THE HIGH COURT

[2021] IEHC 462

[2020/234 COS]

IN THE MATTER OF BRANDON PLANT HIRE LIMITED

AND

THE COMPANIES ACTS
(PRESERVATION OF ASSETS MOTION)

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 6th day of July, 2021.

1. Mr. Fitzpatrick is the liquidator of Brandon Plant Hire Limited (In Liquidation), which I will refer to as Brandon throughout this judgment.

2. Brandon acted as a subcontractor to Cairn Homes Construction Limited ('Cairn') in a number of building and development projects; three such projects are of particular relevance to these proceedings, and connected proceedings taken by Brandon. In March 2020 Brandon and Cairn entered into an agreement which resulted in a reduction by Brandon of the sums which it claimed to be due to it by Cairn, and the payment by Cairn to Brandon of this reduced amount. This agreement predated the appointment of Mr. Fitzpatrick as official liquidator, which occurred in April 2020

3. In these proceedings, Mr. Fitzpatrick seeks reliefs under the Companies Act 2014 to the effect that the settlement agreement "constitutes a fraudulent disposition in favour of [Cairn] in the sum of €6,002,832.27" (according to the affidavit of Mr. Fitzpatrick resisting the motion brought by Cairn). In the related proceedings, Brandon seeks rescission of the settlement agreement "for duress and other reasons" (according to Mr. Fitzpatrick in the same affidavit).

4. Cairn now bring a motion seeking the following reliefs:-

> "1. An Order directing the Applicant to furnish Replies to the Respondent's Notice for Particulars dated 16 December 2020 within such time as this Honourable Court deems appropriate.
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> 2. An Order pursuant to section 631 (1) of the Companies Act 2014 and/or pursuant to the inherent jurisdiction of this Honourable Court directing the Applicant, as follows;
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> a) To preserve the assets of [Brandon] until the determination of the within proceedings and related proceedings bearing Record No: 2020/5722P.
> b) To make no payments to himself, whether directly or indirectly and whether in respect of remuneration or otherwise, and to make no payment to his lawyers in respect of legal costs during the course of the liquidation without obtaining prior approval of this Honourable Court.
> c) Further or in the alternative, to make no payments to himself, whether directly or indirectly and whether in respect of remuneration or otherwise, and to make no payment to his lawyers in respect of legal costs during the course of the liquidation, otherwise than (i) in accordance with the order of priorities laid down in section [617] of the Companies Acts 2014 and (ii)

subject to retaining within the liquidation sufficient monies to pay the costs of the Respondent in these and the said related proceedings."

5. The relief sought at paragraph one became redundant after the issuing of the motion but before its hearing, The only relevant relief is the somewhat unusual one set out at paragraph two.

6. Paragraph 2(a) seeks mareva type relief against Mr. Fitzpatrick. Paragraph 2(c) seeks a direction determining the order of priorities for payments to be made in the liquidation, and requires Mr. Fitzpatrick to abide by them. Paragraph 2(b) seeks an intermediate form of order, recognising the possibility that Mr. Fitzpatrick may want to pay legal or liquidator's fees, but requiring him to apply to the court in order to do so.

7. In support of these orders, Cairn relies upon the following evidence:-

   (i) Cairn will incur costs of about €1,010,000 (exclusive of VAT) in these proceedings and in the Brandon proceedings; of this amount, costs of €150,000 (VAT exclusive) have already been incurred.

   (ii) Brandon's realisable assets are estimated at €892,000 by its directors. This may well be an optimistic estimate.

   (iii) In the past, Mr. Fitzpatrick has (in other liquidations) been found to have paid himself fees on an interim basis without proper authority.

   (iv) There are a number of unsatisfied judgments registered against Mr. Fitzpatrick personally.

   (v) Despite suspicions that Mr. Fitzpatrick has made payments in this liquidation to himself and his solicitor, Mr. Fitzpatrick has refused to confirm the position one way or the other.

   (vi) Mr. Fitzpatrick has refused to provide undertakings sought in correspondence, which were broadly in the terms of Paragraph 2(a) and (b) of the motion.

8. This evidence is set out in the grounding affidavit of Jack Kennedy, the solicitor in A&L Goodbody acting for Cairn. In reply, Mr. Fitzpatrick has set out in some detail the facts which he says underlie the two proceedings seeking to challenge the agreement of March 2020.

9. At paragraph thirteen of his affidavit, Mr. Fitzpatrick purports to reply to paragraph 18 of Mr. Kennedy's grounding affidavit; in fact, paragraph eighteen of Mr. Kennedy's affidavit refers not to section 617 of the 2014 Act but to the phenomenon of directors overestimating the likely level of realisable assets in a liquidation. Mr. Fitzpatrick's evidence must be referring to paragraph nineteen of Mr. Kennedy's affidavit when Mr. Fitzpatrick swears:-

> "I say in reply to paragraph 18, the Respondent's averment re Section 617 appears correct but it is the Respondent's own actions which has now brought about the necessary proceedings herein and caused the Company's insolvency."

10. Importantly, paragraph nineteen of Mr. Kennedy's grounding affidavit reads:-

> "I say and believe that under section 617 of the Companies Act 2014 any costs order made in favour of the Respondent would properly rank as an expense "properly incurred in preserving, realising or getting in the assets" and ought therefore to rank ahead of the liquidator's own remuneration and ahead of the costs payable to his Solicitor."

11. It therefore appears to be the case that Mr. Fitzpatrick accepted in his affidavit the central proposition out forward by Cairn, namely that the statutory order of priorities puts payments of Cairn's costs ahead of Mr. Fitzpatrick's fees and his legal costs. However, the acknowledgement of this legal reality is apparently qualified by an entirely irrelevant reference to Brandon's finances. In doing so, Mr. Fitzpatrick includes (at paragraph fourteen of his affidavit) the sentences:-

> "The Respondent is now assuming the Court will rank any claim by the Respondent as an expense in the liquidation over the other creditors' claims who did not cause the Company insolvency. The two costs Orders of the Respondent are not currently enforceable and the Respondent consented to both sets of proceedings being entered into the Commercial List."

12. It is difficult to make sense of this. If the order of priorities advanced by Cairn is correct, then costs awarded to Cairn will rank above the claims of other creditors. Mr. Fitzpatrick appears therefore to dispute the order of priorities suggested by Cairn, even as he appeared to have accepted it in the previous paragraph of his affidavit. The fact that Cairn consented to the entry of the two actions into this list, and the fact that the two costs orders in favour of Cairn are not immediately enforceable, have nothing whatsoever to do with the correct order of priorities.

13. On his behaviour in other liquidations, Mr. Fitzpatrick avers (at paragraph sixteen):-

> "The Respondent has not set out any basis for its speculation in paragraph 20. I was appointed by the High Court in March 2020 as Provisional Liquidator and in April 2020 as Liquidator of the Company and the Respondent has not set out any legal or jurisdictional basis whatsoever for seeking the undertakings it is seeking. I deny the Respondent is entitled to same and I am not providing same to the Respondent. The Respondent refers to previous liquidations and states I did not receive the approval of the Committee of Inspection for my fees. I deny this averment. My solicitor has set out my position in his letter and I do not have to apply to a Committee of Inspection for my fees in this liquidation as there is none. As there is no Committee I can apply to the creditors or to the Court ultimately which I will do when I am seeking my fees. That is a matter at the final stages of

the liquidation unless it is necessary to seek interim fee approval in the course of the liquidation. It is not the place of the Respondent to seek to control the Applicant as a Respondent. I believe the Respondent is attempting to wrongfully control the finances and expenditure of the Company in liquidation, as it did the Company's finances pre-liquidation. I believe as in its dealings with the Company, the Respondent is endeavouring to force me to withdraw my claims against it which it consented to being entered into the Commercial List in the first place. This is in keeping with the Respondent's heavy-handed tactics. The Respondent could have set out all their concerns in an application for security for costs in the plenary proceedings but has chosen not to because the Respondent knows it made the Company insolvent by its own non-payment of amounts properly due and owing to the Company and forced it into liquidation with the loss of 42 jobs. I believe this opportunistic attempt by the Respondent for an undertaking is an application for security for costs 'by the back door'. I am always subject to the jurisdiction of this Honourable Court as an official Liquidator appointed by the High Court and I say that I have a Defence to the reliefs sought by the Respondent in this Motion."

14. I place some significance on the acceptance by Mr. Fitzpatrick that he is always subject to the jurisdiction of this court. In fashioning the order that I will make on this application, I have ensured that the supervisory jurisdiction of this court will be effectively exercised and will be respected by all parties. Equally, I have taken into account Mr. Fitzpatrick's position that the question of his fees is a matter for the end of the liquidation unless it is "*necessary*" to seek interim fee approval.

15. Mr. Fitzpatrick did not, in his evidence, address the testimony of Mr. Kennedy that three judgments (totalling just over 48,000) against Mr. Fitzpatrick personally remain unsatisfied. Counsel for Mr. Fitzpatrick attempted to plug this evidential gap with the following submission:-

"JUDGE: There is apparently an undischarged judgment marked against Mr Fitzpatrick.

MR HUDSON: Judge, there were three judgments that taxed costs order in that matter, Judge, which were stayed by your colleague for a considerable time. Newham J. The only -- since July last year when the Court of Appeal determined that matter, the stay essentially lifted and the matter is now before the Supreme Court by way of an application for leave. A further stay has been sought on those judgments in respect of those costs. So I say is it not necessary for the Court to make any order in this case. There is no jurisdictional basis for the Court to make any order in this matter. The High Court was happy to appoint Mr Fitzpatrick, two judges of the High Court, but the orders were upon own appeal, there's no application to remove Mr Fitzpatrick. The authorities are very clear in relation to the legal principles. If --

JUDGE: I do have a couple of questions for you. Firstly, where do I see the affidavits in reference to the stay that you mentioned?

MR HUDSON: No, Judge, the stay was in the Kirby and Fitzpatrick proceedings. I can send the Court in a copy of the judgment at lunch time, it is from the Court of Appeal.

JUDGE: I just want to know, it was raised in the course of this motion … against Mr Fitzpatrick where do I see any information provided that will give me comfort that there are no such unsatisfied judgments and that any judgment is subject to a stay?

MR HUDSON: Just so the Court doesn't misunderstand the position, the three taxed costs orders that were made in favour of Mr Kirby against Mr Fitzpatrick were stayed initially by Newham J on the payment of €18,000 by Mr Fitzpatrick to Mr Kirby subject to the matter being appealed to the Court of Appeal. The matter went before the Court of Appeal and a judgment was delivered in July of 2020 and the stays essentially disappeared at that stage and the judgments became live and enforceable. Subsequent to that, Judge, a costs application in relation to the same matter was before the Court of Appeal in January 2021 and the Court of Appeal directed that a payment of €20,000 be made within 10 days to Mr Kirby by Mr Fitzpatrick. That matter is the subject of a leave application to the Supreme Court. What occurred is the judgment was actually perfected the 1 following day and Mr Fitzpatrick was not able to apply to the Court of Appeal to seek a further stay from the Court of Appeal in any regard in relation to that. So he has an application which was filed two weeks ago in the Supreme Court and for the purpose of this application here the judgments are now live and enforceable, Judge, and they are fully paid. To be absolutely clear, but that is the background."

16. It would have been preferable if this situation was described by Mr. Fitzpatrick in his replying affidavit; it would have been at least as profitable as spending time in that affidavit on the details of the proceedings against Cairn. I did not find that the exposition of counsel lead to a position which was 'absolutely clear'. Even considered in the simplest terms, the undischarged judgments about which Mr. Kennedy gave evidence amount to over €48,000. The sums paid against them, according to Mr. Fitzpatrick's counsel, amount to €38,000. Doing the sums, it is difficult to see how these judgments were "fully paid", as I was told.

17. As it happens, I do not place any real emphasis on the unpaid judgments; even without them, it is plain that I can take into account the possibility that payments made in the liquidation other than in accordance with the statutory priorities may be incapable of repayment, in the event that such repayment is required.

18. I have set out Mr. Fitzpatrick's evidence about his behaviour in other liquidations. This evidence does not, I feel, adequately address or explain the comments made in particular by Irvine J. (as she then was) and Peart J. in two separate actions involving Mr. Fitzpatrick.

19. In *Revenue Commissioners v. Fitzpatrick* [2016] IECA 228, and in the context of a dispute about the circumstances in which Mr. Fitzpatrick had paid himself fees, Irvine J. observed:-

> "56. The upshot of these contradictory statements is that if Mr. Fitzpatrick's first account is correct he procured the unlawful sanction of his remuneration at the AGM on 12th July, 2013. If his latter account is true, the position he initially outlined to the Court in which he stated it was no longer open to the Revenue to challenge his remuneration which was agreed in the sum of €79,693.70 was to mislead the Court.
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> 57. While it was argued by Mr. Forde in the course of the appeal that the creditors in a general meeting have the power to approve of a liquidator's remuneration, that is clearly not the case having regard to the provisions of s. 269(1) of the 1963 Act which provides as follows:-
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> > 'The Committee of Inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators.'
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> 58. Not only was the High Court judge concerned as to the manner in which Mr. Fitzpatrick had sought to obtain approval of his fees and a payment on account of those fees as outlined above, she also expressed herself concerned that he had not produced for the Court a detailed set of accounts or a plan to demonstrate how he might steward the liquidation to a timely conclusion. Instead, he had chosen to invoke his legal right to act as he had done throughout. He had, she concluded demonstrated a flawed understanding of the role and duties of a liquidator thus leading her to conclude that the loss of confidence expressed by the Revenue was genuine and warranted.
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> 59. It follows that in seeking to have his remuneration approved by the general body of creditors not only did Mr. Fitzpatrick ignore the statutory code governing his conduct, but he did so in a manner which deprived the Revenue of any opportunity to object to his remuneration and did so in the full knowledge of the objections made the previous day by those creditors in attendance at the meeting of the Committee of Inspection."

20. These findings were described by counsel for Cairn as "startling" and "chilling". Without necessarily aligning myself with this rather vivid use of language, there can be no doubt that the state of affairs as described by Irvine J. is very disturbing.

21. Peart J., in *Kirby v. Fitzpatrick* [2019] IECA 231, had the following to say about Mr. Fitzpatrick:-

> "29. I fully appreciate that Mr Fitzpatrick may have been disappointed to say the least that the High Court replaced him as voluntary liquidator by Mr Kirby. I have no doubt that Mr Fitzpatrick felt that such an order was made in error, hence his appeal against it to the Court of Appeal. But that does not entitle Mr Fitzpatrick to

indulge in what I consider to have been a tactic of frustrating the High Court's order by conducting himself as he did, as deposed to by both Mr Healy and Ms. O'Reilly. A reasonable interpretation of his actions as evidenced by those affidavits, and which I would accept as to their veracity, is that Mr Fitzpatrick was intent upon making it as difficult as he could for the order to be implemented. In saying that I am not overlooking that he has averred that he offered to hand over the documents if Mr Kirby would specify a time and date on which he would call to collect the materials. But it is not up to Mr Fitzpatrick to impose an obligation upon Mr Kirby in the face of an order that placed the obligation upon him to deliver the materials to Mr Kirby.

30. In my view the trial judge was entitled to conclude on the evidence before her that beyond a reasonable doubt Mr Fitzpatrick was in breach of the order by having failed to deliver the books and records of the company to Mr Kirby by close of business on the 15th August 2016, where it is clear that this did not happen, he being fully aware of the obligation upon him under that order. It was appropriate in all the circumstances of the case that no fine be imposed upon Mr Fitzpatrick for the reasons stated by the trial judge."

22. Mr. Fitzpatrick's reaction to this criticism, criticism relied upon by Cairn, is utterly vacuous. Almost as damaging as the judicial commentary is the fact that Mr. Fitzpatrick appears not even to have acknowledged it, let alone learned from it.

23. I have already mentioned that the core issue in this motion, in my view, is the correct order of priorities applicable to this liquidation. This is the legal issue on which Cairn want me to make a decision, in accordance with the provisions of section 631 of the 2014 Act. It is also, as it transpires, the easiest issue to determine as counsel for Mr. Fitzpatrick conceded at the hearing of this motion that the order of priorities contended for by Cairn is the correct one. In particular, it is now agreed that the two costs orders already made in Cairn's favour and any further costs order that may be made in Cairn's favour in these proceedings rank ahead of the costs payable to the solicitor for Mr. Fitzpatrick and the remuneration of Mr. Fitzpatrick.

24. Given this agreement, is there a need for any order to be made? Ordinarily, one would think not. However, in this case there are other factors which persuade me that orders are required.

25. Significantly, there is the striking fact that Mr. Fitzpatrick has been so slow to acknowledge that the proper order of priorities favour Cairn. The efforts required to secure this agreement are significant.

26. On the motion papers, the first time that Cairn made the case that costs awarded to it ranked above payments to the liquidator or his lawyers was by letter of the 17th of December 2020. That letter also enquired whether any payments in the liquidation had been made to Mr. Fitzpatrick or his lawyers and, if so, the legal basis for same. This inquiry was never answered. I think it an absolutely reasonable set of questions to ask,

given Mr. Fitzpatrick's conduct in other liquidations. It is unfortunate that these questions were never addressed in a meaningful way.

27. The reply (of the 4th of January 2021) from Mr. Fitzpatrick's solicitors (JCK) gave no comfort to Cairn about the order of priorities; certainly, the priorities as set out by Cairn was not clearly accepted. Indeed, the position consistently taken by JCK was that Cairn was a debtor of Brandon and (by implication) payments of costs to Cairn simply would not arise.

28. The next engagement on this issue is in the exchange of affidavits which I have already described. While Cairn's position on priorities is set out plainly, it cannot be said that Mr. Fitzpatrick's view about the order of priorities is set out with any level of clarity.

29. The legal submissions on behalf of Cairn have, as I mentioned, described in some detail what Cairn asserts to be the correct order of payments. The legal submissions of Mr. Fitzpatrick do not address this issue at all.

30. By the time that the motion was heard, therefore, and despite correspondence, evidence, and written submissions, Mr. Fitzpatrick had yet to accept clearly and unconditionally that the order of priorities suggested by Cairn was the appropriate one. In particular, Mr. Fitzpatrick had not unequivocally accepted that costs awarded to Cairn in these proceedings ranked above his own fees and his own legal costs.

31. I therefore asked Mr. Fitzpatrick's counsel about this issue:-

> "JUDGE: Before you do that, Mr Hudson, just as I raised with Mr MacCann, what seems to me to be some of the big-ticket items in this application, you don't dispute the order of priorities as set out by Mr MacCann and Ms Smith …
>
> MR HUDSON: Absolutely not, Judge. […]"

32. Mr. MacCann and Ms. Smith were counsel for Cairn; Mr. Hudson was counsel for Mr. Fitzpatrick. However, after this apparently clear response, counsel immediately went on to another topic, namely the circumstances in which a liquidator can attract personal liability in litigation. I therefore revisited the question:-

> "Nevertheless, Judge, that doesn't detract from the order of priority, the order of priority is a statutory priority.
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> JUDGE: Mr Hudson, so let's get back to the question I asked you and it is for my purposes, the liquidator, Mr Fitzpatrick cannot pay his fee or cannot pay his lawyers' fees in respect of these proceedings because to do so would be to violate the order of priority, isn't that right?
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> MR HUDSON: Judge, he cannot pay his own fees, in relation to the solicitors' fees if he did -- if he did pay solicitors fees, Judge, outside the order of priorities well then Mr Fitzpatrick would have to account to the company for the liquidator – for the

legal fees, Judge. He's bound by the order of priorities and that is it, Judge. He cannot exceed it."

33. Finally, I asked counsel about the relief sought at paragraph 2(c) of the motion:-

> "JUDGE: Yes, all right. If you look at paragraph 2(3) of the notice of motion, what resistance Mr Fitzpatrick could have or does have for that particular form of order?
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> MR HUDSON: There's no jurisprudence. Firstly, it's section 623 of the Companies Act but secondly there's no jurisprudence, there's no other order made against a liquidator appointed by the Court, as Mr MacCann has referred to, in these terms. McKechnie J has set out how the system works --
>
> JUDGE: All right, Mr Hudson. Please, Mr Hudson, listen to me. Does Mr Fitzpatrick contend that he has a legal entitlement to make a payment to himself or to his lawyers in respect of legal costs otherwise in accordance with the order of priorities?
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> MR HUDSON: No, Judge. No, the order of priorities is a statutory -- it wasn't under the old Act that could be varied, Judge.
>
> JUDGE: Yes, thanks, Mr Hudson."

34. Counsel's reference to "section 623" is a reference to a typographical error in the motion, corrected by Cairn's counsel at the start of the hearing. In itself, it is an unimpressive reason to advance as to why an order should not be made in terms of paragraph 2(c) of the motion. As to jurisdiction, I clearly have jurisdiction to decide (a) the statutory order of priorities and (b) whether or not Mr. Fitzpatrick can make a payment other than in that order. I believe that, exercising the supervisory role which Mr. Fitzpatrick accepts applies to this liquidation, I have the jurisdiction to make any required ancillary orders.

35. I have decided to make an order which is in effect an amalgam of elements of 2(b) and 2(c) of the motion. It will be an order directing Mr. Fitzpatrick:-

> "To make no payments to himself, whether directly or indirectly and whether in respect of remuneration or otherwise, and to make no payment to his lawyers in respect of legal costs during the course of the liquidation (i) otherwise than in accordance with the order of priorities laid down in section 617 of the Companies Act 2014 and (ii) without obtaining prior approval of this Honourable Court."

36. I make this order for the following reasons:-

(i) It is undoubtedly the law that payments must be made in accordance with the statutory order of priorities.

(ii) In other liquidations, Mr. Fitzpatrick has not observed legal requirements in making payments, including payments to himself.

(iii) In this liquidation, Mr. Fitzpatrick has been slow to acknowledge the basic proposition that payments must only be made in accordance with the statutory order. Indeed, at one time his counsel appeared to suggest that interim payments could be made (to the legal team) but that this would be at the liquidator's risk in the event that such payments violated the order of priorities.

(iv) I have been given no reason to be confident that interim payments could be expected to be made good by Mr. Fitzpatrick should it transpire, at the end of the day, that these payments were not in accordance with the statutory order. Even more strikingly, Mr. Fitzpatrick does not even advert to the possibility that payments to the legal team would be repaid by them if turns out that these transgress the order of priorities. I therefore have no reason whatsoever to believe that such terms as to repayment will be imposed on the legal team if interim payments are made to them or, if such terms are imposed, that as a matter of commercial reality that they could be honoured.

(v) Mr. Fitzpatrick has not answered, in an open and plain manner, questions put to him about whether he has already paid fees either to himself or his lawyers. Particularly in this case, where Cairn was able to point to concerns on the part of Irvine J. and Peart J. relating to Mr. Fitzpatrick and where Cairn was already in possession of two orders for costs in these proceedings, the questions put were reasonable and the refusal to deal with them regrettable.

37. Given the very unusual circumstances of this case, and given the track record of Mr. Fitzpatrick as set out in the judgments of the Court of Appeal which I have cited, I feel that it is necessary to make an order that he follow the statutory order of payments and that no payment be made without court approval. This will ensure that the order of priorities, now expressly if belatedly accepted by Mr. Fitzpatrick, is obeyed. It will also avoid a situation where a payment is made, without court approval, which is then simply not repaid or is incapable of repayment even if it is inconsistent with the statutory order. In that regard, I am cognizant of the fact that it may be easier to avoid a breach of the order of payments than to rectify such a breach, and the court would be in a good position to assess whether any interim payments are (to use Mr. Fitzpatrick's phrase) "necessary" and, if they are to be approved, on what terms. I should add that this order does not constitute "security for costs by the back door"; it simply ensures that the provisions of the 2014 Act are obeyed.

38. In light of this order, should I make an order in terms of paragraph 2(a)? This is, by common consent, a mareva type order. The requirements of such an order, in Ireland, are set out by Clarke J. (as he then was) in *Hughes v. Hitachi Kiki Imaging Solutions Europe* [2006] 3 IR 457. The relevant section of the judgment is to be found at paragraphs 3.9 and 3.10:-

"3.9 It is, therefore, clear that the directors of any company are under a fiduciary obligation (which arises in circumstances where the company does not have sufficient assets to meet its liabilities) to have regard to the insolvency provisions of

the Companies Acts in the way in which the assets are managed. While an inappropriate disposition of the company's assets in such circumstances might not act for the benefit of the company itself, it seems to me that, nonetheless, in an appropriate case, it may be open to a plaintiff to seek mareva relief where it can be shown that an insolvent company intends to deal with its assets in a manner which would prevent those assets being dealt with in accordance with the provisions of the Companies Acts. In the ordinary way such a company must be taken, at least prima facie, to intend the natural consequences of its acts. Where it can be demonstrated that the company concerned intends to deal with its assets in such a manner as would be in breach of the obligations of the company and its directors under Frederick Inns and where such action would be likely to affect the position of the plaintiff, it seems to me that "requisite intention" required to justify the grant of a mareva type injunction would be established.

3.10 I am, therefore, satisfied that, in principle, it is open to a plaintiff to seek a mareva type injunction in circumstances where it can be shown that an insolvent corporate entity intends to deal with its assets in a manner which would be in breach of the obligations on the company and its directors to ensure that those assets are maintained in a fashion which would enable them to be applied in accordance with corporate insolvency law. This situation may arise even where the company proposes to pay its lawful debts. It should, however, be emphasised that the primary means available in law for the enforcement of any such entitlement is to seek to place the company in liquidation so that the assets would, then, be dealt with by the liquidator in accordance with corporate insolvency law. However where, for whatever reason, it may not be possible for the plaintiff to seek to have the company put into liquidation or where, for whatever reason, liquidation may not be appropriate at that stage, it seems to me that it is open to a plaintiff, in such circumstances, to seek a mareva type injunction."

39. Given the order that I intend to make, I do not think that a mareva type order is required. After all, the only potential dissipation of assets which Cairn suggest may occur is the payment of legal fees and liquidator's remuneration which can only happen, in this liquidation, with the consent of this court. Even if a mareva type order was made, it would be open to Mr. Fitzpatrick to apply to have its terms varied in order to permit such payments; the principles governing the two types of application may well be different, but they would not be so different to justify making a mareva type order as well as the order that I have already stated I will make.

40. Put another way, by analogy with the judgment of Clarke J. in Hughes, the basis of any mareva order would be that there is an intention on the part of Mr. Fitzpatrick to deal with the assets of Brandon otherwise in accordance with the provisions of the Companies Acts. However, even if such intention was established the appropriate order would (in effect) be the one that I have proposed.

41. I should also say that I am by no means convinced that a mareva type order can be made on an application under s. 631 of the Companies Act 2014. Happily, this is not an issue which I either must or should decide.

42. I will therefore make an order in the terms indicated. I will hear the parties on the precise form of the order, and the costs of the motion, at 10am on the 20th of July 2021.