 26 consequent on the appointment of a new trustee under s. 25, I would prefer to leave over the determination of that question to a case in which the matters are fully argued.”

69. Accordingly, the Court made Orders in the following terms;

‘(a) Pursuant to section 596 of the Companies Act 2014 The Property at Nos. 4-6 Barrett Street, Ballina, County Mayo be declared as company property

(a) Pursuant to section 25 of the Trustee Act 1893 Daire Murphy Solicitor be appointed as trustee of the property at 4-6 Barrett Street Ballina County Mayo in substitution for Mr Joseph Miley Mr John Brett and Mr Eamonn Brett

(b) Daire Murphy Solicitor do execute the transfer and all consequential documents necessary to give effect to the transfer of the property into the name of the company and the registration of the company’s legal tile thereto’.

70. The Order at (a) has been considered within the first issue above. Orders (b) and (c) relate to considerations surrounding the 1893 Act.

71. Pursuant to these orders Mr Murphy would therefore be the sole trustee of the partnership’s interest in the property. As (c) above discloses, this would be with a view to ensuring a transfer of the property by the partnership to the company in liquidation. The trial judge expressed reservations about making any order pursuant to s.26 as she was concerned that, if she were to make such a vesting order, this might impede or negate the role of trustee she proposed to appoint in carrying out his duties over the property.

72. In making these orders Butler J. considered that they would ensure that the liquidator could take custody and control of the property and granted him liberty to apply should any further difficulties arise.

73. Within his appeal the appellant advances no argument with regard to the 1893 Act. His argument is based upon his objection to the High Court's finding of any agreement to transfer the property to the company (or to set any agreement aside) which would, I assume, encompass any mechanism ordered by the Court to effect such a transfer.

74. The liquidator seeks to uphold the High Court's decision to appoint a trustee pursuant to s.25 of the 1893 Act. In oral submissions to this Court his counsel accepted that he had not, by way of cross appeal or otherwise, sought a vesting order pursuant to s.26 of the 1893 Act. However, he did accept that, in all the circumstances, a vesting order might be appropriate. His written submissions largely seek to uphold the High Court judgment in referencing the case law considered below.

The Operation of ss. 25 and 26 of the Trustee Act

75. The cases considered below all deal with interests in land and illustrate the utilisation of equitable principles within the 1893 Act, in providing both a legal rationale and practical solution for the conundrum where (1) an interest in land is held upon a bare trust (2) for whatever reason, that interest in land cannot be legally transferred to those beneficially entitled to it.

76. At the risk of stating the obvious, this involves consideration as to whether there is a trust holding a bare legal title, the circumstances as to why the trustee(s) of that trust cannot transfer the bare legal title to the beneficiaries of the land and finally whether ss. 25 and /or 26 of the 1893 Act can assist.

77. In this regard Butler J. had considered *Clariant AG and Clariant Plastics and Coatings (Ireland) Limited* ('Clariant') [2020] IEHC 211 and the judgment of Costello, J. of in *Re Kavanagh and Cantwell* (High Court unreported 23 November 1984) ('Kavanagh'). The respondent's submission to this Court considers *Clariant* and also cites *Kavanagh*, together with the well-known authority of Laffoy, J. in *Re Heidelberg Company Ltd and Courtview Management Ltd* [2007] 4 IR 175 ('Heidelberg').

78. In my view there are certain common features within this case law which are helpful in considering the issues raised within this appeal.

79. In *Heidelberg* the purchasers sought to perfect title to their respective apartments, in circumstances where both the vendor and management companies had been dissolved. The respective dissolutions had occurred prior to the usual practice whereby, upon sale, the apartment owners assumed control of the management company and the common areas were then transferred by the vendor company to that management company.

80. The relief sought by the applicant purchasers was for a vesting order pursuant to s.26 of the 1893 Act, so as to enable the interests, formerly held by the dissolved vendor and management companies, to vest in a new management company incorporated by them.

81. Laffoy J. found that where a vendor incorporates a management company to manage the common areas it (the management company) becomes the owner in equity of those areas and on the completion of the sale, thereafter the vendor merely holds the bare legal estate in the common areas as trustee, on behalf of the management company.

82. In short Laffoy, J. held that the vendor holds the estate in fee simple of the common areas upon trust for the management company.

83. Laffoy J. set out the basic premise of ss 25 & 26 as follows (para. 7);

‘Section 25 of the Act of 1893 provides that the High Court may, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee even if there is no existing trustee, and s. 26 empowers the court to make a consequential vesting order in favour of the new trustee or trustees. Section 26 also provides that in the other circumstances set out in that section, one of which is where a trustee entitled to or possessed of any land cannot be found, the Court may make an order, which is called a vesting order in the Act, vesting the land in any such person, in any such manner and for any such estate as the court may direct’.

84. Laffoy J. then considered the judgment in *Kavanagh*. In that case the same issues arose as in *Heidelstone*; namely whether s.26 of the 1893 Act could be utilised to vest lands in persons shown to be beneficially entitled to them, in circumstances where, at the date of its dissolution those lands were held by a company upon a bare legal trust.

85. In that case Costello J. was satisfied that a trust arose in circumstances where the company held the property upon trust at or immediately prior to its date of dissolution and the applicants were entitled to the entire beneficial interest.

86. In order to get in the outstanding legal estate Costello J. did not consider it necessary to resort to the expedient of appointing a new trustee pursuant to s.25 of the 1893 Act with a consequential vesting order pursuant to s.26. Rather he took the view that he could make a vesting order simpliciter pursuant to s.26 as the dissolved company constituted a trustee “*who cannot be found*” within the meaning of the section (a reference to s.26(ii)(c) of the 1893 Act).

87. On the basis of this authority Laffoy J. in *Heidelstone* adopted the same procedure. She made an order, invoking s.26(ii)(c) of the 1893 Act on the basis that the trustee cannot be found, vesting the property in those entitled to the entire beneficial interest in the new management company set up by the applicant purchasers. In such circumstances, in line with *Kavanagh*, she did not consider it necessary to require the restoration to the register of the company who had previously held the bare legal interest.

88. In the final two paragraphs of her judgment Laffoy J. makes two related findings, which in my view are pertinent to the present case. In the penultimate paragraph she admits of the possibility that, in *Heidelstone*, an application might be brought to have the vendor company restored to the register. In doing so she pointed out that as the nature of the trusts had been clearly identified, even if the vesting order were not made the result would be that the company would in any event have been compelled to execute a conveyance ‘*which would have the same effect as the vesting order*’ (para. 21).

89. Within the final paragraph she points out that it ‘*was probably more cost effective and it is certainly a more clear cut solution to the title problem to procure the incorporation of the*

new management company rather than seek to have the ... Company restored to the register of companies' (para. 22).

90. In *Clariant* the difficulty arose as a portion of land was held by a dissolved company, in circumstances where it was not possible to void its dissolution. On the same basis that the bare trustee of the land “*cannot be found*”, pursuant to s.26(ii)(c) of the 1893 Act, as found in *Kavanagh and Heidelstone* Barniville J.(as he then was) was satisfied that a more convenient and practical step was for the land to be simply vested directly in the entity entitled to the entire beneficial interest pursuant to the jurisdiction set out within s.26 of the 1893 Act.

The Property

91. In considering the property one important factual aspect of this case differs from *Heidelstone, Kavanagh and Clariant*. In this case the entity holding the bare legal interest (the partnership) has not, to the best of my knowledge, been dissolved. There is no suggestion within the submissions to this Court or indeed the judgment and documentation before the High Court that this has occurred. Therefore, it is not the case that, as required by s.26 (ii) (c) of the 1893 Act, invoked in these three cases, that the trustee ‘cannot be found’. This was correctly identified by Butler J. and was given as one of the reasons why she was, in all the circumstances, hesitant and indeed reluctant to invoke s.26. So can or should it be invoked?

92. Within the cases discussed above none of them made any order for the appointment of a trustee pursuant to s.25 but all invoked the vesting order provision within s.26, a distinction not made clear within the respondent’s submissions, who referred to s.25 (as it was the section invoked by the High Court) but not s, 26, which was the basis of all three decisions.

93. On the facts of this case, there is no missing trustee(s) holding the bare legal estate. That suggests that there is potentially no apparent legal impediment to the bare legal estate being transferred by the partnership. Within the partnership one partner, Mr Miley, has accepted that he will execute a transfer of the partnership's interest to the company, John Brett is bound by the findings of the High Court that leaves no doubt that the company is entitled to have any outstanding interest transferred to it. Eamonn Brett is likewise bound by this Court's findings on appeal.

94. In my view this echoes the considerations of Laffoy J. in *Heidelstone* at paras. 88 and 89 above when she was considering the advantages, on the facts of that case, of simply utilising the vesting order procedure pursuant to s.26 as a preferable course of action to any subsequent restoration of companies and the possible necessity of compelling a transfer of property.

95. Keane on *Equity and the Law of Trusts in Ireland* (3rd ed.) at para. 9.15 in considering s.26 confirms that;

“The court has also jurisdiction to make orders in relation to land, stocks, shares and choses in action generally, vesting the relevant property in any person as it may direct.”

He summarises the circumstances in which s.26 can be employed as follows;

- ‘(1) where the court has appointed or appoints a new trustee;*
- (2) where a trustee is a minor, is out of the jurisdiction or cannot be found;*
- (3) where it is not certain whether the last surviving trustee is alive or dead;*
- (4) where there is no personal representative of a trustee who has died intestate;*
- (5) where a trustee has been required by a beneficiary who is entitled to land, shares or other choses in action to transfer the land etc to him and the trustee has wilfully refused or neglected to do so for 28 days.’*

The full quotation from (5) above is set out below.

96. Within the same paragraph he also confirms that pursuant to s.32 of the 1893 Act, a vesting order in the case of land has the same effect as a conveyance or assignment of that land. This latter point is significant as if it can be invoked, on the facts of this case, it obviates the necessity for any additional conveyances to effect title. This is precisely the point made by Laffoy J. in *Heidelstone*.

97. S.32 of the 1893 Act which considers the effect of a vesting order is set out in full as follows

“Effect of vesting order

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the Court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.” (my emphasis).

98. On the facts of this case the findings of this Court are clear; this trustee (the partnership) holds a bare legal interest and has not advanced any argument that has been accepted by the High Court or this Court as to why those clearly entitled to the entire beneficial interest should not be entitled to the legal title to the property.

99. I also note that the liquidator must have regard to the interests of creditors of the company for whom he now acts.

100. In considering the reliefs granted by Butler J., in my view the benefit of utilising s.26 is in its simplicity, in that it is beyond doubt, as quoted by Keane above and Laffoy J. in *Heidelstone* and s. 32 of the 1893 Act, that a vesting order has the same effect as a conveyance or assignment of the property to the company directly. In other words, no further step is required if the court is satisfied that one of the criteria within s, 26 has been met.

101. Butler J. did query, without making any definitive finding, whether the conditions set out within s.26 are cumulative. In my view they cannot be so (as is reflected within the cases set out above) and that each criterion must be assessed individually. I cannot envisage any trust of land that would easily satisfy all criteria.

102. In my views s. 26 (c) (vi) of the 1893 Act can be utilised on the facts of this case – to reiterate its terms.

“(vi) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement; the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.” (my emphasis)

103. As the facts and findings of this Court disclose, there is a trustee (the partnership) who has been required by the company (through the liquidator) to transfer its interest to it. That is the entire basis of this litigation. The failure of Eamonn Brett to agree to convey the interest is clear, John Brett is bound to do so and Mr Miley has indicated his consent to do so. The partnership as a whole has declined to fulfil the clear agreement of the partnership to do so and in my view there is as a result an entitlement of the Court to make an order pursuant to s.26 of the 1893 Act in such circumstances.

104. With regard to s.25, the import of the High Court order is that a trustee capable of executing any Deeds of Conveyance or Assignment may be required. As mentioned above and considered by Laffoy in *Heidelstone*, any execution of such a court order would necessitate additional considerations. In my view, on the very specific facts of this case, and mindful that the liquidator must also have regard to the creditors of the company, in all the circumstances it is preferable that a vesting order be made. I note Butler J.'s order to appoint a trustee over the interest of the partnership in the land but that entity remain its registered owner. These points were not argued on appeal, so I do not propose to analyse them further.

105. The liquidator seeks a number of alternative reliefs but essentially orders that, in the absence of agreement, the property can be properly considered an asset of the company and not of the partnership, together with a mechanism by which that asset might be transferred by that company. I endorse the view of O'Regan J. that reliefs can be granted to the company pursuant to the exercise of ss.25 and 26 of the 1893 Act. I entirely endorse her view that these were not matters where reliefs pursuant to the 2014 Act would have entirely met the difficulties encountered by the liquidator in this case. I note that thereafter this respondent properly issued fresh proceedings pursuant to the 1893 Act.

106. As a general point, in any case title to land must always be clearly delineated. This is in part the intent behind Land and Conveyancing Law Reform Act, 2009 ('the 2009 Act') which proscribes that legal title to land must always vest in trustees and within s.109 of the 2009 Act seeks to identify those entitled. In discussing this feature of the 2009 Act, Wylie's Irish Land Law (6th ed). at para 10.10 considers in particular those provisions within s.109 which seek to delineate the identity of those persons. He states that these provisions should cover the majority of cases, but also points to '*...an express saving of the court's power to appoint a trustee and to vest land in a person as trustee*'. The footnote to this paragraph references ss 25 and 26 of the 1893 Act and cites the passages in Keane, discussed above. These two sections can therefore in my view be seen in a context of being utilised in seeking to assist in dealing with identifying and dealing with trusts of land.

107. In my view, on the specific facts of this case s.26 of the 1893 Act is the appropriate section of the Act to vest the property in the company which is clearly entitled to it. I am satisfied that the criteria within s. 26 (c) (vi) of the 1893 Act is appropriate on the special facts of this case. Not only can it be utilised, but it is the best option available to give effect to the clear agreement between the partnership and the company, whilst also ensuring the liquidator now has this issue fully resolved. In this regard I also point to the analogy with the comments in *Heidelstone* at para. 88 above where Laffoy J. states that, in that case the company would have been compelled to execute a conveyance in any event. The same applies here to the position of the partnership being compelled to execute a conveyance to the company.

108. For the reasons set out above the appellant's appeal is rejected both on the basis set out within his Notice of Appeal and any other matters raised within the hearing before this Court.

109. This Court upholds the judgment of the High Court. It confirms the 2009 agreement to transfer the property from the partnership to the company. Based upon this Court's analysis of the relevant case law and the 1893 Act, this Court agrees with the utilisation of the 1893 Act for this purpose. The only variation to the High Court Order is the utilisation of s.26 as opposed to s.25 of the 1893 Act. In my view, given that the effect of the proposed order is to vest the property in the company, there is no necessity in such circumstances for an order pursuant to s.596 of the 2014 Act.

110. In making a vesting order I appreciate that the liquidator has all the company records which I assume includes the title documentation. This Court does not have that documentation so the vesting order, in describing the property has done so in general terms only.

111. Pursuant to the criteria set out with s.26 (c) (vi) of the 1893 Act this Court makes a vesting order that the property known as 4-6 Barrett Street, Ballina, Co Mayo more particularly set out and described in the Deeds of Conveyance and Assignment dated only with the year 2013 (no day or month included) vest in Joe Miley and Partners (Dublin) Limited (in voluntary liquidation).

Costs

112. Whilst this Court has varied the Order of the High Court it has done so on the basis of the same conclusions reached by that Court. It is simply this Court's view as to how those conclusions might best be effected pursuant to ss. 25 & 26 of the 1893 Act.

113. The appellant has been wholly unsuccessful in his appeal. In the circumstances, having due regard to Order 99 and the provisions of the *Legal Services Regulations Act, 2015*, that

having been “*entirely successful*” in this appeal within the meaning of s. 169(1) of the 2015 Act, the respondent is entitled to an award of costs against the appellant, such costs to be adjudicated in default of agreement.

114. If the appellant contends for an alternative order, then a written submission (no longer than 1,500 words) is to be filed and furnished to the other side within fourteen days of the date of delivery of this judgment and any like response is to be filed by the respondent and furnished to the appellant within a further fourteen days thereafter. In default of any such notification the proposed orders will be made.

115. As this judgment is being delivered electronically Costello P. and Noonan J. have indicated their agreement with it and the orders I have proposed.