THE HIGH COURT

[2023] IEHC 230

[2011 735 COS]

IN THE MATTER OF

CTO GREENCLEAN ENVIRONMENTAL SOLUTIONS LIMITED

(IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012

ND

IN THE MATTER OF S. 617 OF THE COMPANIES ACT 2014

Judgment of Mr. Justice Quinn delivered on the 21st day of April 2023

1. Myles Kirby, of the firm Kirby Healy Chartered Accountants, was appointed official liquidator of CTO Greenclean Environmental Solutions Limited ("the Company") by order of the Court (White J.) made on 22 February 2016. He is the third person to have been appointed liquidator of the Company and I shall refer to him as "the Liquidator".

2. On 23 November 2022, Mr. Kirby issued an application for final directions in the liquidation, including orders sanctioning the payment of costs remuneration and expenses incurred by him in the liquidation, directions regarding the retention and disposal of the Company's seal, books and papers, an order discharging him as official liquidator and dissolving the Company. I shall return in more detail to the forms of orders sought by him.

3. Before the Liquidator issued his application for final directions, there was pending before the court an application made by Louis J. O'Regan Limited ("the Petitioner"), a creditor of the company and the original petitioner, for orders pursuant to s. 617 of the

Companies Act 2014, declaring certain fees and expenses incurred by it to be expenses of preserving, realising or getting in the assets of the Company which would attract the priority conferred by s. 617 over other claims in the winding up, including the costs remuneration and other expenses of the Liquidator.

4. After the Liquidator issued his application for final directions, Mr. Fergus Applebe, a solicitor in Cork who had acted for one of the previous liquidators Mr. Alan Fitzpatrick, issued an application for a variety of orders and directions. Although this was not apparent from his Notice of Motion, Mr. Applebe's grounding affidavit revealed that he was seeking a declaration that he is entitled to be reimbursed, again with the priority conferred by s. 617 (1) (a) of the Act of 2014, in respect of a payment of €27,675 which he made to Mr. Fitzpatrick in respect of fees, costs and expenses of Mr. Fitzpatrick.

5. If successful, the claims of the Petitioner and of Mr. Applebe would rank in priority to or partly pari passu with the costs, remuneration and expenses of the Liquidator. Therefore the application by the Liquidator for final directions cannot proceed until the court has determined these claims which I do by this judgment.

6. It is appropriate to note here the terms of the Liquidator's application for final directions. In that application, he seeks the following reliefs, many of which are common in applications for final directions: -

1) *An order dispensing with the requirement for the official liquidator to vouch accounts.*
2) *An order sanctioning the payment of the following sum in respect of the costs, fees and expenses of the official liquidator's solicitors, Maples & Calder (Ireland) LLP for the period of the winding up: -*

Professional fees	*€112,500*
VAT at 23%	*€25,875*
Counsel's fees (inclusive of VAT)	*€107,625*
Total	*€246,000*

and granting the official liquidator liberty to pay to his solicitors the said sum out of the assets of the company, in part discharge of the costs, fees and expenses incurred by the official liquidator's solicitors.

3) *An order dispensing with the necessity for taxing the costs and outlay outlined at para. 2 thereof.*
4) *An order sanctioning the payment by the official liquidator of the following sums in respect of his remuneration and expenses for the period of the winding up: -*

Professional fees	*€100,000*
VAT at 23%	*€23,000*
Total	*€123,000*

and granting the official liquidator liberty to retain the said sum out of the assets of the company (after making provision for the costs of his solicitors as aforesaid) in part discharge of his remuneration and expenses.

5) *Directions concerning the retention and disposal of the company's seal, books and papers.*
6) *An order discharging Myles Kirby as official liquidator of the company.*
7) *An order dissolving the company.*
8) *Such further or other order as this Honourable Court may deem appropriate.*

7. The application is grounded on an affidavit of Mr. Kirby in which he outlines the history of the liquidation and exhibits his final report to the court.

8. Before turning to the detail of the applications of the Petitioner and of Mr. Applebe, it is necessary to recite the unusual history of this liquidation, which informs both of those applications.

The petition

9. On 20 December 2011, the Petitioner presented its petition for an order that the Company be wound up under the provisions of the Companies Acts. The petition was grounded on a judgment which the Petitioner had obtained against the Company on 27 October 2010 for a sum of €596,802 and the failure of the Company to pay that amount following the service of a statutory demand pursuant to s. 214 of the Companies Act 1963.

10. The petition was opposed and on 12 March 2012, Laffoy J. delivered judgment. Laffoy J. held that this is an appropriate case in which to make an order for the winding up of the Company.

11. On 23 March 2012, an order was made by Laffoy J. for the winding up of the Company by the court and appointing Mr. Joseph Foran official liquidator.

12. Differences arose between Mr. Foran and the Petitioner. Mr. Foran claimed that at the time of his appointment the Petitioner had agreed to fully fund the remuneration, legal fees and expenses and any other costs of the liquidation for the purpose of commencing substantive proceedings against certain parties. He claimed that Mr. O'Regan had given him written confirmation of an agreement to fund his investigations and to discharge all necessary costs and fees which would arise. When the Petitioner did not discharge costs, fees and expenses of Mr. Foran, Mr. Foran indicated his desire to resign as liquidator.

13. The Petitioner claimed that Mr. Foran did not discharge his duties as Liquidator to pursue and realise assets, including the pursuit of claims described later in this judgment.

14. The Petitioner applied to court for the replacement of Mr. Foran by Mr. Alan Fitzpatrick.

15. On 17 June 2013, the court (Finlay – Geoghegan J.) noted and accepted the resignation of Mr. Foran as official liquidator and appointed Mr. Alan Fitzpatrick official liquidator.

16. The court directed Mr. Foran to hand over all papers in relation to the winding up.

17. The court also made an order declaring Mr. Foran entitled to his costs up to and including the date of his discharge and resignation as costs in the winding up with liberty to him to apply in due course for payment of costs and remuneration. No such application has been made.

The 2014 Proceedings

18. On 18 December 2014, the Petitioner issued proceedings against Stephen Griffin and David Ronan, formerly directors of the company, and certain Ark Life pension trustee companies, which were trustees of the pension schemes of the directors, seeking orders pursuant to s. 139 of the Companies Act 1990 (assets improperly transferred), s. 286 of the Companies Act 1963 (fraudulent preference), s. 298 of the Companies Act 1963 (misfeasance), and for certain injunctions. The claims related to monies totalling €2,664,333 paid to the respondents and/ or their pension schemes out of the Company's assets which the Petitioner alleged were transferred fraudulently and for the benefit of the respondents. The payments to Mr. Griffin, which spanned a period from 11 February 2008 to 26 May 2008, were for a total sum of €2,064,333. The payment to Mr. Ronan was made on 5 January 2009 for an amount of €600,000.

19. These proceedings were unusual in that, although it is open to a creditor to bring such applications, in circumstances where a company is in the course of being wound up applications under the sections invoked are typically brought by the appointed liquidator. The Petitioner says that it was dissatisfied with a lack of progress in the winding up, which prompted it to commence these proceedings in its own name.

20. The notice of motion issued by the Petitioner sought an order requiring the respondents to repay the relevant monies "to the applicant" being the Petitioner itself. The court was informed that this reference was later amended to an application seeking repayment of the monies to the liquidator of the Company but it is telling that the original issued motion sought payment to the Petitioner.

21. On 15 January 2015 and 19 January 2015, the respondents Messrs Ronan and Griffin swore and delivered replying affidavits.

22. The respondents brought applications for an order requiring the Petitioner to provide security for costs of the proceedings, pursuant to s. 390 of the Companies Act 1963 or alternatively pursuant to O. 29 of the Rules of the Superior Courts.

23. Different accounts were given to this court as to the final disposal of the security for costs applications. It became clear that the Petitioner was unable to provide security for costs and this was one of the reasons for the events which are next described. Ultimately the Petitioner was ordered to pay the respondents costs of their applications for security for costs.

Appointment of Mr. Kirby and amendments to 2014 Proceedings

24. On 25 November 2015, the Petitioner issued an application for the removal of Mr. Fitzpatrick as liquidator and the appointment of Mr. Kirby.

25. On 22 February 2016, an order was made by this Court (White J.) noting the resignation of Mr. Fitzpatrick and appointing Mr. Kirby.

26. On 14 September 2016, Mr. Kirby issued an application for an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts joining him in his capacity as official liquidator as co – applicant in the 2014 Proceedings. He sought also orders prohibiting the respondents from taking any steps to dissipate or utilise the monies the subject matter of these proceedings pending the determination of the proceedings.

27. The application by Mr. Kirby to be joined as an applicant in the 2014 Proceedings was opposed by Messrs Griffin and Ronan. On 26 April 2017, Haughton J. delivered his judgment and granted the application to join Mr. Kirby as an applicant. On 11 May 2017, an order was made joining Mr. Kirby as an applicant in the proceedings. The court also made further directions for the exchange of pleadings and particulars.

28. On 15 June 2017 the Petitioner made a most unusual application. It sought that the Petitioner be "disjoined or released" from the proceedings with its costs reserved. It sought, in the alternative, an order "permitting the [Petitioner] be renamed or re-constituted as a

Notice Party to the within proceedings for the sole purpose of making submissions in relation to costs at the conclusion of the hearing of the substantive matter."

29. On 17 July 2017, Haughton J. made an order removing the Petitioner from the proceedings. He refused the other reliefs sought by the Petitioner.

30. Haughton J. also made an order that the Petitioner pay to the first and second named respondents (Messrs Griffin and Ronan) the costs of the proceedings incurred to date, including the costs of the motions for security for costs.

31. After the making of these orders, the proceedings were progressed by Mr. Kirby. Further pleadings were exchanged and ultimately the matter was listed for an eight day trial on 5 November 2019. The hearing did not proceed that day having regard to the unavailability of a judge. O'Connor J. made certain directions with a view to narrowing the issues in the case.

32. On 23 March 2021, a settlement was concluded between the Liquidator and Messrs Griffin and Ronan, and other parties, which provided for a payment to the Liquidator on behalf of the Company of an aggregate sum of €300,000.

33. On 23 April 2021, O'Connor J. made an order entering the settlement as a rule of court.

The Petitioner's application

34. The application by the Petitioner now is for orders in the following terms: -

> *(1) An order pursuant to s. 617 (1) (a) of the Companies Act 2014 and/or pursuant to the inherent jurisdiction of this Honourable Court providing for the payment by the respondent to the applicant all fees and expenses properly incurred by the applicant in preserving, realising or getting in the assets of the company, such payment to be paid out of the property of the company in priority to all other claims, including those set forth at s. 617 (2) of the Companies Act 2014.*
> *(2) If necessary, a declaration to the effect that the applicant is entitled to be paid (in priority) the fees and expenses expended by it in preserving, realising and/or getting in the assets, to include the costs incurred in the applications brought before this Honourable Court for: -*

(a) the preservation, realisation and/or getting in of the company's assets from Messrs Stephen Griffin and David Ronan, and for
(b) the removal of the old liquidator and the appointment of a new liquidator, (namely the respondent herein).

(3) If necessary, a declaration pursuant to s. 617 (2) of the Companies Act 2014 to the effect that the applicant is entitled to payment of the costs of the petition, first in the order of priority as set forth in the above referenced section, after the payment referred to at para. 1 of the notice of motion herein.

35. The relief sought in para. (3) was not pursued at the hearing and counsel for the applicant confirmed that it was making no application in respect of the costs of the petition itself.

36. S. 617 provides as follows : -

"617. (1) All costs, charges and expenses properly incurred in the winding up of a company, including the remuneration of the liquidator, remaining after payment of—
(a) the fees and expenses properly incurred in preserving, realising or getting in the assets, and
(b) where the company has previously commenced to be wound up voluntarily, such remuneration, costs and expenses as the court may allow to a liquidator appointed in such voluntary winding up,
shall be payable out of the property of the company in priority to all other claims and shall be paid or discharged in the order of priority set out in subsection (2).
(2) The costs, charges and expenses referred to in subsection (1) shall, subject to any order made by the court in a winding up by it, be liable to the following payments which shall be made in the following order of priority, namely:

(a) First — In the case of a winding up by the court, the costs of the petition, including the costs of any person appearing on the petition whose costs are allowed by the court;
(b) Next — Any costs and expenses necessarily incurred in connection with the summoning, advertisement and holding of a creditors' meeting under section 587;
(c) Next — The costs and expenses necessarily incurred in and about the preparation and making of, or concurring in the making of, the statement of the company's affairs and the accompanying list of creditors and the amounts due to them as required by section 587 (7);
(d) Next — The necessary disbursements of the liquidator, other than expenses properly incurred in preserving, realising or getting in the assets as provided for in subsection (1);
(e) Next — The costs payable to the solicitor for the liquidator;
(f) Next — The remuneration of the liquidator;
(g) Next — The out-of-pocket expenses necessarily incurred by the committee of inspection (if any).
(3) Subsection (4) applies in relation to a person who has provided funds to discharge any such costs, charges or expenses (other than costs or expenses referred to in subsection (2)(b) or (c)) as are referred to in subsection (1).
(4) Such person shall be entitled to be reimbursed to the extent of the funds so provided by him or her in the same order of priority as to payment out of the property

of the company as would otherwise have applied to the costs, charges or expenses concerned".

37. At the hearing, the court invited all of the parties to address subsections (3) and (4) of s. 617 but no submissions were made in reliance thereon.

38. The application is grounded on an affidavit sworn on 23 February 2022 by Rowena Patterson, a director of the Petitioner. Ms. Patterson refers to the 2014 Proceedings and appointment of the successive liquidators. She explains that the 2014 Proceedings were issued by the applicant "qua creditor, by reason of the respondent's predecessors' failure to do so". She explains further that following the appointment of Mr. Kirby as liquidator and after he took over prosecution of the applications, he was the party more appropriate to bring those applications to a conclusion. She refers to the order of Haughton J. releasing the Petitioner from the proceedings. She makes no reference to the fact that the court refused an application by the Petitioner to be retained in the proceedings as a notice party for the sole purpose of making submissions in relation to costs at the conclusion of the hearing of the substantive matter or of the fact that Haughton J. had made orders for costs against the Petitioner when discharging it from the proceedings.

39. Ms. Patterson says that the Petitioner's actions of issuing and prosecuting the 2014 Proceedings secured and preserved the Company's assets by way of undertakings provided in those proceedings, procuring the resignation of the previous liquidator and the appointment of a liquidator interested in prosecuting the proceedings all caused and contributed to the preservation, realisation and getting in of the assets ultimately recovered by Mr. Kirby on behalf of the creditors. She says that but for the Petitioner's actions in seeking to preserve and recover assets and in seeking to appoint a liquidator who would prosecute the application these monies would not have been recovered for the benefit of the liquidation.

40. Mr. Kirby opposes the application. He refers to the appointment of his predecessors and their resignations. He says that it was a specific condition of his agreeing to act as

liquidator that the Petitioner would underwrite the costs of the liquidator and/or the risk of adverse costs orders being made against him in legal proceedings. He says that he asked the Petitioner on several occasions to provide funding in accordance with those representations and that despite assurances the Petitioner failed to honour its commitments in this regard, yet now seeks reimbursement of costs in priority to his costs.

41. Mr. Kirby says that after he was joined as an applicant in the proceedings, he pursued the proceedings as the "sole applicant". He says that apart from issuing the originating notice of motion and grounding affidavits, no further substantive steps were taken in the proceedings by the Petitioner. He refers also to the application which was made by Messrs Griffin and Ronan for an order for security for costs which was a factor in the inability or failure of the Petitioner to advance the proceedings themselves. He says that after the removal of the Petitioner from the proceedings there was an extensive exchange of pleadings, contested interlocutory applications, a discovery process, and ultimately a trial date fixed for 5 November 2019 with all the preparations which that entailed, the matter having been listed for hearing for eight days.

42. Mr. Kirby says that apart from commencing the proceedings and having been removed from the proceedings with a costs order made against the Petitioner, it did not otherwise contribute to what he describes as the successful outcome of the litigation.

43. Mr. Kirby refers also to an agreement executed on 17 October 2016 referred to as a "Deed of Acknowledgment of Priority" by which the petitioner agreed to cede priority in respect of costs to the Liquidator. I shall refer to that agreement in more detail later.

44. Mr. Kirby's affidavit was replied to by an affidavit of Mr. O'Regan sworn on 18 July 2022. Mr. O'Regan states that Mr. Kirby was aware that there was no funding available for the liquidation when he was appointed, and that correspondence in which Mr. Kirby had sought an indemnity illustrates that awareness.

45. Mr. O'Regan says that the fact that the liquidation had been "kept open and alive so long" was because of his "single minded determination and belief there were funds available to the creditors of the company".

46. Mr. O'Regan summarises his position by stating that he believes that Mr. Kirby:-

> *". . . forgets that we issued and progressed to a great degree the proceedings which he took over. We had set out previously our work in collecting and in preserving the assets and the motion I caused to be issued through my solicitors on the 18th of December 2014 seeking to preserve the assets of the company and to which Mr. Kirby ultimately successfully joined by order of this Honourable Court in 2017".*

Deed of Acknowledgment of Priority: 16 October 2016

47. A notable feature of the affidavits of Ms. Patterson and Mr. O'Regan is that they do not address at all the Deed of Acknowledgment of Priority.

48. On 17 October 2016, an agreement was signed described as a "Deed of Acknowledgment of Priority". The parties are the Petitioner and Mr. Kirby. Clauses 1 and 2 are the most relevant for the purpose of the issue now before the court and provide as follows: -

> *"1. The Official Liquidator shall be entitled to the following payments out of the assets of the Company remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in such assets:*
>
> *(a) the necessary disbursements of the Official Liquidator (other than expenses properly incurred in preserving, realising or getting in the assets of the Company);*
>
> *(b) the costs payable to the solicitors for the Official Liquidator;*
>
> *(c) the remuneration of the Official Liquidator.*
>
> *(together, the 'Costs and Expenses' of the Official Liquidator).*

2. The Petitioner acknowledges and agrees that the Costs and Expenses of the Official Liquidator shall be paid in priority to <u>any</u> claim the Petitioner may have to be paid out of the assets of the company, <u>including</u>, but not limited to, the following payments: (emphasis added)

(a) the costs of the petition, including the costs of appearing at the hearing of the petition;

(b) any costs allowed by the Court in favour of the Petitioner as costs in the liquidation;

(c) any costs in favour of the petitioner directed by the court to be an expense in the liquidation".

49. Clause 1 is of limited assistance in resolving this application. It is little more than a recital, in abbreviated form, of the essential provisions of s. 617 itself. If this court were to be persuaded that the Petitioner should be granted a declaration that costs it incurred represented "fees and expenses properly incurred in preserving, realising or getting in such assets" then any amount so declared would enjoy priority over the general remuneration, costs and expenses of the liquidator.

50. If such a declaration were made, and if, as would likely be the case, there were a shortfall in respect of the amounts to which parties were so entitled, it may be that the Petitioner or any party obtaining such a declaration would participate pro rata with the Liquidator in respect of the reimbursement of those amounts, before any payment could be made in respect of other costs or remuneration of the Liquidator. However, the Petitioner's application now before the court can be determined by reference to the customised provision in Clause 2 of the Deed freely entered into by the parties. In Clause 2 the Petitioner acknowledges and agrees that the costs and expenses of the liquidator shall be paid in priority

to "any claim the Petitioner may have to be paid out of the assets of the Company, *including* but not limited to the following payments: -" (emphasis added).

51. The use of the word "any" before "claim" and the word "including" in Clause 2 above are the clearest acknowledgment by the Petitioner that all and any claim it may otherwise have had, including any entitlement it may have for reimbursement of expenses, cedes priority in this case to those of the Liquidator.

52. Undoubtedly the Petitioner incurred legal costs associated with the commencement of the 2014 proceedings.

53. There is a dispute on the affidavits between the parties as to what, if anything, was achieved by this activity. The Petitioner says that if it had not commenced the application there would never have been any recovery against Messrs Griffin and Ronan. It claims that it secured undertakings from them at the outset, having initially sought orders restraining the trustees of the relevant pension funds from dissipating monies representing the proceeds of these payments.

54. The Liquidator says that no such undertaking was ever given. This is borne out by the fact that he was required, as part of his application to be joined as a co-applicant in the proceedings to seek an injunction, which Haughton J. refused. The Liquidator says that no more was done by the Petitioner than the issue of the originating notice of motion, albeit that the grounding affidavits outline the substantive case and at least had the effect of commencing the proceedings. Only after the liquidator took over the proceedings were full pleadings exchanged and the matter advanced to trial with all the preparations required for such.

55. Were it not for the Deed of Acknowledgment of Priority, the Petitioner may have been in a position to credibly argue that its costs of initiating the 2014 Proceedings, being a step in getting in and seeking to preserve assets of the Company for the benefit of its creditors

should attract the priority of s. 617(1)(a). Nonetheless, the Deed of 2016 is so clear on this point that the Petitioner cannot escape its consequences.

56. The Petitioner says that Mr. Kirby had accepted the appointment and had lodged his application to be joined in the 2014 Proceedings (on 14 September 2016) before the Deed of Acknowledgment of Priority was signed (on 17 October 2016). He submits also that Mr. Kirby was aware at the time of his appointment that there was a risk that the Company did not have the necessary assets.

57. The Liquidator says in response that these were the very reasons that he had requested an indemnity and he says that in pursuing the proceedings through to a trial and final settlement he did so in reliance on the Deed. I conclude that Clause 2 of the Deed is so clear that the Liquidator was entitled to rely on it.

Other considerations

58. The Petitioner elected to commence the 2014 Proceedings in circumstances where it was dissatisfied with the activity of the first two liquidators. It had declined to fund those liquidators' costs, albeit that there is a dispute as to the extent of its agreement to do so, and as to the diligence of those liquidators.

59. The removal of the Petitioner followed from its inability or unwillingness to provide security for the costs of the 2014 Proceedings. On its removal the court deemed it appropriate to award the respondents costs against the Petitioner.

60. The matter of the costs was clearly an issue when the applications regarding joinder of Mr. Kirby and removal of the Petitioner were before the court. If the Petitioner had wished to secure a declaration of priority, those were the occasions to do so. In so far as costs were the subject of any ruling the court ruled against the Petitioner, albeit on an interparty basis.

61. As regards costs associated with the two applications to change liquidators, those applications were the appropriate occasion for the Petitioner to apply for costs orders or declarations.

62. To accede to the application of the Petitioner would have the substantive effect of reversing certain costs orders already made against it, or at least have the effect of mitigating, at the expense of the Company in liquidation, the burden of costs incurred by and ordered against the Petitioner.

63. Finally, I characterise this application as an unjustified attempt to rewrite the terms of the Deed of Acknowledgment of Priority.

64. I have therefore concluded that the Petitioner's application should be refused.

The Liquidator's remuneration and costs

65. Mr. O'Regan says that he has requested details of Mr. Kirby's fees, but that Mr. Kirby has refused to address this request. Mr. O'Regan makes this observation in the light of an erroneous assumption on his part that the liquidator has recovered a sum of €600,000 in the liquidation. The Liquidator's final report shows that the amount recovered was €300,000. In its capacity as a creditor of the Company the Petitioner is a notice party on the Liquidator's application for final directions and has now been served with details of the Liquidator's claimed remuneration and costs. At the hearing of that application, the Petitioner will be entitled to make its submissions as to the quantum of Mr. Kirby's remuneration and costs.

Application by Mr. Fergus Applebe

66. Mr. Applebe issued an application on 7 December 2022 for the following reliefs: -

1) *An order for the official liquidator to vouch accounts.*
2) *An order to compel the liquidator to engage with Fergus Applebe in relation to the final account.*

3) *An order requiring the official liquidator to tax the costs and outlay in his final account.*
4) *Such further or other orders as to this Honourable Court may seem appropriate.*
5) *An order for the costs of this application.*

67. The application is grounded on an affidavit sworn by Mr. Applebe on 7 December 2022. In this affidavit Mr. Applebe states that he acted for Mr. Alan Fitzpatrick as liquidator of the company. He refers to the application brought by the Petitioner to discharge Mr. Fitzpatrick and to replace him with Mr. Kirby, which came before the court on 22 February 2016.

68. Mr. Applebe states that Mr. Fitzpatrick consented to the application and agreed to resign on the basis that his costs would be paid in advance of the hearing. Mr. Applebe states that he discharged those costs in the sum of €27,500 "from my own personal resources".

69. Mr. Applebe states that Mr. Kirby was aware of "these negotiations" and that he discharged Mr. Fitzpatrick's costs from his own resources.

70. In his replying affidavit, Mr. Kirby states that he was not aware of the "negotiations", but he acknowledges that he cannot gainsay the averment that Mr. Applebe discharged Mr. Fitzpatrick's fees from his own personal resources.

71. In his second affidavit, sworn 9 March 2023, Mr. Applebe states that when the application came before the court for the appointment of Mr. Kirby, Mr. Fitzpatrick had adopted the position that he would not consent to resigning unless he was paid immediately, rather than awaiting the outcome of the liquidation. Mr. Applebe says that "different ideas were discussed". He then says that the only solution which would work was that funds were secured and paid to Mr. Fitzpatrick through his client account. He continues: - "I had funds at my disposal which I made available and paid to Mr. Fitzpatrick".

72. Mr. Applebe now claims reimbursement of this money and submits that by virtue of s. 617 of the Act, he should be afforded priority over the Liquidator's own fees and expenses.

73. Mr. Applebe omits a number of important events and the complete account only emerges in the exhibits to Mr. Kirby's replying affidavits.

Events of 22 February 2016

74. On 22 February 2016, the day when the application for the removal of Mr. Fitzpatrick and the appointment of Mr. Kirby was before the court, an agreement was entered into between the Petitioner and Mr. Fitzpatrick. Clause 1.1 of the agreement provides as follows: -

> *"The petitioner will discharge the measured costs of the liquidator in the amount of €22,500.00 plus VAT at 23% (to wit, €5,175.00). These monies are to be held in escrow between the solicitors for the petitioner, Messrs Padraig J. Sheehan Solicitors, and solicitors for the liquidator, Applebe Solicitors".*

75. The agreement provided that the escrow money would be released to the solicitors for Mr. Fitzpatrick once the High Court had approved his resignation and the appointment of Mr. Kirby, and after Mr. Fitzpatrick formally handed over all relevant books and records to Mr. Kirby.

76. The agreement provided also for the Petitioner to provide an indemnity to Mr. Fitzpatrick, although the form of indemnity attached to the agreement does not appear to have been executed.

77. The agreement contains a confirmation regarding independent legal advice, to the effect that the Petitioner had taken independent legal advice from Padraig J. Sheehan Solicitors and Mr. Fitzpatrick confirmed that he had taken independent legal advice from Mr. Applebe.

78. The agreement was signed on behalf of the Petitioner and by Mr. Fitzpatrick and is witnessed by "Louise Healy, Applebe Solicitors, 24 South Main, Bandon, Co. Cork, solicitors on behalf of Alan Fitzpatrick".

79. On the same day, an order was made by the Court (White J.) appointing Mr. Kirby and directing Mr. Fitzpatrick to deliver custody to Mr. Kirby of the seal, books, records and any property of the company in his possession. The court made no order in respect of costs and then provided as follows: -

> *"And it is ordered that the sum of €27,675 held in escrow in Applebe Solicitors, solicitors for the said Alan Fitzpatrick, be paid out to the said Alan Fitzpatrick in part discharge of his legal fees and professional fees associated with the winding up herein".*

80. It is clear from the terms of this order that the court was led to believe (by whom this court has not been informed) that a sum of €27,675 was held in escrow at Messrs Applebe Solicitors and available to be paid out to Mr. Fitzpatrick in discharge or part discharge of his legal fees and fees associated with the winding up. It now transpires from Mr. Applebe's affidavits in this application that, contrary to the agreement of 22 February 2016 the Petitioner did not provide the money and the funds were sourced by Mr. Applebe from his own resources.

81. Following the making of the order of 22 February 2016, Mr. Fitzpatrick engaged with Mr. Kirby, and, for whatever reason, no payment was made to Mr. Fitzpatrick as ordered by White J. On 11 July 2016, Mr. Fitzpatrick issued a notice of motion seeking an order declaring "that it is now in order that the sum of €27,675 held in escrow by Applebe Solicitors be paid out to him forthwith in part discharge of his legal fees and professional fees associated with winding up". The motion was returnable for 18 July 2016 and heard on 25 July 2016. In the intervening week correspondence was exchanged between Mr. Kirby's

solicitors Maples, and Messrs Hanley and Lynch, solicitors for Mr. Fitzpatrick in which Messrs Hanley and Lynch gave the following confirmation on behalf of Mr. Fitzpatrick: -

> *"We confirm that the sum being sought by our client in the notice of motion represents full and final settlement of all claims by Mr. Fitzpatrick in respect of his remuneration, costs and legal fees in respect of his period spend as official liquidator of the company".* (emphasis added)

82. When the matter came before the court on 25 July 2016, White J. made an order that the sum of €27,675 "held in escrow by Applebe Solicitors, solicitors for the said Alan Fitzpatrick, be paid out to the said Alan Fitzpatrick forthwith in part discharge of his legal fees and professional fees associated with the winding up herein".

83. White J. further ordered that Mr. Fitzpatrick recover his costs of that application against the Petitioner, measured in the sum of €2,000.

84. By the agreement of 22 February 2016 the Petitioner agreed to pay Mr. Fitzpatrick's costs in the sum of €27,675. Those monies were to "be held" in an escrow between Messrs Sheehan and Mr. Applebe to be released once Mr. Fitzpatrick resigned and handed over papers to Mr. Kirby. The evidence before the court now is that the Petitioner did not discharge the costs in accordance with the agreement and instead Mr. Applebe funded the payment from his own personal resources. In submissions before the court, Mr. Applebe indicated that he did so because he felt "honour bound" in terms of a responsibility to the court notwithstanding that the Petitioner had defaulted on its obligation. This court does not doubt Mr. Applebe's recollection of events, but the Agreement records that the payment obligation was that of the Petitioner, not of Mr. Applebe.

85. In summary: -

1) The Petitioner agreed to pay Mr. Fitzpatrick's fees in an amount of €27,675.

2) The Petitioner agreed to lodge the payment in escrow with Mr. Applebe to be released after Mr. Fitzpatrick had resigned and had delivered books and records to Mr. Kirby.
3) The court ordered, twice, (22 February 2016 and 25 July 2016) that the sum of €27,675 be paid out of the escrow account.
4) The petitioner did not pay the €27,675. Mr. Applebe paid it from his own resources.
5) Mr. Applebe considered himself to be "honour bound" to source the payment.
6) The amount of €27,675 is no more than a figure which the Petitioner agreed to pay to Mr. Fitzpatrick. The court never approved a payment of €27,675 in respect of the fees of Mr. Fitzpatrick otherwise than by a release of that amount from an escrow account. The obligation to fund payment of the €27,675 was not Mr. Applebe's or, critically, the Company's, but that of the Petitioner.
7) There is no basis upon which this Court can now sanction such a payment out of the assets of the Company.

86. It is regrettable that Mr. Applebe funded this payment out of a sense of obligation or honour, in circumstances where there is no evidence of an obligation to have done so. But this court cannot now impose the burden of this payment on the Company, when the Petitioner had assumed the obligation unconditionally.

87. This court is not being asked to enforce the Agreement of 25 July 2016, but cannot disregard it as evidence of the Petitioner's obligation in an agreement with Mr. Fitzpatrick, witnessed by a member of Mr. Applebe's firm.

88. I therefore refuse the application for a declaration pursuant to s. 617 in respect of these monies.

89. Although Mr. Applebe's application as presented in court related principally to reimbursement of the sum of €27,675 which he paid, there is no paragraph in his notice of motion which seeks that relief.

90. In his notice of motion, Mr. Applebe seeks an order compelling the liquidator to engage with him in relation to the final account and other orders relating to the vouching of final accounts and taxation of costs and outlay in the liquidation. Apart from the matter of Mr. Applebe's claim for €27,675 which is now determined against him, these are matters which will be addressed in the context of the liquidator's application for final directions which will next be heard following the delivery of this judgment. Although I had directed that Mr. Applebe be served with the Liquidator's application for final directions, it is clear now that Mr. Applebe is not a creditor of the Company.