THE HIGH COURT
CHANCERY

[2021] IEHC 488
[2020 No. 155 COS]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 631(1) OR SECTION 684(1) OF THE COMPANIES ACT 2014
AND IN THE MATTER OF SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND THE THIRD FORESTRY GROWTH PLAN PLC (IN LIQUIDATION)

BETWEEN

LAR SHEERAN, AISLING MURPHY AND RICHARD MULCAHY

APPLICANTS

AND

ALAN FITZPATRICK, AS LIQUIDATOR OF THE SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND THE THIRD FORESTRY GROWTH PLAN PLC (IN LIQUIDATION)

RESPONDENT

JUDGMENT of Mr. Justice David Keane delivered on the 16th July 2021

Introduction

1. This case raises issues about the nature and scope of the powers conferred on the court by ss. 631 and 684 of the Companies Act 2014 ('the 2014 Act').

2. The first and second applicants are shareholders in the Sixth Irish Forestry Fund plc (In liquidation) ('the Sixth Fund') and the third applicant is a shareholder in the Third Forestry Growth Plan plc (In liquidation) ('the Third Plan'). In this judgment, I will refer to the Sixth Fund and the Third Plan collectively as 'the companies'. The respondent ('the liquidator') is the liquidator of each of those companies.

3. The applicants move for an order under s. 631(1) or s. 684(1), or both, of the 2014 Act, directing the liquidator to furnish them with copies of certain documents or provide them with certain information, or both, relating to the trade, dealings or business of the companies.

Procedural history

4. A notice of motion issued on 27 May 2020, returnable for 13 July 2020. It is grounded on an affidavit of the first applicant Mr Sheeran, sworn on 22 May 2020 ('the first Sheeran affidavit'). The liquidator swore an affidavit in reply on 30 July 2020 ('the first Fitzpatrick affidavit'). Mr Sheeran swore another affidavit on 10 September 2020 ('the second Sheeran affidavit') to ground an application to amend the relief sought in the notice of motion. The liquidator swore a further affidavit on 15 October 2020 ('the second Fitzpatrick affidavit') to exhibit *inter partes* correspondence and David Martin, a partner in the firm of solicitors representing the applicants, swore an affidavit on 4 March 2021 for the same purpose.

Background

i. the companies

5. The Sixth Fund was incorporated on 14 July 1999 and the Third Plan on 9 May 2007. The companies formed part of a wider portfolio of 18 companies under the same management that owned and controlled approximately 10,000 acres (4,000 hectares) of forestry land, divided across 185 different estates. To avoid confusion between the two companies that

are the object of the present application from the wider portfolio of 18 companies, I will refer to the latter for the remainder of this judgment as the portfolio companies.

6. The opportunity to invest in the portfolio companies through the purchase of preference shares was publicly marketed to investors by way of prospectuses. Approximately €30 million was raised across the portfolio companies from a total of 12,400 individual investors between 1997 and 2008. The prospectuses issued by the portfolio companies were very similar.

7. The prospectus for the Sixth Fund described its purpose in this way:

> 'The [Sixth Fund] is a public limited company established to take advantage of the **grants, forest premia** and the **tax favoured** status of Commercial Forestry in Ireland. The fund allows investors, at modest levels of investment, an opportunity to participate in an attractive investment where **100% of the profits** will be distributed to them. Monies received will be used to purchase suitable land in Ireland. The **grant** scheme in operation at present will pay for that land to be cleared, fenced and planted. Appropriate **forest premia** will be applied for, and once granted, will cover essential forest management fees, and other necessary overheads. The Directors will endeavour to capitalise on the development potential of certain lands and purchase existing plantations, where appropriate, to maximise potential returns to the Preference Shareholders.
>
> The attraction of this investment is its simplicity and the fact that it is asset backed. Monies contributed by the investors will be used to purchase land which will then be afforestated (*sic*). For this once off investment of £500, based on the assumptions [stated] (which include an assumption that inflation will average 4.5% per annum over the 30 years of the Fund**), the investor should receive a distribution in excess of €16,000 when the trees are sold in 30 years' time**.'
> (emphasis in original)

8. Each of the portfolio companies was established as a public limited company. The shares in each company were divided into two classes – ordinary and preference. The original holders of the ordinary shares were the same persons who were the directors of each of the portfolio companies, although those shares were subsequently transferred to a company associated with those directors.

9. The differing entitlements of the holders of preference shares, on the one hand, and ordinary shareholders on the other, were described in the prospectuses. According to each prospectus, the ordinary shares had no rights to dividends but carried all of the voting rights in general meeting. The preference shares held no voting rights, but were to enjoy all dividend rights and other economic rights in respect of the companies' assets.

10. As the prospectus for the Sixth Fund explained, reflecting in material part those of the other portfolio companies:

'The authorised share capital of the fund is £33,000 divided into 30,000 Ordinary Shares of £1 each and 3,000 Preference Shares of £1 each. The Preference Shares will be sold at £500 each.

The Preference Shares are the only shares entitled to participate in the growth of the forest investment and, as such, will be the only shares to participate in the final distribution to be made at the time when the forest is harvested, in approximately 30 years. The Preference Shareholders shall not have any right to attend or vote at Annual General Meetings.

30,000 Ordinary Shares of £1 each have been issued to the Directors of the Sixth Irish Forestry Fund plc, which have been paid up as to 25p per share. These shares will not rank for dividend, but will carry votes to ensure that necessary decisions involving the management of the Fund can be made.'

iii. related entities and the payment of fees

11. The ordinary shares issued to the directors of the Sixth Fund, Paul Brosnan and Trevor McHugh, were later transferred to a company that they controlled named IFS Asset Managers Limited ('Asset Managers'). Asset Managers is a wholly owned subsidiary of IFS Irish Forestry Services Limited ('Forestry Services'), which in turn the directors beneficially own through intermediary companies. Forestry Services holds 66.6% of the issued share capital in a company named Veon Limited ('Veon'), which is the parent of a company named Forestry Enterprises Limited ('Forestry Enterprises').

12. Mr Sheeran avers that, under the terms of the prospectuses, each of the portfolio companies was to have an independent forestry consultant and complains that Forestry Services was appointed to a number of the later-incorporated companies, including the Sixth Fund, notwithstanding that the majority of the share capital in that entity was held by the directors of the Sixth Fund.

13. From a reading of the prospectus for the Sixth Fund, the issue arises in the following way. In the foreword, under the heading 'Management', the prospectus states that the forests will be managed by Forestry Services, in conjunction with Forest Enterprises Limited ('Forest Enterprises') – I do not know whether this is the same entity as Forestry Enterprises or a different one. The term 'Forest Management Consultant' is expressly defined to mean 'a company recognised within the Forestry Industry as being technically competent in Forest Management, whose officers are professionally recognised by the Society of Irish Foresters.' Then, under the heading 'Directors, Management Team & Advisors', Forest Enterprises is described as 'an independent forestry consultancy company with over 40 years' experience in the fields of acquisition, forest auditing and management', which has 'been retained to act as the Forest Management Consultant to the Fund'. Under the heading 'Forest Management Strategy', the prospectus states that deviations from the plan it describes will only be made with reference to the Forest Management Consultant, and will at all times be subject to the objective of maximising

the Investors' returns' Finally, in 'Section B' of the prospectus, which sets out 'General Information', the following appears under the heading 'Material Contracts':

'Three contracts have been entered into:

(i) The forest establishment contract has been awarded to Green Belt Ltd.
(ii) [Forestry Services] has been awarded the contract to maintain the forests. Mr Declan Kennedy and Mr Paul Brosnan are Directors of this company.
(iii) [Forest Enterprises] has been contracted to act as the Forest Management Consultant to the Fund.'

No connection (if one exists) between Forest Enterprises and the directors of the Sixth Fund is disclosed.

14. Mr Sheeran also complains that, although Forestry Services was awarded the contract to maintain the forests, the notes to the financial statements of the Sixth Fund filed in the Companies Registration Office ('CRO') for the financial period 1 June 2018 to 31 May 2019 disclose, under the heading 'Related Party Transactions', significant fees paid to both Veon and Forest Enterprises. Hence, Mr Sheeran asserts that significant fees appear to have been paid to entities associated with the directors throughout the lifetime of the Sixth Fund.

15. Moreover, Mr Sheeran goes on to complain that, from his reading of the financial statements of the Sixth Fund, the substantial Irish and EU forestry grants (that are the most attractive feature of forestry investments) have been totally eaten up by the management and other fees charged to the company by various entities associated with the directors, even after initial plantation costs gave way to smaller maintenance costs.

iii. the representations in the prospectuses

16. In the usual way, the prospectuses for the various companies included a series of representations. Taking that for the Sixth Fund as a representative example, the applicants identify the following as material to their application.

17. First, under the heading *'Project Timescale'*:

'It will take approximately 30 years for the trees to mature at which time they will be sold to the highest bidder. The underlying land will also be sold. The fund will then be wound up and all the profits distributed to the Investors.

Initially 2,500 trees are planted per hectare. Such high density planting is designed to encourage the sapling trees to grow tall and straight. During the life of the forests many of these trees will be removed in a process called thinning. This allows the better performing trees to grow and also reduce[s] the competition for light and nutrients. These thinnings should themselves provide the necessary income to help finance the fund to maturity.'

18. The next section of the prospectus was headed and '*Forest Management Strategy'* and included a table outlining the proposed forest management plan, the final entry in which identified 2029 as the year designated for the sale of both the harvested timber and the underlying forestry land, commenting that this was to be done to 'maximise the return for the investors.' The section concluded by stating that '[d]eviations from this plan will only be made with reference to [the] Forest Management Consultant, and will at all times be subject to the objective of maximising the Investors' returns.'

19. Next, under the heading '*Returns'*:

> 'Once the forests are mature they will be sold as standing timber at arms length. The underlying land will then also be sold at arms length. All profits from the sale of these assets plus retained profits will then be distributed to the Preference Shareholders. Based on the assumptions set out below, **a once off investment of £500 per share should result in a distribution in excess of £16,000 Tax Free per share when the crop is harvested. This equates to a compound annual rate of return of 12¼% per annum'**. (emphasis in original)

20. Under the heading '*Illustrative Financial Tables'*, the prospectus stated that the illustrative financial returns indicated were based on the following assumptions:

'i. Land of the necessary quality and meeting Forest Service requirements will be acquired at current market value.

ii. The duration of the fund is approximately thirty years, subject to any changes in tree felling regulations which may reduce the volume of trees that may be felled in any one year.

iii. Initial costs will comprise Commission (5%), Stamp duty (6% on land acquisition, 1% on share issue), Professional fees and Marketing costs (2½%) of fund raised.

iv. The following costs are assumed to be incurred Grant available

1) Forest establishment	£1,800 per ha	Yes
2) Pruning	£375 per ha	Yes
3) Roads	£220 per ha	Yes
4) Pruning (sic)	£424 per ha	Yes
5) Repair	£50 per ha	No

v. The forest will be thinned when necessary by reference to the forest management strategy.

vi. Revenue is based on expert technical data compiled by the Forest Management Consultant.

vii. The land is sold at open market value as forestry land. In these projections, it is assumed that land will be sold at a price which will not give rise to a gain for Capital Gains Tax purposes.

viii. Inflation is assumed to average 4.5% per annum for the duration of the Fund.'

21. Accompanying the table of '*Illustrative Returns'*, under the heading *'Illustrative Financial Tables'*, the prospectus included the caveat:

> 'The projection of illustrative returns should not be regarded as a forecast but as a projection based on the assumptions stated above. Because the projections cover a period of approximately 30 years the assumption are necessarily more subjective than would be appropriate for a forecast. The promoters have taken care to ensure that the assumptions used are reasonable based on historical trends and current forest management practice. Future events and circumstances may cause results to vary from those projected.

22. Finally, under the heading '*Exit Mechanisms'*:

> 'Once mature in approximately 30 years, the forests will be sold as standing timber to the highest bidder. This method of selling is at present seen to be the most beneficial, in terms of maximising shareholders' return. The underlying lands will also be sold to the highest bidder. All monies will then be pooled along with retained profits and interest earned and distributed to the Preference Shareholders. **All** unclaimed distributions will be divided amongst the preference shareholders. The fund will then be dissolved.' (emphasis in original)

23. Mr Sheeran avers that the proposed strategy outlined in the prospectuses was consistent, so far as he is aware, with orthodox thinking on the maximisation of returns in the forestry business, whereby it is generally recognised that the sale of forestry significantly prior to maturity can only result in a significant discount on the price achievable. Mr Sheeran exhibits two documents in support of that proposition: first, a draft of the document later published as Philips , H., Little, D., McDonald, T., Phelan, J. 2013, *A Guide to the Valuation of Commercial Forest Plantations*, COFORD, Dublin; and second, a copy of a Final Report prepared by the firm of economic consultants named Peter Bacon & Associates, *entitled Assessment of the Consequences of the Proposed Sale of Coillte's Timber Harvesting Rights,* 10 January 2013.

24. Mr Sheeran avers that, in reliance upon the representations set out in the prospectus, he invested £20,000 (€26,000) to purchase 40 preference shares in the Sixth Fund in 1999. Thus, had the returns projected (which he accepts were illustrative and in no way guaranteed) been achieved, he would have received a distribution of €812,632 in 2029.

iv. the sale of the companies' assets and the liquidation of the companies

25. On 19 May 2019, the *Sunday Independent* newspaper published a report headed '*Forestry investors in line for sale windfall'*, stating in material part:

'Thousands of small-time forestry investors across the country are set to receive a summer bonanza after the largest private forestry sale in Irish history.

Irish forestry fund management company Veon has agreed the sale of a portfolio of 18 funds – equating to about 10,000 acres of private forestry – to a global institutional buyer following a competitive process, the Sunday Independent understands.

Veon is one of the largest players in forestry funds in Ireland and manages over 34,500 acres of forestry.

The long-term forestry funds sold by Veon involve 12,400 investors in Ireland who on average have invested about €3,500, meaning a total investment of more than €40m.

The sale will see investors receive substantial returns on those original investments, it is understood.'

26. The article concluded:

'The strength of the offer by the institutional investor was described as "very compelling" not least because of various threats to Ireland's forestry industry.

Up to 70pc of Ireland's timber is exported to Britain and Brexit is seen as a major threat to the industry.'

27. Mr Sheeran exhibits a contemporaneous media report of a press release on behalf of Veon, stating in material part:

'Veon has completed the "single largest private forestry transaction in Irish history" a spokesperson for the company has confirmed.

The deal was closed on behalf of 12,400 retail forestry investors in the Irish Forestry Funds who are set to receive a "summer bonanza" at the end of July, according to the firm.

The UK's largest commercial forestry manager Gresham House Asset Management (GHAM) was appointed as the exclusive asset manager to the 4,074ha (10,067ac) portfolio of mature Irish forests on a long-term contract in the deal.

...

The appointment of GHAM follows the acquisition of the portfolio of mature Irish forests by AXA IM – Real Assets, acting on behalf of clients, for an undisclosed sum, from Veon, which is being retained to provide forestry management services. '

28. And later:

'Richard Hoare, Chairman of Veon, also spoke, stating: "We are pleased to have realised this important transaction for the Irish Forestry Funds and to continue our interest in their long-term stewardship.

This is a very positive development for our shareholders, with the portfolio's value and return serving as a strong endorsement of the Irish forestry and timber sector."

29. On 15 August 2019, each of the portfolio companies, including the Sixth Fund and Third Plan, was placed in members' voluntary liquidation and Mr Fitzpatrick was appointed liquidator of each.

30. Mr Sheeran avers as follows about those events. No advance notice was provided to investors of the directors' decision to sell the assets and no details of the terms of the sale agreement reached or the consideration paid were ever furnished to them. Mr Sheeran was very surprised by the decision to sell as it did not appear to be in the financial interest of investors. That is because, as a general rule, forests remain of low value until they start to become marketable, after approximately 20 years, when their value rapidly escalates until they are harvested, after approximately 30 years. Thus, the sale was effected shortly before those forests would have been expected to significantly increase in value. Mr Sheeran does not know whether the directors, or any entity linked to the directors, received any collateral benefit from the sale of the assets or the decision of the purchaser to retain Veon to provide forestry management services. None of the investors were consulted in relation to place the companies in voluntary liquidation.

31. On 16 August 2019, the directors, rather than the liquidator, issued cheques containing a dividend and distribution to each of the preference shareholders. The cover letter that Mr Sheeran received stated, in material part:

'I wish to inform you that on 4th July 2019, a dividend was declared on the Redeemable Preference Shares of €1.269738 (Ir£1.00) each (€634.85(IR£500.00) paid up per share), which you hold in the [Sixth Fund] (In Members' Voluntary Liquidation) for the period ended 21st May 2019. Provided overleaf is the dividend warrant in relation to same.

Please be informed that on 15th August 2019 the [Sixth Fund] went into Members' Voluntary Liquidation and on the instructions of the Liquidator, the Directors were requested to arrange for a distribution in specie to be made to you on the forty Redeemable Preference Shares of €1.269738 each, fully paid, registered in your name for a consideration of €634.85 per share amounting to a total distribution of €25,394.00 equating to the original investment made by you.

Attached hereto is a cheque in the amount of €44,276.00 being the total amount due to you with respect to the aforementioned dividend together with the distribution in specie.'

32. Hence, the return that Mr Sheeran received on what turned out to be a twenty, rather than thirty, year investment represented a combined annual return of less than 2%, rather than the compound annual return of 12¼ % projected in the prospectus, and the sum of €44,276.00 he received was a little more than one-twentieth of the return of €812,632 projected there. This, then, was Mr Sheeran's share of the 'summer bonanza' for 12,400 retail forestry investors that Veon had announced to the media the previous May.

33. Mr Sheeran wrote to the liquidator on 2 October 2019, in material part stating:

> 'I believe the [Sixth Fund's] assets were sold prematurely and that, in facilitating the sale of the assets, the directors of the [Sixth Fund] had a conflict of interest and acted in breach of their duties to the [Sixth Fund] and to the investor shareholders in the [Sixth Fund].
>
> Please note that I intend to encash the cheque in order to protect my position, but will do so strictly without prejudice to my rights and those of the [Sixth Fund] to seek redress in respect of the issue, including but not limited to seeking to have the transaction in question set aside. The encashment of the cheque is in no way to be interpreted as an indication of any acquiescence/implicit consent/agreement/waiver on my part to the said sale of the assets by the directors of the [Sixth Fund] and associated actions of the directors. I therefore reserve my right to seek all appropriate redress in this regard.'

v. correspondence with the liquidator and directors

34. On 17 October 2019, the firm of solicitors then acting for the applicants and other investors in different forestry fund companies wrote to the liquidator laying out the concerns described above and requesting the provision of documentation and information in a number of categories addressing, amongst other things: the decision-making process that led to sale of the portfolio of assets; the process of sale of those assets; any fees or benefits received by the directors or any persons connected with the directors in connection with, or in consequence of, the sale of those assets; and the process of calculation of the distribution made to each shareholder.

35. The liquidator replied, by letter dated 29 October 2019, confirming that he was the liquidator of each of the portfolio companies, before stating:

> 'I have discussed with the directors of the [portfolio] companies the process that was employed by them in establishing the timing and value of the assets which were sold to AXA Investment Managers ("AXA"). In the regard, I am advised that the [portfolio] companies engaged the services of Deloitte Corporate Finance for the purpose of:
>
> A Establishing the market value of the assets.

B Establishing the best sale process in order to achieve the best return for the Preference Shareholders of the [portfolio] companies.

C Identifying a suitable buyer.

I am satisfied that the directors took reputable professional advice to assist them in establishing the best return achievable to the Preference Shareholders and the timing of same.

...

I am further satisfied that all of the required steps in this process have been applied correctly and that the directors of the [portfolio] companies have acted honestly and responsibly.

...

As you are aware, if you or your clients are of the belief that the directors acted inappropriately, there are various remedies available at both common law and under the Companies Act 2014.'

36. The applicants' then solicitors wrote again on 20 December 2019, characterising the liquidator's response as an effective refusal of their request for documentation and information, before continuing:

> 'The process deployed by the directors in selling the assets of the [portfolio companies] does not appear to have been in compliance with what had been promised to our clients pursuant to the terms of the various prospectuses when they were invited to subscribe for preference shares in the funds. In particular, positive representations were made as to how the forests would be managed, harvested and sold. The sale, and particularly the timing, did not comply with what had been clearly represented to them in this regard. There is furthermore a complete lack of transparency surrounding the sale.'

The letter concluded by reserving the right to apply to the High Court for directions, pursuant to s. 631 of the Companies Act 2014, to compel disclosure of the documentation and information requested.

37. On the same date, the applicants' then solicitors wrote separately to the directors and to the company secretary of Forestry Services, seeking the provision of the same information and documentation by them and reserving the right, in default, to take all appropriate steps to protect the applicants' interests, including the right to issue proceedings: a) for damages for having induced each of the companies to breach the binding representations to preference shareholders set out in its prospectus; and b) for compensation, pursuant to s. 212 of the Companies Act 2014, for having acted in an oppressive manner or in disregard of the interests of the preference shareholders, or both, and continuing to so act by refusing to provide the applicants with the documentation and information requested.

38. The solicitors for the directors and forestry services responded to the substance the applicants' request by letter dated 4 February 2020.

39. In that letter, they first pointed out that the companies' books and records were now in the possession of the liquidator.

40. Second, they disputed the claim that the sale of each company's forestry assets prior to maturity represented a breach of the terms of its prospectus, relying on those terms, already described, that: 1) envisage the possibility of a deviation from the forest management plan, after consultation with the forest management consultant, with the objective of maximising investors' returns: 2) enter the caveat that projected returns are based on subjective assumptions covering a thirty-year period and that future events and circumstances may cause actual returns to vary from those projected; and 3) require each subscribing preference shareholder to irrevocably authorise the directors to manage the company without reference to that shareholder.

41. Third, they quoted an extract from the 2013 Directors' Report for each of the portfolio companies in which the Directors stated that they would 'continually assess the market place for opportunities for the company and its investors' before continuing;

> 'During the course of this continuous review of the Irish Forestry Market, in and around 2017 the Directors identified significant issues that were starting to adversely and seriously effect (sic) the Forestry Industry in Ireland. As a result of a detailed review of such issues over a period of time and following the obtaining of the appropriate advices the directors of the Irish Forestry Funds reached the decision that, in order to 'maximise the investors' returns' in accordance with the terms of the Prospectuses the Assets ought to be sold. We are enclosing a memorandum prepared by our clients, setting out a summary of the factors on foot of which the directors made the decision to dispose of the assets.' (emphasis in original)

42. The Directors' memo enclosed with the letter is also dated 4 February 2020, approximately 9 months after the sale of the forestry assets and almost 6 months after the portfolio companies were placed in voluntary members' liquidation. It identifies for the first time the five primary factors that the Directors assert informed their decision to dispose of those assets. In very brief summary those factors were as follows:

    (a) A concern about the impact of Brexit on the Irish timber industry, which was then exporting 80% of its output to the United Kingdom.

    (b) A glut in the supply of higher-grade continental timber on the United Kingdom market, as more trees were felled to deal with the problem of unprecedented levels of spruce bark beetle (and other pest) infestation, exacerbated by the effects of climate change.

    (c) Regulatory issues in the licensing of forestry activities within the State.

(d) The risk that a cyclical economic downturn would coincide with the maturity of the portfolio companies' forestry assets, exacerbated by poor trade relations between the U.S.A. and China.

(e) The receipt of a strong offer for the portfolio companies' forestry assets from AXA.

43. Fourth, they referred to the terms of the chairman's letter, accompanying the audited financial statements of a number of companies, including the Sixth Fund, for the year ended 31 May 2018, circulated to each preference shareholder, in which the chairman stated:

> 'The directors are cognisant of the increasingly volatile economic cycles we have experienced over the past decade and remain alert to other current macro-economic issues, especially the risks associated with maturing illiquid forestry funds in an economic downturn or in an uncertain economic climate. With this in mind, the directors will monitor and investigate various strategic initiatives, including early disposal and maturity for the benefit of the preference shareholders. The directors will therefore employ strategic flexibility to maximise shareholder value and minimise these risks.'

The solicitors record the directors' instruction that no contact, comment or objection was received from either any of the applicants or any other preference shareholder in relation to the potential disposal of the assets prior to the maturity date flagged in that letter.

44. Fifth, they denied that the forestry assets of the Third Plan, in which the applicant Richard Mulcahy is a shareholder, were disposed of prior to maturity, relying on the statement in its prospectus that the relevant forestry lands would be maintained for a period of 'approximately 12 years, after which time the standing timber and, subsequently, the lands will be sold and distributions will then be made to investors.'

45. Sixth, they challenged the applicants' entitlement to details of management fees and benefits received by the directors and Veon from the company or details of Veon's management agreement with AXA, before going on to assert that Veon's forestry management role and, consequently, the fees it was to receive under its agreement with AXA were more limited than those under its former agreements with the portfolio companies, and that Forestry Services had waived the termination fees due to it under its agreements with the portfolio companies, leaving a larger pool of funds for distribution among the preferential shareholders.

46. The letter continued by asserting that the applicants request for documentation and information amounted to a fact finding mission to formulate a claim with no basis, before concluding in material part:

> '[The applicants'] that the assets were sold prematurely is simply incorrect. For [the directors and Veon] to cause the various funds to simply wait until the end of the term to sell the assets, not actively review the market and take into account the

negative forces in the market would be, to say the least, irresponsible, not in [the applicants'] best interests and not conducive to the objective of maximising the return for the preferential shareholders. [The applicants] are clearly making these claims without any consideration whatsoever to the market and the ongoing crisis in the Irish forestry sector which is showing no evidence of abating.'

47. The liquidator then provided his substantive response to the applicants' request in a letter from his solicitors, dated 19 March 2020. That letter states, in material part:

> 'The liquidator has carefully reviewed and considered the comprehensive information and documentation furnished [to him] by the directors.
>
> Having engaged in further consultations with the directors and completed his investigations, the liquidator has concluded that all decisions made by the directors, including specifically the decisions to sell the [portfolio companies'] assets prior to the estimated maturity and to wind up [those companies], were appropriate in the circumstances. It is the liquidator's view that the directors pursued an early exit strategy in the best interests of the preference shareholders with due and careful regard to the challenges faced by the forestry sector. Such a step is not uncommon for a fund of this nature/structure.
>
> Furthermore, having taken legal advice, the liquidator has concluded that the sale was lawful and *intra vires* the directors in accordance with the [portfolio companies'] constitutions, the prospectuses and their delegated powers from the preference shareholders (in accordance with the authorisation in each investment application signed by your clients in respect the relevant [company]).
>
> ...
>
> While it is regrettable that your clients' return on investment was not at the level they had hoped, the prospectuses make very clear that the estimate of returns contained in the prospectuses were projections only based on certain assumptions and were not to be regarded as a forecast of likely returns to investors. Your clients received a return on their investments in excess of the original investment and, therefore, have suffered no loss.
>
> In relation to your information request, your clients are not conferred with any express right, either in the constitution of [the companies], the prospectus, statute or otherwise, to receive certain information concerning the decision to wind up the [portfolio companies].
>
> Notwithstanding this fact, we understand that [the solicitors for the directors and Veon] wrote to you on 4 February 2020 providing a comprehensive response to the queries raised in your letter to them of 20 December 2019, which we understand is in substantially the same form as the request made to the liquidator in your letter

of 17 October 2019. Accordingly, we do not believe any further information or documentation is required to be provided to you by the liquidator.'

48. The applicants' present solicitors replied on 3 April 2020, confirming their intention to apply to court and, as already described, the present motion issued on 27 May 2020.

The information and documentation sought

49. The applicants seek an order directing the liquidator to provide them with the following documents or information, or both, relating to the trade, dealings or business of the companies:

(a) Copies of all sale documentation and all corporate approvals relating to the disposal of the assets of the companies to AXA;

(b) Copies of all third-party valuations carried out in relation to the assets at or prior to the time of the disposal of the assets;

(c) A list of all of the assets that were sold, and of any assets of the companies which were not sold, including details of each plantation, acreage and age of trees;

(d) Copies of any advice received by the companies (or any person connected to the directly or indirectly), including any advice from a silvicultural expert, in relation to the sale of the assets;

(e) Copies of any management agreement, fee structure, carry fee, or other benefit received or to be received, whether directly or indirectly, by the directors of the companies, Asset Managers and Veon, or any of them (or anyone connected to each or any of them either directly or indirectly) in connection with the disposal of the assets;

(f) Particulars of the basis on which Deloitte Corporate Finance was engaged in relation to the sale of the assets and copies of any engagement documents;

(g) Copies of any documentation showing the decision-making process carried out in relation to the sale of the assets, including board minutes, notes of meeting and any other documents showing what weight, if any, was given to the terms of the prospectuses on which the applicants relied when investing;

(h) Particulars of all fees or benefits, or both, received or to be received by the directors of the companies, Asset Managers and Veon (or anyone connected to each of any of them either directly or indirectly) related to or connected with the assets over the course of the applicants investments, such information to be provided on an annualised basis together with the source of payments (e.g. grants, premia etc); and

(i) Copies of any insurance policies in relation to the companies.

The power to order inspection

50. In asserting an entitlement to the order they seek, the applicants rely on ss. 631 and 684 of the Companies Act 2014.

51. Section 631(1) provides, in material part, that a contributory of the company may apply to the court to determine any question arising in the winding up of a company. Section 631(2) states:

> 'The court, if satisfied that the determination of the question will be just and beneficial, may accede wholly or partially to such an application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.'

52. Section 684 states, in material part:

> '(1) The court may, at any time after making a winding-up order or the commencement of a voluntary winding up, make such order for inspection of the accounting records, books and papers of the company by creditors or contributories as the court thinks just.
>
> (2) Where such an order is made, any accounting records, books and papers in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.'

The basis upon which the applicants seek that information and documentation

53. The first Sheeran affidavit explains (at paragraph 38) that the applicants are concerned that the cause of the disappointing outcome of their investments in this instance was either: (a) the taking of excessive or unwarranted fees from the companies by entities related to the directors; or (b) the directors' decision to sell the assets at the worst possible time from the perspective of maximising the value of the investments, or both.

54. It goes on to explain (at paragraph 39) that, for those reasons, the applications are concerned that the directors may have been guilty of misrepresentation and/or mis-selling at the inception of the investments; or making untrue statements in the prospectuses in breach of s. 49 of the Companies Act 1963 ('the 1963 Act') and its successor provision, s. 1349 of the 2014 Act; or breach of duty or breach of trust in their management of the companies' assets, or some combination of those things. The applicants are also concerned that Asset Management, as the holder of the ordinary shares in the companies and company controlled by the directors, may have acted in disregard of the applicants' interests in facilitating the decision to sell the companies' assets and place the companies in liquidation.

55. The Sheeran affidavit continues (at paragraph 40) that in order to fully assess whether they have a cause of action against the directors and Asset Managers and, if so, the strength of that action, the applicants require an order directing the liquidator to disclose the documentation and information they seek.

56. In subsequent *inter partes* correspondence, the liquidator requested the applicants to confirm that the intended proceedings for which they were seeking disclosure from him were indeed proceedings against the directors and Asset Managers, any proceeds of which would be lodged to the liquidation for distribution among the contributories of the companies.

57. The applicants responded to that request in this way:

> '[We] confirm that the proceedings being contemplated for which the information is sought include a claim under [s. 608 of the 2014 Act] against the former directors and shareholders in [the companies], the proceeds of which would be lodged in the liquidation for distribution among the contributories. The purchaser of the assets, which you have now identified as [AXA], will also be a necessary party to any such proceedings. Secondly, as set out in Mr Sheeran's affidavit sworn on 22 May 2020, our clients are contemplating seeking relief against the directors pursuant to [s.612 of the 2014 Act] in respect of misfeasance and/or breach of trust and/or breach of duty, the proceeds of which would once more be lodged in the liquidation. Thirdly, as set out in that paragraph, our clients are contemplating seeking relief against the directors pursuant to [s. 49 of the 1963 Act] and/or its successor provisions, including [s. 1349 of the 2014 Act] on foot of misrepresentation in the prospectus. We understand that the primary remedy for this third category of claim would be an award of damages directly to the plaintiffs.'

58. Section 608 of the 2014 Act confers a power on the court in a winding-up to order a person to return company property previously disposed of, or its money's worth, to the liquidator where it is shown to the satisfaction of the court that the effect of that earlier disposal was to perpetrate a fraud on the company, its creditors or members.

59. Section 612 of the 2014 Act confers a power on the court in a winding-up to assess damages in favour of the company against certain persons, including company promoters and directors, where it appears to the court that any such person 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.

60. In each instance, the relevant application can be made by a liquidator, creditor or contributory of the company. In the case of s. 612 of the 2014 Act, the relevant application can also be brought by the Director of Corporate Enforcement.

61. Section 1349 of the 2014 Act, like its predecessor s. 49 of the 1963 Act, imposes civil liability on various persons associated with the promotion of a company for any misstatement in the company's prospectus.

Discussion

i. s. 631 of the 2014 Act

62. Although the applicants now acknowledge that the more obvious source of any jurisdiction there may be to make the order they seek is s. 684 of the 2014 Act, they still contend that s. 631 is sufficiently broad in its terms separately to permit that order to be made.

63. There is no doubt that the power conferred on the court under s. 631(2) to determine any question arising in a winding-up where satisfied that it will be 'just and beneficial' to do so is a very wide one. But can it go so far as empowering the court to direct the disclosure by a liquidator to a contributory of information and documentation in the guise of determining a question arising in a winding-up?

64. In submitting that it does, the applicants point to an order made by Pilkington J on 8 August 2019, on foot of an *ex tempore* judgment, of which no note or transcript is available, in the case of *Re Custom House Capital Limited (In liquidation),* Record No. 219 MCA of 2011. The order directed the liquidator of that company to provide certain information (in the form of calculations about various aspect of the claims of the company's client investors) to the applicant, which was the Investor Compensation Company DAC. The Investor Compensation Company DAC is an independent body set up under the Investor Compensation Act 1998 as a 'fund of last resort' for customers of authorised investment firms.

65. The applicants submit that the existence of this order provides authority for the proposition that there is a jurisdiction to make an order directing a liquidator to disclose information or documents under s. 631(2).

66. While the absence of any note or transcript of the judgment on foot of which the order was made makes it difficult to form a concluded view, the order seems to me to do no more than evidence the existence of a jurisdiction to direct the disclosure of information or documentation ancillary to the statutory jurisdiction to determine a question arising in a winding-up where it is just and beneficial to do so.

67. As the applicants acknowledge in their submissions, the question before the court in *Custom House Capital Ltd* was the nature and scope of the subrogation entitlement of the Investor Compensation Company DAC to the rights of those of the insolvent company's clients that it had compensated. In *Re Custom House Capital Ltd (In liquidation)* [2019] IEHC 43, (Unreported, High Court, 31 January 2019), Finlay Geoghegan J refused an application by the Investor Compensation Company DAC either to allow it to seek the determination of that question under s. 231 of the 1963 Act (the direct predecessor of s. 631 of the 2014 Act) or to direct the liquidator of that company to do so because, in the court's view, there were a number of facts that would first need to be established to provide the essential context for the determination of that question. It does not seem unreasonable to speculate that the order made by Pilkington J on 8 August 2019 in the same proceedings was intended to permit the Investor Compensation Company DAC to establish those facts. In short, it appears to me that the order was made as a necessary ancillary measure to enable the determination under s. 231 (now s. 631) of the subrogation rights question and did not represent the purported determination of any

separate or free-standing question about the entitlement of the applicant to the disclosure to that information.

68. In support of their argument that there is a separate jurisdiction to order disclosure of documents and information under s. 631 of the 2014 Act, the applicants cite the decision of Morgan J of the Chancery Division of the England and Wales High Court in *Sunwing Vacations Inc v E Clear (UK) Plc* [2011] EWHC 1544 (Ch), which they say is authority for the proposition that an application for disclosure and inspection of classes of documents held by a company may be acceded to under s. 112 of the UK Insolvency Act 1986 (the equivalent of s. 631 of the 2014 Act) *or* s. 155 of that Act (being the equivalent of s. 684).

69. I do not think that is correct. Section 112 of the UK Insolvency Act 1986 appears to me to be a more broadly drafted provision than s. 631 of the 2014 Act, in that it confers a power on the court not merely to determine any question arising in the winding up of a company but also to exercise all of the powers that the court might exercise if the company were being wound up by the court. The power under s. 155 of the UK 1986 Act to make an order for the inspection of a company's books and papers, at any time after making an order for the winding-up of that company, was thus engaged in that case through the gateway of s. 112, not as an alternative to the exercise of an equivalent separate power under s. 112. A consideration of the terms of s. 684 of the 2014 Act confirms the clear distinction because, unlike the inspection order power under s. 155 of the UK 1986 Act, which – in and of itself - is only exercisable by the court 'at any time after making a winding-up order', the equivalent power under s. 684 of the 2014 Act is exercisable *'at any time after making a winding-up order or the commencement of a voluntary winding-up'.*

70. Thus, I accept the liquidator's submission that, while s. 631 of the 2014 Act confers a wide power to determine – where just and beneficial - the rights and obligations that arise in a winding-up (and extends to a statutory power to annul or stay a winding-up), it does not confer a free-standing jurisdiction to order disclosure of information or documentation.

ii. s. 684 and the need to show a potential benefit in the winding-up

71. It is common case that there is no authority on the proper construction of the inspection order power under s. 684 of the 2014 Act. Under s. 684(1), such order may be made for inspection of the accounting records, books or papers of the company – either by the creditors or, as in this instance, the contributories – 'as the court thinks just'. Obviously, that is not an unfettered discretion but one that must be exercised judicially.

72. The first issue that arises is whether the s. 684 inspection order power can only be invoked for the benefit or purposes of the winding-up or may be invoked more broadly by any creditor or contributory who seeks inspection to advance a private interest.

73. In *re D.P.R. Futures Ltd* [1989] 1 W.L.R. 778 was a case that concerned an application for an inspection order under s. 155 of the UK 1986 Act. The applicants, who applied as contributories, were the former directors of the company. They were facing criminal prosecution for conspiracy to defraud in the conduct of the company's affairs. They sought inspection to enable them to prepare their defence. Giving judgment in the Chancery Division of the High Court of England and Wales, Millet J first quoted the provisions of s. 155 before continuing (at 788-9):

'A section in identical terms has been in every Companies Act since 1862. In *In re North Brazilian Sugar Factories* (1887) 37 Ch.D. 83 the Court of Appeal held that (1) the section then in force applied only to documents in the possession of the company, and (2) it could be invoked only for the purpose of the winding up, for example, in order to prosecute claims against the directors or others which would increase the company's assets available to creditors or contributories. It was submitted to me that the second of those statements was strictly obiter, but it was the considered view of the court which has stood unchallenged for more than a century and, in my view, ought not to be departed from by a judge at first instance even if he were minded to depart from it, which I am not.'

74. The applicants in this case submit that, since there is no authority in this jurisdiction limiting the scope of s. 684(1) to instances where the purpose for which the inspection is sought would benefit the winding up, there is no a priori reason to impose such a limitation on its scope. The liquidator, relying on the authority of the decision of McKechnie J in Dunnes Stores v Revenue Commissioners [2019] IESC 50, (Unreported, Supreme Court (O'Donnell, McKechnie, MacMenamin, O'Malley and Finlay Geoghegan JJ), 5 July 2019), submits that the meaning of the section must be construed by reference to the subject matter with which it deals, in this instance the winding-up of companies under Part 11 of the 2014 Act, so that it the limitation acknowledged in the England and Wales jurisprudence must apply to the provision properly construed. In my view, that is the correct approach to the construction of s. 684 of the 2014 Act. Hence, I tend to doubt that the inspection order power under s. 684 of the 2014 Act, properly construed, could be exercised solely to permit a creditor or contributory to pursue a private interest that would confer no benefit in the winding-up, although I am conscious of the submission that there is contrary authority in the Australian cases referred to in McPherson & Keay*, The Law of Company Liquidation,* (4th edn, 2017) (at 7-069).

75. I do not have to decide the issue because, on the evidence before me, the applicants are not merely contemplating a civil action for misrepresentation in the companies' prospectuses, under s. 1349 of the 2014, but also an application to set aside the fraudulent transfer of company assets, under s. 608 of that Act, and an application for the assessment of damages due to the companies for the misapplication of company property or misfeasance or other breach of duty or trust by the companies' former directors, under s. 612. For that reason, it seems to me that it cannot be said that the applicants are seeking only to further their own interests, rather than – potentially, at least - to benefit the winding-up. I share the view adopted by Morgan J in *Sunwing Vacations Inc,* already

cited, that the relevant inspection power can be invoked where the potential benefit to the winding-up is merely indirect or incidental, once that potential benefit exists.

iii. s. 684 and fishing for evidence

76. The applicants have failed to satisfy me that it would be just to permit the inspection they seek because their proposed inspection seems to me to fall on the wrong side of the line between one that would assist them with an existing or intended claim against the directors or promoters, on the one hand, and one that would allow them to fish for evidence to enable them to determine whether they can formulate such a claim, on the other.

77. I have reached that conclusion for the following reasons.

78. First, the expressed concerns of the applicants that there may have been a fraudulent disposition of company property or that there may have been some misfeasance, breach of duty or breach of trust on the part of the companies' directors fall some way short of establishing a *prima facie* case to that effect on the limited material the applicants have presented.

79. Second, even the modern Australian cases – to which the applicants refer in contending for an inspection entitlement to further their own interests rather than benefit the winding up – are consistent in the view that an applicant should not be permitted inspection to enable him or her to 'fish' for a case. Rather, there must be material before the court from which it appears that the applicant has a *prima facie* case to which the relevant accounting records, books and papers are relevant, before the discretion to order inspection can properly be exercised. The concerns and suspicions of the applicants in this case, while undoubtedly honestly held and sincerely felt, fall some way short of a *prima facie* case.

80. Third, while the distinction between a legitimate application for disclosure in support of an intended claim and an impermissible trawl for disclosure in an attempt to construct such a claim is ultimately one of degree, the present application seems to me to fall on the wrong side of the line between the two. Allowing for the limits of the analogy, I take the same view of this application as Murray J took of the discovery application in the competition law case of *Framus Ltd v CRH Plc* [2004] 2 IR 20 (at 40), which is to say that, in addition to its speculative element, it seems more akin to an investigation process than a litigation process and perhaps one more appropriate to the exercise of public investigatory power by a competent authority. In this instance, the liquidator, an officer of the court, is the person already in possession of all of the extant accounting records, books and papers of the companies and has the same standing as the applicants to bring any appropriate application under s. 608 or s. 612 of the 2014 Act. The Director of Corporate Enforcement also has standing under s. 612 to apply to the court to examine into the conduct of any promoter, officer or liquidator of the companies who it appears 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.'

81. Fourth, the broad and diffuse nature of the concerns the applicants raise, and hence of the inspection they seek, creates the same difficulty as that identified by Hart J in *Inland Revenue Commissioners v Blueslate Ltd* [2003] EWHC 2022 (Ch), [2003] 9 WLUK 292 (Ch D) (at para. 18):

> '[A] process of disclosure uncontrolled by any pleaded issues is likely if proceedings do subsequently eventuate to complicate rather than simplify the resolution of those proceedings. In making those observations I have in mind what Rix LJ said in *Black-Sumitomo Corporation*, a case under CPR 31.16, [2002] 1 WLR 1562. At paragraph 92 he says,
>
> > "In such circumstances, unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure escape the probing eye of the litigation process and thus possibly all detection, I think the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focussed allegation by a roving inquisition."
>
> At paragraph 95, he says:
>
> > "In my judgment, the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a near fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required. The more diffuse the allegations, however, the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise."'

82. Finally, it is evident that the s. 684 disclosure entitlement that the applicants contend for, if accepted, would be easier to qualify for, wider in scope, and less constrained in effect than the discovery entitlement of a person who has actually brought proceedings of the kind that the applicants are, at present, only contemplating. I do not think that it would fair or just to purport to exercise the court's discretion in that way.

83. For those reasons, I do not propose to make the order that the applicants seek.

Final matters

84. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered

electronically and posted as soon as possible on the Courts Service website. The statement continues:

> 'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of deliver subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

85. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be *electronically* filed with the appropriate registrar within 14 days, to enable the court to adjudicate upon it.