THE HIGH COURT

[2020] IEHC 613

[2020 No. 50 COS.]

BETWEEN

EAMON RICHARDSON, LIQUIDATOR OF CHEMPRO INVESTMENTS LIMITED (IN MEMBERS VOLUNTARY LIQUIDATION)

APPLICANT

AND

GARY LENNON

RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 26th day of November, 2020

1. The applicant in this case is the liquidator of Chempro Investments Limited ("the company"), having been appointed as such by order of the High Court on 18th November, 2019 on foot of an application brought under s. 638 of the Companies Act, 2014 to remove the respondent from that role. There are currently two applications before the court although, as will be explained, this judgment relates to only one of them. The application with which this judgment deals is brought under s. 612 of the Companies Act, 2014 seeking to declare the respondent guilty of misfeasance and directing the repayment to the Company of €871,017 which represents sums of money withdrawn by the respondent from the Company's bank accounts and paid to himself or to a company owned and operated by him respect of liquidator's fees and costs.

2. The second application is brought in the earlier proceedings under s. 638 of the Companies Act, 2014 (Record No. 2019/274 COS.) and seeks the attachment and committal of the respondent for failure to comply with an ancillary order made in those proceedings directing the respondent to deliver the books, records, seals, assets and property of the company to the applicant. The original time limit for compliance with this element of the s. 638 order was extended by a subsequent order made on 19th November, 2019. Although the respondent delivered a number of folders of material to the applicant within the extended deadline and some additional material after that, the applicant complains that the records furnished are incomplete. The applicant's lawyers prepared a table drawn from the affidavits sworn by both parties which provides a very helpful comparison as to what company documents the applicant both expected to receive and did receive and the documents the respondent says he provided. As there were significant discrepancies between what the respondent says he provided and what the applicant says he received, the court allowed the respondent a further opportunity to clarify exactly what had been provided and also to provide certain key documents which he says were provided by him in his capacity as liquidator to the company and of which he should have retained electronic copies.

3. In addition, the respondent now says that as the order applied only to him, he has not provided any material in the possession of Lennon Corporate Recovery Ltd. Leaving aside the fact that, as liquidator, the respondent was responsible for taking possession of the company's documentation and that Lennon Corporate Recovery Ltd.'s involvement in the liquidation could only have been as agent of the respondent, the court expressly extended the order of 18th November, 2019 to include all of the company's books, records,

documents and material held or previously by Lennon Corporate Recovery Ltd. (as that company has now been dissolved). Consequently, the attachment and committal motion was adjourned.

4. In order to deal with the issues raised, it is necessary to understand the nature of the company and the circumstances in which it went into liquidation. The company, which was incorporated in 2001, held a single asset, namely a pharmaceutical trademark which it sold in 2011 for €1,200,000. On 24th February, 2012, a resolution was passed placing the company into a members' voluntary liquidation and, on the same date the respondent was appointed liquidator. The company was solvent on the date on which it went into liquidation having assets of in excess of €1,300,000 in cash and debts of only €30,000. The declaration of solvency made by the directors on 24th February, 2012 gave a figure of €9,533 for the estimated costs of the liquidation. This figure would be consistent with the fact that it was a members' voluntary winding up of a solvent company with significant cash assets and limited debt.

5. At the time of the liquidation, there were two shareholders in the company, namely Malko Investments SA based in Belize which owned 33 out of 100 issued shares and Istifid S.p.A. based in Italy which owned the remaining 67 shares. Istifid was a fiduciary company which held the shares on trust for two beneficial owners who were mother and daughter, namely, LF and OC, and who were beneficially entitled to 34 and 33 shares respectively. OC died in 2014 leaving 50% of her shareholding to her daughter, LF, and the other 50% divided between her grandsons, DF and FF. Consequently, the relevant beneficial owners since 2014 have been LF and her two sons. Further, in December 2017, Istifid merged with its parent company, Unione Fiduciaria S.p.A. ("Unione") such that the legal title to the 67 shares in which LF and her sons hold the beneficial interest was transferred to Unione.

6. The application under s. 638 of the Companies Act, 2014 to remove the respondent from the position of liquidator was brought jointly by Unione and the beneficial owners of the shares at a time when the liquidation had been in being for over seven years and the liquidator had failed to make a distribution to the members. The moving parties in that application also complained generally of a lack of transparency in the liquidation process as no annual meetings had been held and no accounts had been filed in the Company's Registration Office in breach of the liquidator's statutory obligations. At the time the s.638 application was made it appears that the moving parties were unaware of the extent of the withdrawals which had been made by the respondent from the company's bank accounts and only became so aware from draft E4 forms (comprising the liquidator's statement of proceedings and position of winding up) which the respondent exhibited.

7. The pleadings in that application ultimately became quite lengthy as the respondent filed a number of affidavits in which he set out difficulties which arose because of the differences between Italian trust law and Irish company law and in respect of which he says he was misled by Istifid. Despite ultimately consenting to the application to remove him, the respondent relies on the contents of the affidavits filed in response to that

application for the purposes of its s. 612 application and it will be necessary to make further reference to those in due course.

8. A number of relevant facts are either acknowledged by the respondent in those affidavits or are evident from the exhibited documentation. Firstly, the respondent confirms that the company's creditors were fully discharged prior to the first anniversary of the liquidation which should, in principle, have been allowed for a distribution to the shareholders shortly thereafter. Secondly, a distribution in the amount of €410,851 was in fact made to Malko in respect of its 33 shares in October, 2012. Thirdly, the respondent confirmed he had not convened any meetings of the members since the commencement of the liquidation. The respondent initially attributed this to uncertainty as to the identity of the members/shareholders and later to a belief that Istifid would not be prepared to attend such a meeting. Fourthly, the respondent failed to file any statutory statements in the CRO under s. 681 of the Companies Act, 2014 in respect of the entire of the period during which he was the company's liquidator. He exhibited draft E4 forms which he had prepared but not filed.

9. Fifthly, those draft E4 forms and an exercise conducted by the applicant in reconciling the company's bank statements show that in the first year of the liquidation the respondent paid his company, Lennon Corporate Recovery Limited, €125,276. Thereafter, the respondent continued to make substantial payments either to Lennon Corporate Recovery Limited or to himself until at the time the s. 638 application was issued in July, 2019, some €854,804 had been withdrawn for this purpose. Subsequent to the institution of the s. 638 application, the respondent continued to make withdrawals from the company's bank accounts and additional sums totalling €17,010 was paid to Lennon Corporate Recovery Limited in August and September, 2019. The solicitor acting on behalf of the respondent acknowledged to the court that these latter amounts were withdrawn in error but was unable to confirm whether they were still available and could be repaid to the company. Sixthly, not having convened any members' meetings, the fees paid by the respondent to himself as liquidator were not fixed or approved by the members of the company in general meeting. Equally, no application was made to the High Court seeking approval for payment of these fees. Finally, at the time the applicant was appointed liquidator, there was only just over €50,000 remaining in the company's bank account.

Relevant Statutory Provisions

10. Against this factual background, the applicant makes an application under s. 612 of the Companies Act, 2014 seeking a declaration that the respondent is guilty of misfeasance in relation to the affairs of the company and an order compelling the respondent to repay or restore the sum of €871,017 to the liquidation account of the company. That application is opposed by the respondent. Section 612 of the 2014 Act provides, insofar as relevant, as follows:-

> *"(1) Subsection (2) applies if in the course of winding up a company it appears that—*
>
> *…*

(b) any past or present officer, liquidator, provisional liquidator or examiner of the company, or receiver of the property of the company,

has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or other breach of duty or trust in relation to the company.

(2) The court may, on the application of the Director or the liquidator… examine into the conduct of the promoter, officer, liquidator, examiner or receiver, and compel him or her—

(a) to repay or restore the money or property or any part of it respectively with interest at such rate as the court thinks just, or

(b) to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or other breach of duty or trust as the court thinks just."

11. One feature of this liquidation, which is now in being for over eight years, is that it was commenced under the Companies Act, 1963. The court's attention has been brought to the transitional provisions contained in Schedule 6 of the Companies Act, 2014 and, in particular, to para. 8(1) of that schedule. This provides:-

"Any thing commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act."

Consequently, although the liquidation was commenced at a time when the potential consequences for a liquidator guilty of misfeasance were set out in s. 298 of the 1963 Act, this application is properly brought under s. 612 of the 2004 Act being the provision in force at the time the application was brought. In any event, although s. 612 comprises an extended reformulation of s. 298 of the 1963 Act, the core of the provision remains the same. For present purposes, both provisions allow the liquidator of a company to make an application to the court in respect of the misfeasance of a past liquidator; they allow the court to examine the conduct of a past liquidator and to compel him to repay or restore money or property to the company. Both sections are expressly stated to apply notwithstanding that the person may also be criminally liable in respect of the same conduct. Note that throughout the remainder of this judgment, I shall use the term "misfeasance" as a shorthand to refer to all of the types of conduct caught by s. 612(1) being the misapplication or retention of money or property of the company and breach of duty or breach of trust in relation to the company.

12. Although para. 8(1) of Schedule 6 of the 2014 Act makes provision for the continuation of things commenced under the 1963 Act but not completed at the time the 2014 Act came into force, express provision is then made exempting certain matters from that general rule. Interestingly one of those matters set out in para. 8(5) concerns liquidator's

remuneration. The current provisions in relation to liquidator's remuneration are contained in ss. 646 to 648 of the 2014 Act and para. 8(5) provides that they shall not apply to a winding up commenced before the commencement of the 2014 Act and the matters dealt with those sections remain governed by the relevant provisions of the prior Companies Acts and rules of court. Although, in light of the facts set out above the differences in the statutory provisions regarding liquidator's fees are unlikely to be of significance, it is nonetheless useful to set them out at this stage. The 1963 Act made little express provision for payment of liquidator's fees save in s. 258(1) which provided as follows:-

> *"The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them."*

The logic of this provision is that a company going into a members' voluntary liquidation would agree with the liquidator, in advance of his appointment, the terms of his remuneration. However, the courts have recognised that in circumstances where remuneration is not fixed by the company in general meeting or where there is a subsequent dispute as to the amount to be paid to the liquidator, the liquidator could make an application to court in this regard.

13. This is now expressly provided for under s. 646 of the 2014 Act. Section 646(1) recognises that a liquidator has an entitlement to remuneration and specifies in s. 646(2) the manner in which the terms of such remuneration are to be fixed. This includes in the case of a members' voluntary winding up at s. 646(2)(c) the approval of such terms by resolution of the members of the company in a general meeting. Significantly however, s. 646(2)(d) then provides that where the members "*having been requested to do so by the liquidator"* fail to pass a resolution in accordance with sub-para. (c), the terms may be fixed by the High Court. This gives express statutory form to the pre-existing jurisprudence which established the entitlement of a liquidator to seek approval from the High Court for fees which had not been fixed by the company in general meeting. Section 647 goes on to provide for the liquidator's entitlement to receive payment where an entitlement to remuneration exists and makes a similar provision in respect of approval of the amount of such payment in the case of a members' voluntary winding up by resolution of the members of the company at a general meeting and, in default, by the High Court or a person designated for that purpose by the High Court. As noted above, para. 8(5) of Schedule 6 to the 2014 Act expressly provides that these provisions do not apply to a liquidator appointed before the coming into force of the 2014 Act.

Application under Section 612

14. The applicant's application under s. 612 identifies three main elements alleged to constitute misfeasance although complaint is also made in respect of other breaches of the respondent's statutory duties as liquidator. I assume that the applicant has focused on these three issues because they all involve financial loss to the company or its shareholders. The other breaches of statutory duty (failure to convene meetings under s.680 and to file returns under s.681) did not of themselves cause financial loss although

undoubtedly they could and most likely did facilitate a situation where such loss could be caused unbeknownst to the members of the company.

15. Firstly, the applicant contends that the payment made to Malko in October, 2012 was made in breach of the liquidator's duty in that any distribution should have been made as between all shareholders in *pari passu* (i.e. on an equal basis proportionate to their shareholding). In purely practical terms, by paying Malko an amount equivalent to 33% of the company's assets in October, 2012 and continuing the liquidation, the respondent has created a situation where there is now only €50,000 remaining in the Company's bank accounts to distribute to Unione in respect of its 67% shareholding. Even if the respondent had not paid most of the company's cash assets to himself, he should still not have paid Malko in advance of making a proportionate payment to Istifid/Unione (see s. 618(1)(b) of the 2014 Act).

16. The second complaint is related to this and is that the respondent has not made any distribution in respect of Unione's 67 shares. The main argument made on behalf of the respondent focuses on the uncertainty created by the identification by Istifid of the beneficial owners of the shares to which it held legal title. The respondent's affidavits set out in some detail exchanges between him and Istifid and between him and Irish solicitors who acted on behalf of Istifid at an earlier stage of the liquidation. Undoubtedly, some difficulties arose because of the fact that the shares were held in a trust in Italy which was governed by Italian trust law which does not seem to dovetail neatly with Irish company law. However, in my view, this is not an adequate answer to the fact that over seven years after a solvent company had gone into liquidation, the respondent had failed to make a distribution to one of the two shareholders.

17. I do not propose to rule on the rights and wrongs of the argument between the respondent and Istifid as regards whether the respondent could transfer Istifid's shareholding to the beneficial owners or, alternatively, make a payment to Istifid or to the beneficial owners save to make two observations. Firstly, it is not clear that the respondent's interpretation and understanding of s. 255 of the 1963 and his assertion that it precluded him from sanctioning the transfer of the shares to the beneficial owners thereby replacing Istifid as a member is correct. More significantly, even if it was correct, the provisions of the 2014 Act which replaced s. 255 of the 1963 Act make material changes to the law governing the circumstances in which an alteration to the register of members of a company can be made. Therefore, the restrictions under s. 255 which caused the respondent concern were no longer operative after the coming into force of the 2014 Act on 1st June, 2015. Despite this significant change in the law, the respondent did not proceed to make any payment to either Istifid or the beneficial owners of the shares.

18. More significantly, the respondent had at all times the power to apply to the High Court for the determination of any question arising in the course of the liquidation including questions in relation to the exercise of his powers as liquidator. This power was originally contained in s. 280(1) of the 1963 Act and is now found in s. 631(1) of the 2014 Act. In

fact, the respondent states on affidavit that, apparently as long ago as 2012, he received legal advice from his then solicitor to the effect that he should make an application to the High Court for directions. Apparently, Istifid subsequently instructed Dublin based solicitors who indicated an objection to the proposed application and threatened to seek costs personally against the respondent if he proceeded – although the correspondence containing this objection and threat is dated 2014. The respondent may well have hoped that the involvement of Irish based solicitors would facilitate an agreed resolution to these difficulties but this did not occur. Instead, the dispute dragged on over a number of years with the respondent seeking expert advice from an Italian lawyer in 2016 and the final correspondence from Istifid being received in November, 2017 shortly before it merged with Unione.

19. The court has some sympathy with a liquidator faced with a threat that a party will seek costs personally against him in respect of steps taken in the liquidation. It is also understandable that in those circumstances, a liquidator might step back from the proposed course of action and see if a solution can be reached on an agreed basis. However, where that manifestly does not occur, it can never be appropriate for the liquidator to allow an issue to drag on indefinitely to the point where the liquidation effectively stalls. The legislature has ensured that a liquidator has the statutory power to refer any question for the determination of the High Court, presumably with the intention that the power should be used in any case where there is a serious doubt as to how the liquidator should proceed. Whilst Istifid's lawyers may have threatened to make the respondent personally liable for their costs, it is of course the High Court which retains the exclusive power to make a costs order. In circumstances where the respondent had received legal advice to the effect that an application to court should be made and where it became obvious the issue was incapable of agreed resolution as between the respondent and Istifid, it is difficult to see how the threat of an application for costs could realistically have prevented the respondent from making an application for directions. These observations are made entirely without reference to the fact that the respondent had received an indemnity from Istifid in respect of any payments or costs for which he might become liable in the course of the liquidation thereby making the likelihood of the respondent having to personally meet such an order, were it to be made, very remote.

20. Of course, all of this ignores the elephant in the room. This is not simply a case where a liquidator, having encountered a problematic issue, allowed the liquidation to stall and, after an extended period, the members took action in order to progress matters. Instead, during the period when no progress was being made in resolving the issues arising from the implications, if any, of Italian trust law and the beneficial ownership of the Istifid/Unione shares, the respondent continued to make significant withdrawals from the company's bank account and to pay these monies to himself and his company. The amounts of money involved were very large, amounting to virtually the entire of the company's remaining assets after payment had been made by the respondent to Malko. In this context, the length of the delay and the lack of transparency arising from the respondent's breach of his statutory duties in failing to convene meetings of the members and failing to make returns to the CRO are significant.

21. In relation to whether conduct complained of amounts to misfeasance, the applicant has drawn the court's attention to a passage from the judgment of Costello J. in *Re Mont Clare Hotels Limited (In Liquidation), Jackson v. Mortell* (Unreported, 1986) in which he stated:-

> *"It is not every error of judgment that amounts to misfeasance in law and it is not every act of negligence that amounts to misfeasance in law. It seems to me that something more than mere carelessness is required, some act that, perhaps, may amount to gross negligence in failing to carry out a duty owed by a director to his company."*

On the face of it, the conduct described above goes well beyond mere carelessness and it is difficult to see how a deliberate course of conduct pursued by the liquidator over a period of some eight years could be regarded as a mere error of judgment. However, before reaching a conclusion it is appropriate to examine the explanations proffered by the respondent in relation to this central issue, namely, the payments to himself of such large sums purportedly in respect of his fees and the costs of the liquidation without the approval of either the members of the company or the High Court.

22. Firstly, the respondent points to the issues which arose as a result of Istifid's desire to transfer legal title in its shareholding to the beneficial owners of those shares and the restrictions which the respondent believes s. 255 of the 1963 Act imposed on the transfer of shares after the commencement of a winding up. The respondent is trenchant in his criticism of Istifid whom he accuses of providing incorrect and misleading information to him. He also queries the authenticity of some of the documents furnished to him by Istifid. Without determining the merits or otherwise of the respective positions of the respondent and Istifid on these issues, I accept that this was a difficult issue for the respondent as liquidator and that it made the finalisation of the liquidation more complex than anticipated at the outset. Further, the fact that a difficult issue arose which entailed extensive correspondence and required the respondent to seek legal advice in both Ireland and Italy would necessarily mean that the overall cost of the liquidation was greater than the director's original estimate. However, the respondent was not justified in stalling the liquidation indefinitely once it proved impossible for him to resolve this issue with Istifid's solicitors. Once there is an intractable difference between a liquidator and members of a company over an issue which impacts on the progress of the liquidation, then there is a duty on the liquidator to find a way forward, if necessary by exercising the statutory power available to him to seek the directions of the High Court. Regardless of the view the High Court might have taken in this case as to the effect of s.255, clear directions could have been given as to how the company's assets should be disbursed and pre-conditions could have been imposed to ensure that the documentation provided by Istifid met the legal requirements in both jurisdictions if there were in fact any valid concerns in that regard.

23. The respondent's contention that this issue necessitated the vastly increased costs is unsustainable in light of the correspondence from Istifid's solicitor of 13th May, 2014. It is

evident from that correspondence that while Istifid had initially sought to transfer its shareholding to the beneficial owners or, subsequently, that payments in the distribution be made directly to the beneficial owners, by October 2013 in light of the concerns raised by the respondent Istifid was prepared to accept distribution directly to it and actively sought that such a transfer be made. Thus, the respondent was both refusing to pay Istifid and refusing to pay the beneficial owners of the shares and, notwithstanding his original suggestion that he would seek the directions of the High Court, also failed to do this. A liquidator cannot simply decline to exercise any of the options available to him and simultaneously decline to seek the directions of the High Court as to the correct course of action. Manifestly this cannot be done in order to facilitate on-going payments to himself as liquidator for as long as the liquidation is in being.

24. The second argument made on behalf of the respondent relates to an indemnity provided by Istifid on 8th May, 2012 which, it is submitted, the respondent believed amounted to consent in respect payment of his fees. In fairness to the respondent's solicitor the argument made in this regard is somewhat nuanced and it was not seriously contended to the court that the indemnity was in fact a consent by the members of the company in respect of his remuneration as required under s. 251(1) of the 1963 Act, merely that the respondent, perhaps erroneously, believed that it was.

25. There are a number of immediate and obvious difficulties with this argument or with any claimed belief on the part of the respondent that the indemnity provided by Istifid amounted to an unlimited sanction on the part of the company for his remuneration. Firstly, although Istifid was the majority shareholder in the company, s. 258(1) envisages the remuneration to be paid to the liquidator being fixed by the company in general meeting. Manifestly, an indemnity provided by Istifid does not constitute an action taken by the company in general meeting. Further, the respondent did not convene any general meetings of the company subsequent to the commencement of the liquidation. Consequently, an indemnity provided in May, 2012 (i.e. subsequent to the company going into liquidation) could never have been one provided by the company in general meeting.

26. Secondly, the terms of the indemnity, which is contained in a letter from Istifid written on Istifid headed notepaper, does not purport to be an indemnity from the company; it is clearly an indemnity being provided by Istifid alone. As the indemnity was provided by Istifid and not by the company itself, it could never justify withdrawals from the company's bank accounts since Istifid and the company are two entirely separate legal entities. In other words the legal effect of the indemnity from Istifid was that the respondent was entitled to seek payment from Istifid for costs properly incurred by him in the liquidation which the company would not or could not reimburse to him. The indemnity itself did not give the respondent any right to payment as against the company.

27. Finally, although there was some dispute as to whether the indemnity did in fact cover the liquidator's own fees, it is drafted in very broad terms and expressly includes all *"costs and expenses whatsoever which may be taken or made against you or incurred*

become payable by you in the course of such winding up". In principle, this is broad enough to include the liquidator's own fees which are costs and expenses incurred by him in the course of winding up the company. However, an indemnity in these terms must be read as being implicitly limited to costs and expenses which are properly incurred by the liquidator in the course of a winding up. Obtaining an indemnity of this nature does not give a liquidator a generic or unlimited right as against the company to claim whatever fees he wished. Equally it would not impose on Istifid an obligation to indemnify the liquidator against non-payment by the company of fees which were not properly recoverable as against the company.

28. Finally, the respondent argues that he was entitled to be paid fees for acting as liquidator and that he can justify the fees which he has been paid. The applicant's response to this argument is very straightforward. The applicant contends that as the respondent did not have the approval of the company in general meeting for his fees and did not seek the approval of the High Court, then any payment to himself of company monies in respect of his fees is necessarily unauthorised. The applicant also points to the fact that even now the respondent has not made an application to the court for approval of his fees. The applicant contends that this is because the jurisprudence establishes that the High Court will exercise "vigilant scrutiny" in respect of any such application (see *In Re Mouldpro International Limited (In Liquidation)* [2018] IECA 88). Further, the applicant points to the decision of Finlay Geoghegan J. in In *Re Custom House Capital Limited (In Liquidation)* [2018] IEHC 625 in which she stated at para. 16:-

> *"First, the onus is on the liquidator to satisfy the Court, on the evidence put before it, that the amount he is seeking is reasonable remuneration for the work done by him. However, the Court, in determining whether or not a liquidator has put before the Court sufficient evidence or should be required either to produce additional evidence or have certain fees disallowed by reason of the absence of relevant evidence to justify same, should bear in mind the balance required which I identified in Re Home Payments Ltd. (in liquidation) [2013] 4 I.R. 141 to provide the Court with 'sufficient information' to enable it to 'form a view as to the appropriate allowable fees whilst not adding unnecessarily to the cost of the liquidation'."*

In the same judgment, citing from the English judgment of Ferris J. in *Mirror Group Newspapers plc v. Maxwell & ors* [1998] 1 BCLC 638, she emphasised the requirement on the liquidator to "*explain the nature of each main task undertaken, the considerations which led them to embark upon that task and, if the task proved more difficult or expensive to perform than at first expected, to persevere in it*" and also that "*office-holders must keep proper records of what they have done and why they have done it*".

29. In the absence of a formal application by the respondent for sanction for the fees paid to him, the court is not required to make any decision in that regard. A formal application by the respondent would require both a detailed breakdown of the sums claimed and a justification for the carrying out of that work. No information at all relating to the

respondent's fees, much less information sufficient to ground such an application, is before the court.

30. Nonetheless, in the context of an application seeking a declaration of misfeasance the very large sums involved in this case cannot be ignored. It is striking that most of the case law dealing with applications for approval of liquidator's fees involve significantly more complex liquidations. For example, the liquidation in *Custom House Capital* was described by Finlay Geoghegan J. as a "*highly unusual and complex liquidation*" in which the company had assets in excess of €1.1 billion under management on behalf of its clients, €24 million in cash held in designated clients' accounts and approximately 1,500 clients. The company itself had limited assets and difficulties arose in the liquidation as to how certain of the complex work required in relation to the clients' assets was to be funded. In essence, that liquidation was a massively complex exercise compared to the one in which the respondent was engaged even allowing for the issue which arose concerning the beneficial ownership of the Istifid shareholding.

31. In passing it might be noted that the applicant brought the court's attention to a recent judgment of the Court of Appeal involving the respondent in which significant reductions were made in the fees the respondent had charged for the liquidation of a different company (*In Re Beauty Holdings Ltd. (In liquidation); Luby v Lennon* [2020] IECA 297). I accept the respondent's solicitor's submission that the circumstances of that case are materially different to this and that no particular reliance should be placed by the court on that judgement. The parties in *Beauty Holdings* had agreed a mechanism whereby the issues in dispute between them would be determined by an independent expert and the proceedings effectively amounted to a challenge to the expert's determination. This can have no bearing on the question of how liquidator's fees should be assessed by the High Court or whether that exercise should be undertaken at all in the absence of a formal application in that respect. Equally however the court attaches no significance to the respondent's reliance on the fact that no finding of misfeasance was made against him in that case. As the issue in the case concerned the legal status of the report of an agreed expert, the extent to which it could be challenged and whether on the facts such challenge was well-founded, the court was simply not considering misfeasance under s. 612.

32. It might be noted that in the attachment and committal application one category of documents which the applicant contends were not provided to him by the respondent are invoices provided to the company including the respondent's own invoices as liquidator. The court was expressly told that invoices were raised by the applicant personally and by his company, Lennon Corporate Recovery, and sent to the company in respect of the monies paid to them and the respondent has expressly stated on affidavit that *"the liquidator's invoices were provided to Mr Richardson in the files collected by Mr Doyle*". The respondent takes issue with the manner in which the company's documents and records were collected from his office by Mr Doyle, a member of the applicant's staff. It seems extraordinary that if these invoices were in fact included in the company documents provided by the respondent, that they have all been mislaid *en route* to the

applicant's office. The applicant's reconciliation of the company's bank accounts shows some 42 separate payments made to the respondent and his company. This would mean that 42 separate invoices have somehow gone missing. However, the court has assumed that both Lennon Corporate Recovery Limited and the respondent have retained electronic copies of the invoices which they issued to the company in the course of the liquidation and the court has allowed the respondent a period of two weeks to provide those invoices to the applicant. This direction was made to facilitate the respondent in meeting the application for attachment and committal and not for the purposes of the court embarking upon the exercise of determining whether the amounts paid to the respondent were justified. As the applicant correctly submits, the respondent has not made an application to court for approval of any fees paid and since this would be an application in which the respondent bears the burden of proof, it cannot be by-passed by simply raising an entitlement to liquidator's fees in defence of an application under section 612.

33. In any event, it is virtually impossible to see how fees at the levels paid by the respondent to himself could ever be justified in respect of a liquidation of this nature. The inadequacy of a general assertion that the respondent can justify his fees is evident from the following. Firstly, in the calendar year 2012, the respondent paid Lennon Corporate Recovery Limited €125,276. Whilst the bulk of the work done in the liquidation was done during the course of this year, the director's original estimate of the cost of the liquidation was less than €10,000. There is nothing before the court to suggest that a twelvefold increase in the original estimated cost of the liquidation was justified by anything that was done by the respondent in the course of 2012. Secondly, the last correspondence from Istifid was received in November, 2017 and the respondent was not aware of Istifid's merger with Unione until the 2019 proceedings were instituted. Nonetheless, subsequent to that last correspondence, the respondent paid either himself or Lennon Corporate Recovery Limited a further €181,997. It is not apparent what, if any, work was done in respect of the liquidation from the end of 2017 to the institution of the 2019 proceedings as no further correspondence with Istifid or Unione took place. Finally, excluding these two periods, the respondent paid himself through Lennon Corporate Recovery Ltd. a sum in excess of €500,000 between 2013 and 2017 while dealing solely with the issue of whether a distribution should be made to Istifid or directly to the beneficial owners of the shares held by Istifid and, of course, not actually doing either of those things.

34. The court accepts that the issue which arose in the course of the liquidation did make the liquidation somewhat more complex and, therefore, somewhat more expensive than originally anticipated. However, the likely amount of any increase in fees which would be justified by the increased work involved is miniscule in comparison with the amounts of money which have been withdrawn from the company by the respondent. The hourly rate generally approved by the High Court for work done by liquidators and other persons at partner level is €350. As the applicant points out, the fees charged reflect nearly 2,500 hours of work at this level. The suggestion that these fees could ever be justified by reference to a single additional issue – which was in fact never resolved by the respondent – is simply not credible. The seriousness of the admitted failures of the respondent to comply with his statutory obligations to convene meetings of the members

of the company and to file returns with the CRO are thrown into stark relief when regard is had to the amount of money withdrawn by the respondent from the company for his own benefit without the knowledge of the members during the period of these failures.

35. In all of the circumstances, the evidence before the court clearly establishes that the respondent is guilty of misfeasance within the meaning of s. 612 of the Companies Act, 2014 and the applicant is entitled to a declaration to this effect.

36. In light of that finding, the applicant seeks an order compelling the respondent to repay the sum of €871,017.87 to the liquidation account of the company. The applicant accepts, based on the authority of *Re Etic Limited* [1928] CH 861, that in order to establish misfeasance there must have been some pecuniary loss caused to the company. Whilst this is not expressly stated in s. 612 itself, it is reflected in the fact that the relief available under s. 612(2) is limited to repayment or restoration of money or property or the contribution of a sum to the assets of the company by way of compensation.

37. It is, in principle, open to question whether it could be argued that a company had not suffered pecuniary loss where a liquidator had paid himself fees which, although not authorised by either the company or the High Court were nonetheless reasonable in respect of the work which had been done. However, where, as here, the payments are so large and so vastly disproportionate to the work undertaken, it is obvious that there has been a significant pecuniary loss to the company. The only residual issue is whether the costs of the liquidation as originally estimated by the directors should be deducted from the €871,017.87. On balance and notwithstanding the argument strongly made on behalf of the applicant to the effect that all payments of fees to the liquidator were unauthorised, I have come to the conclusion once the company had resolved to go into a members' voluntary liquidation some liquidation costs were necessarily going to arise. Therefore, the company could not be said to be at a loss of the amount a properly conducted liquidation would have cost.

38. It should be noted that it does not follow from the finding that the company has not suffered a pecuniary loss to this limited extent, that the respondent has established any entitlement to fees in that or any amount. There remains a procedural requirement for approval of a liquidator's fees and until the respondent has obtained such approval from either the company or the High Court he has no entitlement to be paid. No application has been made by the respondent for the approval of his fees, and consequently I am not prepared to treat any additional costs related to the Istifid issue as necessarily arising at this stage. As the applicant points out it remains open to the respondent to make a formal application to the High Court for his fees and if such application is made then no doubt the applicant can act as *legitmus contradictor* in any argument as to whether such fees are properly recoverable.

39. Therefore, in making an order under s. 612(2) that the respondent repay monies to the company, I am going to deduct from the total amounts in issue the sum of €9,533 which was the directors' original estimate in the Declaration of Solvency of the cost of the

liquidation. Consequently, I will make an order that the respondent repay to the company's liquidation account the sum of €861,484.87.