THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2020/120
High Court Record No. 2017/225 COS
High Court Record No. 2017/7252 P
Neutral Citation No. [2022] IECA 31

NO REDACTION NEEDED

Murray J.
Collins J.
Pilkington J.

IN THE MATTER OF DECOBAKE LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

PAUL COYLE

APPLICANT/APPELLANT

- AND -

DENNIS MCHUGH, DEIRDE MURPHY AND DECLAN DE LACY

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 8th of February 2022

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The application to remove and/or discharge the Liquidator and/or to 'issue an order … for misfeasance' and/or to issue orders for the protection of the assets of the creditors and management of the liquidation and/or bias in the appointment of the Liquidator (Grounds 13, 16, (in part) 17, 19 and 20)

Background

1. Decobake Limited ('the Company') was incorporated on 5 May 2000. At all relevant times prior to its winding up its directors were Paul Coyle and his wife, Margaret Coyle. The Companies Office returns before the court record Mr. and Mrs. Coyle as the sole and equal shareholders in the Company. Mr. Coyle was also the Company's secretary. The Company carried on the activity of supplying baked goods and similar products - Mr. Coyle describes its essential trade as that of specialised cake decorating. It was, he says, the leading Irish brand in that field. To that end it used various methods of decoration which (Mr. Coyle contends) he devised and invented and the intellectual property rights in which (it is his claim) are vested in him. Both Mr. and Mrs. Coyle were employed in the business, as were their two daughters. The Company operated out of properties comprising a warehouse and retail store at Clane Business Park, Clane, County Kildare, together with premises at 3/4 and 26 Bachelors Walk in Dublin.

2. In 2015, Denis McHugh was a rate collector appointed by Dublin City Council ('the Council'). His function was to collect rates falling due from the occupiers of rateable premises in Dublin city. He is now retired. In 2015 he issued proceedings in the Dublin District Court to recover an alleged liability of the Company for arrears of rates. The Council's claim is that the Company had paid no rates in respect of the premises occupied by it in Dublin City since 2012. Mr. Coyle says that he disputed that the Company had any obligation to pay some or all of these rates. The grounds on which he said he had no such obligation are not developed in the papers he has filed in this court, but appear to revolve around the claim that the Company did not, at some or all

of the relevant times, occupy and/or trade from the Bachelors Walk premises. He also makes reference to unspecified '*exemptions*' which he says applied. In the course of his affidavit sworn for the purposes of the winding up application, Mr. McHugh's solicitor asserted that the Company never alleged in opposition to the three sets of District Court proceedings brought for non-payment of rates that it was not in occupation of the property.

3. On 7 May 2015 a judge of the Dublin District Court granted a decree/warrant of execution in the amount of €13,878.30 for rates due on the premises at 3/4 Bachelors Walk. An application was thereafter brought by the Company to set aside that decree/warrant of execution. That application came before the District Court (Judge O'Neill) on 22 November 2016 and was listed at the same time as two further proceedings that Mr. McHugh had in the meantime caused to be issued, in each of which he also sought to recover arrears of rates for various years. One of those proceedings was in respect of the premises at 3 Bachelors Walk, and the other in relation to 26 Bachelors Walk. Mr. Coyle appeared at the hearing and attempted to represent the Company in those proceedings. The District Judge refused to permit him to do so. The judge also refused an application by Mr. Coyle for an adjournment, doing so (according to the submissions delivered in this court on behalf of Mr. McHugh) because Mr. Coyle had previously been informed by the court of the need for a company to be represented by lawyers, and had on that earlier occasion been granted an adjournment in order to obtain such representation.

4. Mr. Coyle thereupon left the court prior to the substantive hearing. Mr. Coyle says that the reason he left the courtroom was that he became distraught and was ordered by the District Judge to do so. This is disputed by Mr. McHugh and the Council. Whichever

version is correct, Mr. Coyle knew that the application to set aside the decree/warrant of execution granted on 2 May was before the court on that date and that the District Judge was proceeding to hear it. In oral submissions to this court Mr. Coyle was unclear as to whether he did not know that there were other applications against the Company before the court that day, or whether he knew that there were other matters listed but did not know that they were to be heard on that day.

5. Following Mr. Coyle's departure from the courtroom, the application to set aside the decree/warrant of execution already obtained against the Company was refused, and the applications for decrees/warrants of execution in a total amount of €42,508.37 were granted by the District Court. Inclusive of costs the Company as of that point owed a decreed debt to Mr. McHugh of €57,326.87. The refusal of the first set aside application was based on the conclusion of the District Judge that the Company was on notice of the hearing of May 2015 on foot of which the decree/warrant of execution was obtained. That decision was never appealed.

6. According to the Liquidator's Provisional Report of 24 July 2017, on 14 December 2016 the City Sheriff sought to seize goods at the Company's premises at Bachelors Walk in satisfaction of the first decree, but was met with physical force from those present. Mr. Coyle disputes that physical force was used against the Sheriff and those assisting him.

7. Immediately after this attempted execution, the Company's solicitors wrote to Mr. McHugh and to the City Sheriff on 16 December asserting *inter alia* that the warrant on foot of which the execution had occurred had expired and advising that the Company had issued proceedings to set aside the warrant. On 4 May 2017 Mr. McHugh caused a demand in respect of the sums outstanding on the three District Court decrees to be

issued pursuant to s. 570 of the Companies Act 2014 ('CA 2014'). The evidence before the High Court at the time of the application to wind up the Company was that this demand was left at the registered office of the Company. Mr. Coyle has contended that this demand was not received by the Company.

8. Mr. Coyle says that he was not aware of the two additional decrees/warrants of execution granted by the District Court in November 2016, but that when he did learn of them he caused the Company to move to set them aside. He said that this occurred in April 2017 (he says that copies of the warrants had been given by the solicitor for the Council to a landlord with whom he was in litigation, and that he learnt of them in the course of that litigation). Those applications were heard and refused by the District Court (Judge Brennan) on 27 June 2017. According to Mr. Coyle in his oral submissions to this court, the Company's counsel on this occasion identified significant issues around the power of Mr. McHugh to issue execution and to bring proceedings before the courts, in Dublin. The refusal of the District Judge to set aside the decrees/warrants of execution was based on his conclusion that the Company had been on notice of the hearing in November 2016 on foot of which the decrees/warrants for execution were obtained. Counsel for Mr. McHugh advised this court that District Judge Brennan decided that in order for the District Court to exercise its set aside jurisdiction it was necessary to establish fraud or surprise, and that because Mr. Coyle had been present in court at the hearing date in November he could establish neither. Mr. McHugh, in the affidavit sworn by him to ground the petition to wind up the Company, says that the District Judge stated that the Company had played '*ducks and drakes*' with legal procedure and had acted in a '*devious and mischievous*' fashion in relation to the set aside application.

The application to wind up the Company

9. On 29 June, a petition to wind up the Company was presented to the High Court pursuant to s. 569(1)(d) CA 2014 and an application thereupon made for the appointment of a provisional liquidator. Mr. McHugh was the petitioner, the application being based upon the statutory notice served by him on 4 May. The appointment of a provisional liquidator was sought because of the stated belief of Mr. McHugh that there was a serious risk of dissipation of the Company's assets in advance of the petition being heard. Reference was made in that connection to the fact that in November 2016 the Company had purported to register a floating charge over its assets, and that security was put in place in respect of an alleged debt to members of the Coyle family in the amount of €1.35M.[1] The affidavit of Mr. McHugh noted that the purported charge was registered on 2 November 2016 at a time when the two later sets of summary proceedings against the Company for non-payment of arrears were well advanced and some eighteen months after the first decree/warrant for execution had been obtained against the Company. Mr. McHugh (reflecting the contents of the provisional liquidator's report) further averred that when the city sheriff sought to execute against those assets he was met by a number of aggressive and physically intimidating individuals who had been procured by the Company to prevent the

[1] In the affidavit sworn by him for the purposes of resisting the winding up petition, Mr. Coyle averred that he had been advised by his solicitor that the charge was void '*in certain respects*'. According to the Liquidator in his affidavit of 12 November 2018 the amounts said to be owed by the Company to Mr. and Mrs. Coyle were variously stated as €120,000.00 (balance sheet exhibited to Mr. Coyle's affidavit opposing the winding up petition), €246,183.00 (proof of debt forms for use in connection with voting at meetings of company creditors), €220,000 (statement of affairs of 17 October 2017). The Liquidator said he was awaiting information from Mr. and Mrs. Coyle to enable him to adjudicate on their claims and that he was thus not in a position to confirm or rebut Mr. Coyle's claim that he was the Company's largest creditor. The petitioner's solicitor in his affidavit records the sum of €1,350,000 purportedly secured by the registered charge as redundancy sums of €250,000 due to Mr. and Mrs. Coyle, redundancy sums of €250,000 alleged to be due to Mr. Coyle's daughters and €375,000 in directors' loans due to Mr. and Mrs. Coyle.

sheriff's staff from taking possession of the Company's goods in satisfaction of the debts. As I have previously noted, Mr. Coyle denies this claim.

10. On 29 June 2017 Mr. De Lacy ('the Liquidator') was appointed by Gilligan J. as provisional liquidator. The appointment was made pursuant to s. 573 CA 2014. An application was made the following day on behalf of Mr. Coyle seeking to set aside the order appointing the provisional liquidator. The application was based upon Mr. Coyle's assertion that he was in a position to discharge the debt. The application was resisted by counsel for Mr. McHugh, who advised the court that there was a total of rates arrears of €102,000 dating back to 2012.[2] In his submissions to this court, counsel for Mr. McHugh said that it had transpired that the money tendered by Mr. Coyle to discharge the debt was made up principally of company funds comprising €49,491 which had been taken from the Company account by its directors after they had been placed on notice of the appointment of the provisional liquidator.[3] Mr. McHugh said that the directors had acted unlawfully in removing these monies: Mr. Coyle says that he did not know that the Company was in provisional liquidation at the time the monies were removed. The application was refused by Gilligan J. (the funds were returned to the Company following the institution by the provisional liquidator of proceedings to that end).

11. Following the appointment of the provisional liquidator but before the hearing of the application to wind up the Company, correspondence was exchanged between the

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[2] According to Mr. McHugh in an affidavit sworn by him following the appointment of the provisional liquidator, there was in addition to the sum of €57,326.87 decreed by the District Court a further sum of €45,746.00 due in respect of rates for the years 2016 and 2017 for which six day notices had been issued but no decrees obtained, making a total liability of €103,072.87.

[3] The same point was made by Mr. McHugh's solicitor in an affidavit sworn for the purposes of the winding up application.

parties and further affidavits were delivered. On 14 July, solicitors representing Mr. and Mrs. Coyle stated that they would immediately pay the sum of €57,326.87 from their own resources if the petition were withdrawn, also undertaking to discharge the balance of any remaining liabilities by monthly instalments over the following 10 months. The petitioner's solicitor responded on 19 July stating that in the event that the entire sum said to be due to the petitioner of €103,072.87 was paid, and in the event it could be shown that the monies were not company funds, the petition would not be proceeded with. The petitioner's solicitor also swore an affidavit addressing service of the petition. In that affidavit he said that the 21-day letter was, as well as being served by hand at the Company's registered office, sent by him by e-mail to Mr. Coyle's e-mail address. Mr. Coyle advised this court (in the appeal against the making of the winding up order) that he had configured his e-mails so that all e-mails from the petitioner's solicitor would be treated as spam. The evidence of the summons server was that when he arrived at the premises of the Company's registered office, the letterbox was screwed shut, but that he unscrewed it before leaving the 21-day notice there. Although affidavits were sworn by Mr. Coyle and each of his daughters following the delivery of the affidavit of the petitioner's solicitor, none made any reference to the fact that the letterbox to the Company's registered office (and the home of one of Mr. Coyle's daughters) had been screwed shut and then unscrewed. In the course of his submissions to this court in the appeal against the winding up order, Mr. Coyle argued that if the demand had been delivered in the manner alleged by the petitioner the service was unlawful as it amounted to an interference with the property of the registered office of the Company which was also a private dwelling.

12. The solicitor said that some weeks after service of the 21 day notice an individual who was unknown to him attended at his office holding an envelope on which was written

the words '*delivered to the wrong address*'. When opened, the envelope was seen to contain the 21-day demand. The solicitor said that his secretary told the man to tell '*him*' that the notice was served, and that the man replied '*I won't be telling him anything*'. The solicitor said that the man was aggressive, and that he believed him to be an associate of Mr. Coyle's who had been procured to return the document.

13. The winding up petition came for hearing before the court on 24 July 2017. Mr. Coyle was represented at the hearing by solicitors and counsel. Mr. Coyle swore an affidavit (on his own behalf and on behalf of Mrs. Coyle and the Company) for the purposes of opposing the application. In the course of that affidavit Mr. Coyle did not dispute the liability of the Company on foot of the District Court decrees. He noted that the Company did not appeal those decrees and said that the reason the Company did not initially discharge its rates obligation was because it had temporary cash flow difficulties, also stating that '*we were not in occupation nor trading in the property*'. He said '*I now realise the company should have paid the said sum*' later averring '*I acknowledge the company should have discharged the rates*'. At no point did he say that he disputed the quantum of the rates, and indeed the reference to paying '*the said sum*' suggested otherwise.

14. Mr. Coyle further averred that neither he, his co-director nor one of his daughters (who resided at the property designated as the Company's registered office) had received the statutory demand and that had they done so they would have discharged the payment as sought. He said that he and his co-director were in a position to lodge the sum demanded from their personal funds. He also disputed the account of the attempted execution by the city sheriff the previous December stating that two of his staff were

confronted on this occasion by fifteen persons. He observed the invalidity of the warrant (as he claimed it to be). He asserted the solvency of the Company.

15. There were, as I have noted, a number of other affidavits before the court delivered on behalf of the Company. One of these was sworn on 7 July by Mr. Maher, the solicitor who had moved the application before Gilligan J. to set aside the order appointing the provisional liquidator. In that affidavit Mr. Maher asserted that the application for the appointment of the provisional liquidator was motivated by a desire to prevent the Company from pursuing its challenge to the warrants of execution by way of appeal or judicial review, and the desire to prevent the Company from issuing proceedings against the Liquidator. These contentions were not pursued in oral submissions during the application to wind up the Company.

16. What counsel for Mr. and Mrs. Coyle did submit in the course of the winding up application was the following:

(i) That the petition should be refused and/or adjourned because the provisional liquidator had failed to issue an originating Notice of Motion as (it was asserted) was required by the Rules of the Superior Courts, and/or that the petitioner required the leave of the court to proceed with the petition pursuant to s. 678 of CA 2014.

(ii) That Mr. and Mrs. Coyle were now in a position to discharge the debt to the petitioner in the amount of €102,000 in full and, indeed, to discharge debts of '*anybody who is in court who was due money*'.

(iii) That the directors took issue with the service of the 21-day letter of demand and of the petition.

(iv) The position was adopted (in reliance on Mr. Coyle's affidavit evidence) that if the 21-day letter of demand had been received the Company would have discharged the payments sought. By the time the directors became aware of the statutory demand it was (so it was claimed) too late and a provisional liquidator had been appointed.

(v) That the Company was in fact in a position to pay its debts and that Mr. Coyle chose not to discharge the debt owed to the Council '*pending resolution of different disputes that were going on between Mr. Coyle and the council*'. Counsel said '*[t]hat was not, with hindsight' a wise decision to take*'.

(vi) That one of the alleged creditors, a Mr. O'Mahony, was not a candidate to take over the petition having regard to litigation between him and the Company (I will return to the position of Mr. O'Mahony later).

(vii) That the Company had an annual turnover of €3.5M, had 49 employees, was solvent and that the majority of creditors did not wish it to be wound up. In these circumstances, it was said, the court should be slow to wind up a viable business.

(viii) The petition was being presented for the '*ulterior motive of closing [the Company] down*'. The judge, it is to be noted, pressed counsel on what the ulterior motive was. At no point was it suggested that there was any '*ulterior motive*' other than that of '*closing the company down*'. Later counsel said, again on being specifically asked what the ulterior motive was, that he could not '*take the question of the ulterior motive any further*'.

(ix) In the course of counsel's submissions it was suggested that one of the reasons the court might exercise its discretion not to wind up the Company was that it was in litigation regarding what was described as '*a valuable lease*' and that if the Company was wound up that litigation would be at an end and the Liquidator would likely disclaim that lease. It was *not* suggested that the petition was being brought for the purposes of thwarting those proceedings, nor was any other ulterior motive identified to the court. It is clear from the transcript that the proceedings being referred to here were between the Company and Mr. O'Mahony. I will also return to that litigation later.

(x) Counsel was also pressed by the court as to whether there was anything in the application before the court that suggested that the underlying bill for rates was '*an issue between the parties*'. Counsel's response was '*No, not the rates issue*'. He said '*we know we owe the rates, Judge*'. Later he said '*the company didn't pay its rates and should have paid its rates, said it would have paid its rates if it got the letter*'.

(xi) Counsel referred to the fact that the Company had threatened to sue the rates collector. This, he said, '*was an unfortunate turn of events*'. It was never

suggested in submissions by counsel to the court that in fact the alleged *ulterior motive* of Mr. McHugh or the Council in presenting the petition was related in any way to proceedings threatened against the rate collector.

17. Keane J. made the winding up order pursuant to s. 573 CA 2014 and appointed Mr. De Lacy as Liquidator. In the course of his *ex tempore* judgment, he found as follows:

(i) That the demand was properly delivered in accordance with the provisions of s. 570(a)(i) of the CA 2014.

(ii) That the Company had for 21 days after the date of service of the demand neglected to pay, secure or compound that debt to the reasonable satisfaction of the creditor.

(iii) That in those circumstances the Company must be deemed unable to pay its debts in accordance with the meaning attributed by ss. 569 and 570 of CA 2014.

(iv) That it therefore was not material to enter into any significant consideration of arguments as to the Company's insolvency at that time (while noting the relevance of this in the exercise of the court's residual inherent jurisdiction).

(v) That the more cogent evidence before the court was that there were at the very least '*very grave or fundamental concerns regarding the company's solvency*' and that the reality was that the demanded debt together with a number of other

debts due from the Company or shortly due from the Company were outstanding.

(vi) That the decision in *Re Genport* [1996] IEHC 34 (which had been relied upon by Mr. Coyle's counsel) could be readily distinguished because while it was said on behalf of Mr. Coyle that the petitioner was acting in pursuit of an ulterior motive in seeking an order winding up the Company, no attempt had been made to substantiate that claim and no alleged ulterior motive had been identified.

(vii) That it was not appropriate for the court in the circumstances to exercise any residual discretion it may have had to refuse the application.

Events following the liquidation

18. Shortly after his appointment the Liquidator instituted proceedings against Mr. Coyle, Mrs. Coyle and their two daughters (High Court Record No. 2017 7252P). In those proceedings a variety of orders were sought restraining the defendants from publishing defamatory, untrue, malicious and derogatory material in relation to the business and affairs or liquidation of the Company, or from interfering with the conduct of the business of the Company or otherwise obstructing or interfering with the liquidation or the Liquidator. At around the same time, Mr. Coyle issued High Court proceedings against the Liquidator and the Company (High Court Record No. 2017/7276P) asserting the intellectual property rights he contended he owned in different aspects of the Company's business. On 8 August 2017 the Liquidator obtained *ex parte* orders, the essential effect of which was to restrain the defendants in the action he had

commenced from interfering with the business of the Company or from obstructing the Liquidator in the discharge of his tasks and duties as Liquidator and requiring the delivery to him of certain property. The order also required the defendants to desist and cease from any manufacture, sale, marketing, supply and/or attempted manufacture in breach of the confidential information, trade secrets and/or intellectual property of the Company. Applications brought by Mr. Coyle on the same day for orders preventing the Liquidator from using what Mr. Coyle claimed to be his intellectual property for commercial benefit, were refused.

19. On 12 October 2017 a sequence of agreed orders were made in both sets of proceedings (Mr. Coyle agreeing to strike out proceedings 2017/7276P) and *inter alia* continuing the interim orders made on 8 August. By further order of O'Connor J. of 20 October 2017 one of these orders was modified on Mr. Coyle's application (and above the Liquidator's objection). In January 2018, the defendants in action no. 2017 7252P delivered a defence and counterclaim seeking various orders and damages against the Liquidator arising from *inter alia* allegedly unlawful communications issued by him, alleged defamation, and alleged breach of Mr. Coyle's intellectual property rights. I will refer throughout to these proceedings as the '*plenary proceedings*'. As the issues in those proceedings were thus joined, the core dispute is whether the business of the Company could be carried on or sold without Mr. Coyle's permission having regard to his asserted ownership of the intellectual property in its products and production methods.

20. On 6 October 2017 a creditors' meeting was convened by the Liquidator pursuant to s. 666(2) of the CA 2014. A committee of inspection was appointed, and five members

were confirmed by the creditors – a Mr. O'Mahony, Ms. Kennedy, Mr. Kiernan, Ms. Woods and Ms. Murphy. Three days later a general meeting of company members passed a resolution appointing three further members to the committee of inspection - Mr. and Mrs. Coyle together with a Mr. Andrew Moffatt. Ms. Woods and Ms. Murphy subsequently retired from the committee in (respectively) August 2018 and March 2021. By order of the High Court (O'Connor J.) of 24 July 2020, it was directed that the committee of inspection should proceed with the creditor members only. The court was advised in the course of the hearing of this matter that Mr. Coyle has applied to set this decision aside. The composition of the committee of inspection has given rise to some controversy, and I will return to it later.

21. Mr. and Mrs. Coyle appealed the winding up order to this court. Costello J. delivered her judgment in that appeal (with which Peart J. and McGovern J. agreed) on 25 June 2019 ([2019] IECA 169). The appeal was unsuccessful. I will return to some of the findings later in more detail, but observe for now that in her judgment Costello J. *inter alia* found that the trial judge did not err in deciding that the statutory demand was delivered to the Company in accordance with the requirements of s. 570(a)(i) CA 2014, determined that there was no reason a rates collector could not avail of provisions to enable the winding up of the Company and found that the Judge was fully entitled to wind up the Company notwithstanding the opposition of some creditors. Costello J. specifically observed that subject to certain exceptions a creditor who satisfies the court as to the proofs necessary to obtain a winding up order is entitled to that order *ex debito justitiae.* She also agreed with the finding of the trial judge that the Company was insolvent and rejected the contention that the trial judge failed to act proportionately in winding up the Company given the tendering by Mr. Coyle of the monies owing to the

petitioner. She rejected the claim that the winding up was brought in pursuit of an ulterior motive.

22. It must be stressed that no attempt was made to seek leave from the Supreme Court to appeal this decision. The time for doing so has long since passed. The findings of this court in that judgment are now *res judicata*.[4] There is and can be no doubt about this.

23. Finally, it is to be noted that on 5 March 2018 O'Regan J. made orders in the liquidation fixing the remuneration of the Liquidator and approving his fees, refusing Mr. Coyle's application for discovery in the context of that fee approval application, and also refusing an application to dismiss the fee approval application pending the application which gives rise to this appeal. Those orders were appealed to this court. The appeal was dismissed, resulting in the judgment to which I have earlier referred ([2021] IECA 254). In the course of his judgment, Haughton J. (with whom Power J. and Collins J. agreed) was critical of aspects of Mr. Coyle's conduct of the application giving rise to that appeal. He referred to allegations made by Mr. Coyle as '*scandalous*' (at para. 32) and to the appeal as being '*fundamentally misconceived at a number of levels*' (at para. 91). He described the attack mounted by Mr. Coyle upon the Liquidator in the course of those applications as '*an abuse of the process*' (at para. 106) and referred to Mr. Coyle as having '*abused the opportunity given to him to rehearse many issues in dispute between him and his family on the one hand and the respondent on the other hand and to make serious allegations of criminality and other wrongdoing on the part of the*

[4] In the course of his oral submissions to this Court Mr. Coyle suggested that it had been intimated to him by the office of the Supreme Court that he could in some unspecified way deal with the issues in any appeal against what was described as the '*for cause*' application. This assertion (which was not recorded on affidavit) is – should the matter come before the Supreme Court – a matter between Mr. Coyle and the Supreme Court. This court must proceed on the basis that the decision on the winding up appeal is final, and conclusive.

respondent without any basis in evidence'. He thus concluded his judgment (at para. 136):

> '*It is important that I should end this judgment by stating that I do not accept any of the appellant's attempts to portray the respondent as less than honest, and the appellant's repeated refrains on affidavit and to the court that the respondent obtained injunctions fraudulently or otherwise acted improperly are unwarranted, irrelevant and scandalous*'.

The applications to the High Court and proceedings before, and Orders of, Allen J.

24. Meanwhile, in October 2019 a series of applications in, or arising from, the liquidation of the Company came for hearing before Allen J. These were made by way of five motions in the liquidation issued by Mr. Coyle between October 2018 and August 2019 and two motions issued by the Liquidator, together with a further application issued in the plenary proceedings. The various applications were as follows:

(i) An application by the Liquidator for directions as to the composition and membership of the committee of inspection. This relief was sought by notice of motion issued on 29 August 2018.

(ii) An application for the removal of the Liquidator and/or annulment of the winding up order and/or orders for the convening of certain meetings together with other orders directed to the composition of the committee of inspection. This application issued on 5 October 2018.

(iii) An application to set aside the winding up order of Keane J. of 24 July 2017 (an order affirmed by this court on appeal) and seeking a declaration that Mr. McHugh did not have standing to present the winding up petition, also seeking an order joining Owen Keegan, Kathy Quinn, Terence O'Keefe and Eleanor Brennan as notice parties to the liquidation proceedings. This application was issued on 8 May 2019.

(iv) An application directing compliance by the Liquidator with his obligation under s. 681 of the CA 2014 to file a statement of proceedings and the position of the winding up, together with orders requiring him to comply with ss. 684, 686, and 687 CA 2014 and other related reliefs. This motion issued on 4 June 2019.

(v) An application for orders directing the release to the judge dealing with the applications in the liquidation of documents discovered in the plenary proceedings. This issued on 23 August 2019.

(vi) An application by the Liquidator for an extension of time within which to comply with the requirements of s. 681 of CA 2014. This issued on 16 September 2019.

25. The hearing of these applications proceeded over eight days. At the commencement of that hearing Mr. Coyle made two further applications – that Allen J. should recuse himself and that he be granted permission to issue a motion in relation to discovery. These applications were refused, the first on the basis that Mr. Coyle had not established

any basis for his suggestion of bias, and the second on the ground that it had been calculated to disrupt business before the court (the applications in relation to the committee of inspection had been pending for over a year and, Allen J. said, Mr. Coyle had never previously mentioned the discovery application). Mr. Coyle then sought to have certain questions referred to the Court of Justice of the European Union ('CJEU'). Those questions were directed to whether the court had been correct to refuse the '*discovery application*'. That application was also refused. The judge delivered an *ex tempore* judgment rejecting Mr. Coyle's application to set aside the winding up order and join the notice parties he proposed, delivering his reserved judgment on the remaining issues in the notices of motions on 18 February 2020 ([2020] IEHC 57).

26. Altogether, the trial judge made the following nine orders which give rise to this appeal:

(i) An Order on foot of the Liquidator's motion of 29 August 2018 determining that the members of the committee of inspection were Malcolm O'Mahony, Catherine Kennedy, David Kiernan, Deirdre Murphy, Paul Coyle, Margaret Coyle and Andrew Moffatt, together with an order refusing the application dispensing with the need to fill the vacancy on the committee of inspection which arose on the resignation of Susan Woods on 16 August 2018.

(ii) An Order refusing Mr. Coyle's motion of 5 October 2018 seeking orders for the removal of the Liquidator and/or annulment of the winding up order and/or orders for the convening of certain meetings together with other orders directed to the composition of the committee of inspection.

(iii) An Order refusing Mr. Coyle's motion of 4 June 2019 seeking directions to the Liquidator to comply with his obligation under s. 681 of CA 2014 to file a statement of proceedings and position of the winding up, together with orders requiring him to comply with ss. 684, 686, and 687 CA 2014 and other related relief.

(iv) An Order refusing the Liquidator's application of 16 September 2019 for an extension of time within which to comply with the requirements of s. 681 of the CA 2014.

(v) An Order for the payment by Mr. Coyle of the costs of the Liquidator's motion of 29 August 2018 and of Mr. Coyle's motion issued on 5 October 2018, these to be costs in the liquidation.

(vi) An Order that there be no orders as to the costs of either Mr. Coyle's motion issued on 4 June 2019 or of Mr. De Lacy's motion issued on 16 September 2019.

(vii) An Order refusing Mr. Coyle's application that Allen J. recuse himself.

(viii) An Order refusing Mr. Coyle's application to have various questions referred to the CJEU.

(ix) An Order refusing the application for the release of documents discovered in the plenary action.

27. Mr. Coyle raises twenty-seven grounds of appeal. These have been developed and, in some respects supplemented in a number of separate sets of legal submissions and speaking notes delivered by him before and after the hearing in this court, as well as during oral submissions made in the course of the hearing. His complaints span different aspects of the specific orders in question. One (ground 12) is a statement rather than a ground of appeal (it declares that Mr. Coyle acted at all times in his fiduciary duty as an officer of the Company to protect the best interests of the shareholders and creditors and ignores the fact that upon the liquidation and pursuant to s. 677(3) of the CA 2014 his powers as a director ceased). The remaining grounds can be conveniently grouped together under seven headings.

The claim that the trial judge ought to have recused himself (Grounds 15, 22 and 23)

28. Logically, the first issue that arises is whether the trial judge erred in refusing to recuse himself from hearing the applications. In this regard, Mr. Coyle says that he had an apprehension that Allen J. would not adjudicate with impartiality. In his notice of appeal, he characterises the application as arising because the judge '*failed to apply the principles of natural Law*'. While some generalised reference is made in the papers to the fact that Mr. Coyle was representing himself and was not a member of the Bar (the implication being that for this reason he was denied a proper or fair hearing) the substantive objection had two principal aspects.

29. The first arose from the fact that the judge had heard the trial of an unrelated landlord and tenant action in which Mr. Coyle was a party and in which the judge ruled against Mr. Coyle (*Coyle v. Coughlan* [2019] IEHC 506). The second arose from a directions

hearing in the liquidation that was heard by the trial judge on 20 June 2019. That directions hearing was convened with a view to confirming that two of the motions ultimately heard in October but then listed for hearing on 2 July, would proceed on that date. After that hearing date had been fixed a further two motions had issued. Counsel for the Liquidator applied to have the latter motions also heard on 2 July, while Mr. Coyle applied to have the motions listed for hearing on 2 July put back until the other applications were ready to be heard. On 20 June Allen J. ruled both against the Liquidator's application and against Mr. Coyle's application.

30. Taking these in turn, the objection insofar as it was based upon the fact that Allen J. had heard another unrelated action in which he ruled against Mr. Coyle is groundless. No basis has been suggested on which it could be concluded that that hearing was conducted unfairly, and Mr. Coyle never appears to have contended that it was. It is incumbent on a person contending that a judge should have recused himself or herself as a result of bias to establish that a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues, (*Bula Ltd. v. Tara Mines Ltd. (No.6)* [2000] 4 IR 412, at p. 441 per Denham J.). Having regard to the manner in which Mr. Coyle has expressed his objection in his notice of appeal and submissions – which assume that the relevant issue is simply whether there is an '*apprehension*' of bias – it must be stressed that '*the apprehensions of the actual affected party are not relevant…[t]hat party is, obviously, not to be equated with a fair-minded and neutral observer*' (*Murphy v. DPP* [2021] IESC 75 at para. 60 per O'Malley J.). The fact that a judge has heard either other proceedings involving the objecting litigant, or other applications in the same proceedings, is not in itself a basis on which a claim of bias can be sustained having

regard to the objective requirement of the test. Instead, it is necessary for the objecting party to identify some aspect of the conduct or disposition of those proceedings that would cause a reasonable and fair-minded observer to conclude that the judge would not fairly and impartially determine the second suit. Mr. Coyle has not discharged that burden, advancing the matter no further than that Allen J. heard the earlier case and found against him. In *Tracey and anor. v. McDowell and ors* [2016] IESC 44 Clarke J. (as he then was) explained (at para. 4.3):

> '*It does have to be recorded that there is an increasing tendency of litigants to allege bias arising largely out of the fact that a judge or judges have previously heard a case involving the litigant concerned and found in favour of the litigant's opponent. Sometimes … the argument is little more than a rehash of the original case coupled with the contention that the judge must have been biased to have found against the relevant party. Such an application for recusal is unstateable*.'

31. In his submissions regarding the hearing on 20 June 2019, Mr. Coyle contends that there had been '*a confrontation*' on that date. I have considered the transcript of the Digital Audio Recording ('*DAR*') of the hearing. It shows that Mr. Coyle was checked by the court on one occasion when he interrupted counsel for the Liquidator when he was addressing the court. There is nothing in that transcript that substantiates any aspect of the claim of bias made by Mr. Coyle. It will be noted that apart from refusing the application made by Mr. Coyle on that date, the court also rejected the Liquidator's application to have the recently issued motions brought forward.

32. Mr. Coyle adds in the course of his submissions some further complaints. In apparent reference to the substantive hearing of the various applications in October, he contends that the judge had formed an unfavourable view of him and that he had viewed him as a '*mischievous*' person who was pursuing a vendetta, thereby ignoring Mr. Coyle's medical condition. The medical condition in question is stated by Mr. Coyle to be that of dyslexia and what is described by Mr. Coyle as '*a sub condition regarding stress and anxiety when in confrontational circumstances*'. In the course of his judgment in the appeal relating to the Liquidator's remuneration Haughton J. commented that '*no medical evidence*' was put before the High Court or this court of this condition ([2021] IECA 254 at para. 76). Indeed, in that appeal this court declined to entertain a contention advanced by Mr. Coyle that he should – in the absence of such evidence – be permitted to resile from a position he had adopted before the court on account of this asserted condition (at para. 112). The evidential basis in this appeal on this matter is no different. In point of fact, the '*sub condition*' was not referred to before Allen J., and the dyslexia was mentioned briefly to him, but without any application being made for any particular facility in the presentation of the case.

33. In a related vein, Mr. Coyle said that Allen J. did not have the patience that a litigant in his position would require. Reliance is placed in this regard on the claim that throughout his judgment the judge was remarking on Mr. Coyle's behaviour and that it appeared that he was '*somewhat frustrated*' by Mr. Coyle's presentation of his case. Reference is made to *Garda Commissioner v. Phoenix Magazine* [2016] IECA 141.

34. I cannot see that this part of the complaint is made out either. The trial judge allowed Mr. Coyle very considerable latitude in the course of the hearing and no specific aspect

of it has been identified that to my mind demonstrates any basis for an apprehension of bias. Nor does the decision in *Garda Commissioner v. Phoenix Magazine* assist Mr. Coyle. There, this court found that the defendant entertained a reasonable apprehension of bias where a judge who was to hear a contempt application arising from a publication which it was suggested might prejudice a forthcoming civil trial before a jury, expressed the view during an *ex parte* application made to him by the plaintiff that the article in issue was '*reckless and irresponsible*'. The court reached that conclusion because, it found, the comments made by the judge had been such that a reasonable and fair-minded person might reasonably apprehend that he had prejudged an issue he was due to decide. That correctly frames the applicable test, but its application also shows why Mr. Coyle does not come near establishing it. A judge who has heard an earlier case involving a litigant and checked them in the past for interrupting counsel in court cannot for those reasons alone be viewed by a reasonable fair-minded observer as being likely to do anything other than determine a subsequent case fairly and in accordance with the law and facts. Judges have a duty to hear cases assigned to them, and parties who seek to disqualify a judge from doing so must adduce a clear basis on which a reasonable observer could be said to reasonably apprehend bias. Mr. Coyle has not established *any* basis whatever for suggesting that a reasonable observer might have had an apprehension of bias, less still any reasonable apprehension, on the facts here.

The set aside and annulment applications (Grounds 1, 2, 3, 4, and (in part) 17)

(i) The issue

35. In the course of the first set of written legal submissions delivered by him in support of this appeal, Mr. Coyle states that '*[a]t all times a Liquidation can be stopped or even*

annulled'. It is on this basis that Mr. Coyle contends that the order for the winding up of the Company should now be set aside or voided. The grounds on which this relief is claimed are as follows[5] :

(i) The debt on foot of which the winding up was sought and ordered was not due.

(ii) The Company was not in fact insolvent at the time of the making of the order.

(iii) The presentation of the petition was '*contrived*' (in part because it was allegedly prearranged with other purported creditors of the Company who were in fact not creditors at all) and the winding up ought therefore to have been annulled.

(iv) The petition was granted by the court in a context where the petitioner deliberately misled the court as to the Company's true financial status.

(v) Mr. McHugh did not have standing to bring the petition to have the Company wound up and/or to seek the underlying District Court orders.

(vi) The petition was presented with a view to thwarting the Company's proposed legal action against Mr. McHugh and/or the city sheriff arising from the attempted execution in December 2016 and/or was the product of a conspiracy

[5] In addition to these grounds Mr. Coyle referred in the course of his oral submissions to this court to the provisions of s. 569(1)(d) CA 2014, stating that the High Court in making the winding up order had failed to have regard to 'just and equitable' principles. Mr. Coyle has, I think, misunderstood the provision which is concerned not with conditioning the exercise of the court's discretion in the exercise of the jurisdiction conferred by the other provisions of s. 569, but with a distinct *ground* of winding up which is generally operated in the context of quasi-partnership companies.

between the Council and others to make an example of the Company and Mr. Coyle.

(vii) The effect of the winding up order was to prevent the Company and/or Mr. Coyle from appealing the District Court orders of 27 June 2017.

(viii) European law and/or the provisions of the European Convention on Human Rights support the policy of rescuing ailing companies or, as it was put in the course of submissions, giving companies '*a second chance*'. In the circumstances that presented themselves here, the winding up of the Company failed to respect and/or give effect to this policy and was disproportionate. Therefore, it is said, the High Court ought to have annulled or set aside the winding up order on that basis.

(ix) The effect of the winding up order was to violate the constitutional rights of Mr. Coyle and/or of the Company and on that basis ought to be set aside.

(ii) The Law

36. Once made, a winding up order effects an immediate and significant change to a company's status and to the legal entitlements of its members, creditors, directors and employees. Such an order can of course be appealed, and in some circumstances a stay may be imposed on the order pending such appeal (see *Re Lobar Ltd.* [2018] IECA 129) (in the present case, Keane J. refused to put a stay on his order and an application to this court for such a stay was also refused on 28 July 2017). Where the winding up

order becomes final, the circumstances in which it will be set aside or the liquidation annulled are of their nature wholly exceptional, and in fact extremely rare. And, to be clear, and contrary to a suggestion made in Mr. Coyle's submissions to this Court a liquidation order *is* final. The existence of either statutory provisions enabling annulment of an order, or a jurisdiction inherent in the court to set the order aside does not mean it ceases to be '*final*' for the purpose of the principles of *res judicata*. All final orders are subject to being set aside in the wholly exceptional circumstances envisaged by that jurisdiction. This does not mean that they do not bind the parties to the findings made by a court, and it does not mean that a party has free reign to return to have the orders upset when it has happened upon a new argument or new fact which it believes afford a basis on which it can be said that the order ought not to have been made.

37. Specific provision for the annulment of a winding up is made in s. 669(1) of CA 2014. This, it should be said, is the only section in the Companies Code allowing such an order to be made: s. 708 was relied upon by Mr. Coyle but this is concerned with the issue of a declaration that a *dissolution* of a company is void. The Company has not been dissolved nor will it be until the winding up is concluded.

38. Section 669(1) provides:

> *"At any time after an order for winding up is made, the court –*
>
> *(a) on the application of the liquidator or any creditor or contributory, and*
>
> *(b) on proof to the satisfaction of the court that the order for winding up ought to be annulled,*

may make an order annulling the winding up on such terms and conditions as the court thinks fit."

39. I stressed in the course of my judgment in *Re PPF Capital Source Ltd.* [2020] IECA 63 (at para. 28) the importance of certainty as to the legal efficacy of a winding up order once made. The law has designed a process intended to ensure that all parties likely to be affected by the making of such an order are in a position to make their case at one and only one hearing of the matter. Where, having heard all parties who choose to exercise the right to appear and make representations, the court on such an application makes an Order winding up the company, the significant alteration of the company's management and control and of the entitlements and expectations of the members and creditors should not and can only upset in the most unusual of circumstances. That judgment makes it clear that without significant qualification the stated premise of Mr. Coyle's application – that '*[a]t all times a Liquidation can be stopped or even annulled*' – is apt to mislead. Orders of this kind can only be made when an application to that end is made rapidly, and where justified by the most exceptional of circumstances.

40. Thus, in that judgment (at para. 25) I emphasised the importance of an application of this kind being brought promptly, noting authority in which a three-month delay in bringing such an application was held to be fatal to it. That reflects the view in the texts (see Forde and Kennedy '*Company Law*' (5th Ed. 2017) at para. 20.88). The general position is particularly well explained by McPherson and Keay '*The Law of Company Liquidation*' (4th Ed.) at 2-044 where, in addressing similar provisions in English law, it is said that:

'*To review is not appropriate except in the most exceptional circumstances, as it involves a judge substituting his or her own decision for that of another judge of a co-ordinate jurisdiction reached on the same material after a full consideration of the arguments. The power to review is not to be used to hear an appeal against a judge of co-ordinate jurisdiction.* ***The power is to be restricted to cases in which there has been some change in circumstances since the original order was made.*** *This might involve the consideration of material which was not previously before the court*'.

(Emphasis added).

41. In *PPF Capital Source Ltd.*, a liquidation order was annulled in circumstances in which the applicant established that he had been unaware of the petition to wind up the company, in which he moved to set aside the order immediately after he learnt of its being made, in which he established by evidence good grounds for his contention that the petition had been brought for the purposes of thwarting proceedings the company had brought against an alleged wrongdoer in England, in which no steps had been taken by the Liquidator (or anyone else) on foot of the winding up order, and in which no-one opposed his application. The application was issued within weeks of the winding up order. I stressed in my judgment that the circumstances in which such an order would be made would rarely arise (see para. 28 of the judgment) and indeed the situation that presented itself in *PPF Capital Source Ltd.* itself was unique.

42. It is clear that in parallel to this express statutory provision, the courts enjoy a general power to set aside their own judgments where these are obtained by fraud[6] (*Desmond v. Moriarty* [2018] IESC 34) and the equally exceptional power – relied upon here by Mr. Coyle – to set aside a final judgment where a failure to do so would represent a breach of the constitutional rights of a party (*Re Greendale Developments Ltd. (No.3)* [2000] 2 IR 514). That latter jurisdiction is – as it must be – significantly constrained by the over-riding importance of the finality generally attending any order of a court that is not interlocutory in nature, and the right of parties to proceedings (and in many cases, others who were not parties) to order their affairs with some certainty that the decision of a court once unappealable, will stand.

43. It follows that the *Greendale* jurisdiction:

(i) is by definition wholly exceptional in nature, available only in '*special and unusual circumstances*' (*Re Greendale Developments Ltd. (No. 3)* [2000] 2 IR

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[6] An argument based upon the winding up order being obtained by fraud and/or misrepresentation was agitated before the High Court. Before this court there was no detailed discussion of this jurisdiction and none of the authorities governing it was referred to. However, Mr. Coyle did suggest at various points that the Liquidator had presented false information before the court at the time of the winding up application, referring in particular to the existence of other debts and his description of the circumstances surrounding the execution of the warrant. It was also suggested that the petition was brought when it was known that the petitioner did not have jurisdiction so to do and where the warrants for collection of the rates were invalid. However, such a contention – had it been framed as engaging the jurisdiction to set aside the judgment for fraud – could never have succeeded. Putting to one side the (important) fact noted by Allen J. that such a claim requires a fresh action, the argument faced two critical difficulties. First, the essential grounds on which the Liquidator is alleged to have made misrepresentations were raised before this court in the appeal against the winding up order and, having been rejected, can not now be revived and presented again under the guise of a claim based upon fraud. Second, the critical facts (as this court must now accept them as being) relevant to the jurisdiction of the court to wind up were never said to have been affected by the alleged misrepresentations – the debt was owed, the demand had been served and the money had not been paid prior to presentation of the petition. It follows that even had this claim been presented as a fresh plenary action (as the law requires it to be) it would have been an abuse of process and bound to fail. The jurisdiction to set aside an order on account of fraud '*should operate exceptionally, should arise only where the person resisting recognition and enforcement establishes a knowing and deliberate deceit of the court, and where the fraud alleged affected the impugned decision in a fundamental way*' (*Brompton Gwyn Jones v. MacDonald* [2021] IECA 206 at para. 63). It will be noted that later in this judgment I explain why the contention that the court was misled as to the other debts owing to the company is misconceived.

514, at p. 527 to 528 per Hamilton C.J., is subject to a burden on an applicant which is '*heavy*' (*id*. per Denham J. at p. 1043) and is operative only where the breach is '*clear*' (*id*. per Denham J. at p.438);

(ii) arises only where it is established that a failure to set aside the decision will result in a breach of the constitutional rights of the applicant and to that end must constitute something extraneous going to the very root of the fair and constitutional administration of justice (*LP v. MP* [2002] 1 IR 219 per Murray J. (as he then was) at p. 229 and 230);

(iii) is *not* available only because the decision is alleged to have been wrong on the merits (*People (DPP) v. McKevitt* [2009] IESC 29 per Murray C.J. at para. 20) and thus cannot be used to reargue an issue already determined (*Murphy v. Gilligan* per Dunne J. at para. 138);

(iv) has been related in each authority in which it has been addressed to an established breach of '*constitutional justice*' (*Re Greendale Developments Ltd. (No.3)* at p. 544, *Attorney General (SPUC (Ireland)) Ltd. v. Open Door Counselling* [1994] 2 IR 333 per Denham J. at p. 352, *LP v. MP* at p. 229) and will thus only usually be in play where the violation of constitutional rights arises from a breach of fair procedures that cannot be remedied other than by a set aside order. For this reason, the jurisdiction arises only where there was established '*a substantive issue concerning a denial of justice in the proceedings*' (*DPP v. McKevitt* [2009] IESC 29 at para. 20 per Murray C.J.) or '*a clear breach of the principles of natural justice, to which the applicant has*

not acquiesced' (*Bates v. Minister for Agriculture, Fisheries & Food* [2019] IESC 35 at para. 112 per MacMenamin J.), and;

(v) will *never* be available where the basis for the application arises from the applicant's own fault (*Re Greendale Developments Ltd (No. 3)* per Denham J. at p. 544).

(iii) Application of domestic law

44. As is evident from my summary of the grounds relied upon by Mr. Coyle, at the root of the applications to set aside the Order of Keane J. and/or to annul the liquidation lie the following essential propositions - that the debt on foot of which the winding up was sought and ordered was not due and owing and/or that the Company was not insolvent, and/or that the petitioner did not enjoy *locus standi* to seek that relief or to seek the underlying orders from the District Court and/or that the liquidation was sought for an ulterior purpose (including the prevention of the bringing of an appeal against the District Court orders or as part of a prearranged strategy agreed with the Company's landlords or in order to thwart proceedings the Company might bring against the rate collector or sheriff arising from the attempted execution in December 2016) and/or that the petitioner was responsible for knowingly misrepresenting relevant facts to the court. The claim was rejected by Allen J. in emphatic terms: the application to set aside by notice of motion a final order of the High Court which had been the subject of an unsuccessful appeal to the Court of Appeal was '*misconceived and devoid of merit*' (at para. 42).

45. In so concluding the trial judge was correct. Having regard to the relevant principles as I have outlined them, I find it impossible to comprehend circumstances in which – as happened here – a person with an interest in the affairs of a company who attends through counsel at the hearing of an application to wind up that company will be permitted to return to court to have a winding up order rescinded, set aside or annulled on the basis of objections he could have raised but did not present at that time. This is the case for any one of a number of reasons.

46. For a start it follows from what I have said earlier that the winding up order is a final order, liable to be annulled in accordance with s. 669 of CA 2014 and/or in accordance with the *Greendale* jurisprudence only in the very limited circumstances identified by me in *PPF Capital Source* and/or subject to the constraints identified in the decision in *Greendale.* In consequence, such an order will be rarely made at the instance of a person who attended before the court at the time of the hearing or who was aware of the hearing and did not attend it, and never on the basis of arguments that could have been presented by him at that time. To permit the determination or unravelling of a liquidation order in those circumstances would be inconsistent with core principles of finality and legal certainty, *res judicata* and the jurisdiction derived from the decision in *Henderson v. Henderson*. It would fail to respect the conditions attached by the courts to the setting aside of final orders expressed in *Greendale Developments* and cognate case law. Each of these features of the applicable law is fundamental.

47. Second (and putting to one side the delay in bringing the application) Mr. Coyle had, and exercised, a full right of appeal to this Court against the winding up order in which he sought to advance many of the arguments on the merits he now urges in this application. The winding up order is thus not merely final, but the grounds on which

Mr. Coyle seeks to upset it were (with one exception to which I will return) agitated on appeal. All of these grounds are thus *res judicata.* The invocation of that principle is not, as Mr. Coyle suggests in the course of his written submissions to the Court, to '*hide behind procedural matters*': it is giving effect to central – and substantive – principles of finality and legal certainty. It also advances the important proposition of public policy that litigants who fail to bring their full cases forward ought not to be rewarded with a second chance to unsettle a court order or finding they find unpalatable.

(iv) The judgment in the appeal against the winding up order

48. In the course of her judgment on the appeal, Costello J. detailed the arguments that were advanced by Mr. Coyle in support of his contention that the winding up order ought not to have been made (see in particular paras. 59 to 65). These included the argument that the petition was presented for an improper and ulterior motive, that is preventing the company from continuing with cases involving the petitioner and the Company. She pointed out that as those claims each involved the Company seeking to resist the payment of the debt it admitted was due and owing in respect of the rates, and in respect of which the petitioner was a judgment creditor, this was (as she put it) '*completely unsustainable*' (at para. 59). She stressed that what was presented to Keane J. at the time of the winding up application was no more than a bare assertion that the rates collector was pursuing an ulterior motive in seeking an order winding up the Company in circumstances where it had failed to discharge its rates for a very considerable period, that no attempt had been made to substantiate that claim and that no proposed ulterior motive had been identified to him.

49. Costello J. proceeded to note that the appellants further alleged that the ulterior motive was to forestall the appellants from initiating proceedings against the petitioner in relation to his allegedly unlawful acts relating to the sheriff's attempt to execute a warrant on the 16 December 2016. She said that this was an entirely fresh allegation which was not advanced in the High Court, that could not be advanced for the first time on appeal. Furthermore, she said that any such proceedings ought properly to be directed against the sheriff who was executing the warrant in question, rather than the petitioner and accordingly that argument, even if admissible, was unsustainable (at para. 61).

50. Costello J. observed that it was alleged that the petitioner '*did work in concert with the landlord of the Clane premises and the landlord of the 26 Bachelors Walk premises*' (at para. 62). She said that there was '*not a shred of evidence*' before the High Court to substantiate this bare allegation. It was not advanced by the appellants in their own affidavits nor was it argued by their counsel before the High Court. It simply could not properly be raised in this Court at that stage of the proceedings.

51. She also noted that the appellants made unsubstantiated allegations of misrepresentation and fraudulent misrepresentation. They alleged that facts were misrepresented and material evidence omitted or kept from the court. The misrepresentation identified was that the liquidation was not about the payment of a debt but was based upon the ulterior motive of two parties, the petitioner and the landlord of the premises in Clane, Co. Kildare. Costello J. said that it followed from her conclusions on the issue of ulterior motive that any claim that there was a misrepresentation by failing to disclose such alleged ulterior motive was likewise unsustainable. Moreover, as I have earlier noted, she also rejected the contention that

the trial judge failed to act proportionately in winding up the Company given the tendering by Mr. Coyle of the monies owing to the petitioner (at paras 63 and 64).

52. Finally, Costello J. noted that it was said that the petitioner was not entitled to act upon the warrants of the District Court or the 6-day notices as proof of the debts which grounded the petition. The appellants claimed that there was no jurisdiction in the District Court to hear the matters which it dealt with in May 2015, November 2016 and June 2017 on a variety of grounds or to issue the warrants or the 6-day notices. They argued that the warrant of 2015 had expired by December 2016.[7] They submitted that all other Courts thereafter dealing with the case did not have jurisdiction either, and that all orders issued pertaining to this matter and any other related matters were void and voidable. They submitted that the presentation of a petition to wind up the Company was *ultra vires* the petitioner (at para. 65)

53. In respect of these arguments, Costello J. said this (at paras. 66 and 67):

> '*These are all entirely new matters which were not raised in the High Court and which may not be raised now on appeal. They are points which, if they had any merit, it was open to the company and appellants to raise on any number of occasions in the District Court, and at least twice in the High Court (30th June, 2017 and 24th July, 2017). Furthermore, under the principles in Henderson v Henderson [1843] 3 Hare 100, in view of the many occasions when the matter was listed in the District Court, at no point was the jurisdiction of the District Court ever raised and it is not now open to the appellants, belatedly, to raise*

[7] The point being made here is that the warrant upon which the sheriff relied on 14 December 2016 was perfected on 31 July 2015, and was valid for only twelve months. Mr. Coyle claims that he was aware of this limitation on the use of the warrant when it was relied upon on 14 December, and his solicitors made the point that it was spent in correspondence of 16 December. The Company thus knew of this objection at the time of the application to wind up. The other warrants were not perfected until February 2017.

any point on the alleged want of jurisdiction of the District Court. Finally, given that the point raised is one which goes to the jurisdiction of the District Court, the appropriate course for the company would have been either to have sought a case stated or to have brought a judicial review.

More fundamentally, these points all go to the issue of whether the petitioner is a creditor of the company. The appellant accepted on affidavit and in submissions to the High Court that he is and admitted that the debt is due and owing. It follows that these arguments are nihil ad rem. That being so, I see no want of vires in a rates collector collecting rates due and admitted to be due, by all lawful means, which includes petitioning for the winding up of a company who has failed to pay rates since 2012.'

54. In seeking to displace these findings Mr. Coyle sought to rely upon the fact that this Court found he could not raise these matters on appeal. He said that the trial judge failed to take into account that the Court of Appeal had refused to allow him to argue before it issues that could have been but were not raised before the High Court at the time of the winding up application. Thus, the argument appears to be, *because* this Court refused Mr. Coyle liberty to make new arguments on appeal this strengthens his case to have them determined by the High Court in his application to have the liquidation order set aside.

55. The argument fundamentally misunderstands the operation of principles of finality and certainty in connection with applications of this kind. Parties are required to bring all of their arguments at the time of the winding up application precisely because of the critical importance of ensuring that a decision of this kind is not the subject of endless

appeals and re-argument. It was open to Mr. Coyle to make the case before the High Court that Mr. McHugh did not have standing to seek the winding up of the Company just as it was open to him then to dispute the debt (either on the basis that the judgment should not have been granted to Mr. McHugh or otherwise). He did not do either. He appealed and sought to make these arguments and was refused permission to do so, the reason being that he should have raised them before the Court of first instance. That does not mean that he can come and make the same arguments as he has been prevented from making on appeal, by way of an application to set aside or annul. That would make a nonsense of the finding that he was precluded from raising by way of appeal issues that could and ought to have been but were not agitated before the High Court at first instance. It would mean that the rules preventing the re-opening on appeal of a case by reference to new argument (which are obviously intended to promote finality, efficiency and fairness to all other persons who have relied upon the making of the order) actually operated to encourage the *re-litigation* in further proceedings of those same matters. That is not the law.

56. I have addressed Mr. Coyle's various arguments on these issues at some length. However, the end point is clear and the application was correctly and quickly dispatched by the trial judge. Each of the grounds of domestic law upon which Mr. Coyle now seeks to contend that the winding order should be set aside have been finally and conclusively resolved against him in the High Court, and by this Court on appeal. All are *res judicata.* This – critically – means that this Court must proceed on the basis that (a) the debt the subject of the winding up petition was owed by the Company, (b) that the Company was served with the statutory demand in accordance with the relevant statutory provisions in advance of the petition, (c) that the claims based upon ulterior

purpose and the standing of the petitioner[8] could have been but were not agitated at the time of the original hearing and cannot afford a basis for vacating the order and (d) that there was no ground based upon proportionality that required the High Court to refuse to make the winding up order. These determinations are now as against Mr. Coyle, fixed and immutable. This court must thus follow the conclusion reached by Haughton J. ([2021] IECA 254 at para. 103):

> '*The appellant cannot now raise issues concerning the validity of the debt owed to Dublin City Council or the Company's failure to discharge the Notice demanding payment or otherwise contend that the appointment was invalid*'

(v) The 'new evidence'

57. In the course of this application Mr. Coyle sought to rely upon evidence that he received only after the hearing of the appeal. The information – obtained by Mr. Coyle pursuant to the provisions of the Freedom of Information Act 2014 – disclosed that Council personnel had since April 2017 been in discussion regarding the bringing of an

[8] This issue and related questions is the subject of a detailed submission made to the High Court and signed by Mr. Moffat which is further elaborated upon by Mr. Coyle and in which it is contended (a) that the power of the rate collector to distrain goods – which was said to be the only power Mr. McHugh had to enforce his right to collect arrears of rates – was limited to chattels of the Company in Kildare, (b) that it was only if sufficient distress was not found in that County that recourse could be had to court to obtain an order enabling distrain in another County, (c) that insofar as he had the right to bring an action in the District Court for rate arrears that power would have to be exercised in Kildare where the Company had its registered office, (d) that while he might thereafter have had the right in his own name or under the suit of the Council to seek judgment in the Circuit Court he had no power to bring High Court proceedings, (e) that the respondents shifted their position constantly as to whether Mr. McHugh was acting in his own capacity as rate collector or was acting on behalf of the Council, and (f) that no managers order had been obtained prior to Mr. McHugh issuing the petition. However, each of these contentions is an attempt to run an argument that could have been but was not presented before the High Court and that was presented (at least in part) before this court in the appeal against the Order of Keane J. Similar points are made in relation to an alleged 'contract' for the appointment of the Liquidator. These are *nihil ad rem*. The Liquidator is appointed by the court, and it has not been explained how dealings between him and the Council and/or Mr. McHugh affect any aspect of his authority. For that reason, the fact that Mr. McHugh has retired (to which Mr. Coyle also made reference in the course of his submissions) is similarly irrelevant.

application to wind up the Company, that it had retained the services of a public relations consultant to liaise with the media in relation to any such application, and prepared a press statement for release after it was made.[9] The 'message' sought to be thus relayed as recorded in the documentation was that the Council was willing to go to great lengths to accommodate ratepayers who were having difficulty but where a ratepayer would not engage meaningfully with the Council it had a duty to compliant ratepayers to pursue liquidation. Reference was also made in some of this documentation to Mr. Coyle's membership of a group called '*the Hub*', the members of which are described in the documents as being of the view that Irish law does not apply to them and had mobilised large numbers of persons in public resistance to proposed evictions. Mr. Coyle says that this is a group of persons who assist those at risk of losing their homes or businesses. The point made by Mr. Coyle is that having developed this strategy, the Council was not going to withdraw from any such application.

58. This evidence does not avail Mr. Coyle. The discovery of new evidence does not afford a basis for disturbing a final order, even under the *Greendale* jurisdiction. As Clarke C.J. recently explained in *Student Transport Scheme Ltd. v. Minister for Education and Science* [2021] IESC 22 (at para. 4.3):

> '*the mere fact that there may be new evidence or materials which might suggest that the High Court or the Court of Appeal were in error is not, in itself, a*

[9] The material was exhibited in an affidavit of Mr. Moffat sworn in relation to the applications under ss. 681, 684, 686, 687 and 634 CA 2014. He says that it was released pursuant to the Freedom of Information Act 2014 on 17 July 2019. The judgment of this Court in the appeal against the winding up order was delivered on 25 June 2019.

reason to breach the principle of finality and enable a successful Greendale application to be brought.'

59. This is aside from a more fundamental consideration. Ratepayers may well have different views as to whether it is desirable that local authorities expend their resources on public relations consultants so as to promote in the media the authority's version of litigation in which it is involved. However, it is not clear to me how the fact that the Council did this, or that it sought in the invocation of the winding up jurisdiction to make a broader point to and about those who did not discharge rates that were due and owing, disentitled it from seeking that remedy. This is not inconsistent with the purpose of that procedure, which is to afford a structured legal basis on which a creditor can demand payment of an outstanding debt, allow the debtor time to pay it, and thereafter apply to wind it up if there is no credible dispute around the liability and the debt is not discharged. The Council was, in my view, quite entitled to avail of that procedure in respect of a debtor who was afforded ample opportunity to pay its debt while wishing in the process to make clear to it and all similarly situated persons that the Council would use all legal procedures available to it where ratepayers failed to comply with their legal obligations. The point is that the Council could only avail of the procedure in the first place because the Company failed to pay the liability it eventually admitted was due.

(vi) 'A second chance' under European law and ECHR: the argument

60. The issues that are now *res judicata* by reason of original decisions of the High Court and of this court become important when the arguments by reference to what Mr. Coyle claims to be principles derived from European law and the European Convention on

Human Rights (ECHR) fall to be considered. Essentially, he argues that these legal regimes favour the rescuing of ailing companies and giving a company what he terms '*a second chance*'. Tied into this is an argument to the effect that the courts must observe principles of proportionality before condemning a company to liquidation, and that the winding up of the company breached these principles.

61. So, Mr. Coyle says, the winding up of a company engages European law because that procedure is subject to the Recast Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings. Therefore, he argues, the Court in winding up a company must have regard to the provisions of the European Charter of Fundamental Rights and therefore of the European Convention on Human Rights, including the provision made there for the protection of property rights in Article 1 of the First Protocol to the Convention. This, it is his case, requires the court to both give effect to the policy favouring the rescue of ailing companies which he argues is reflected in the Insolvency Regulation, and to operate the winding up procedure in a proportionate way.

62. In this connection he refers to the decisions of the European Court of Human Rights – including in particular the judgment of 25 October 2003 in *Rousk v. Sweden (Application no. 27183/04)*. In this case, he contends, the winding up of the company breached the principles he deduces from these cases. The Company was solvent, was successfully trading and was providing employment, and it offered to pay the debt prior to the hearing of the petition. To liquidate it in these circumstances (particularly having regard to what he claims was the size of the debt) was unnecessary, disproportionate and an undue interference with his property rights. It was therefore in breach of European law. European law, Mr. Coyle advised the court, is supreme and national

laws must be set aside insofar as they conflict with it. In this case, he says that this means that Allen J. ought not to have viewed himself as being bound by the decision of this court on the appeal against the winding up order because to do so involved him in not giving effect to EU law.

(vii) Analysis of the EU law argument

63. This argument is misconceived at every level. First, if a case based upon proportionality, EU law, the ECHR, the policy of rescuing ailing businesses or otherwise was to be made, it was a matter for Mr. Coyle to advance it at the hearing of the petition itself. Mr. Coyle's references to the supremacy of European law suggest a belief on his part that because European law is supreme – which of course within its actual sphere of operation it is – this means that considerations of finality and legal certainty should not prevent the deployment of that supreme law to prevent the argument he has now formulated from being advanced now or indeed at any stage. However, to borrow and adapt the memorable phrase of Barrington J. when speaking of the invocation of constitutional rights as a basis for negating statutory limitation periods in *McDonnell v. Ireland* [1998] 1IR 134 at p. 148, European law is not a wild card which can be played at any time to defeat all existing rules.

64. Principles of finality and of legal certainty are themselves central features of the European legal order. European law proceeds on the basis that in order to ensure both stability of the law and legal relations and the sound administration of justice, it is necessary that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (see *Pizzarotti v. Comune di Bari* Case C- 213/13

ECLI:EU:C:2014:2067 at para. 58 as applied recently in this jurisdiction in *Kenny v. Trinity College Dublin* [2021] IESC 57 and *Student Transport Scheme Ltd. v. Minister for Education and Science* [2021] IESC 35). It would be extraordinary were the position otherwise. Thus, it is clear that where, in accordance with national law, a matter is considered to be *res judicata,* and where the national court is operating within its area of competence, the fundamental principles of the law of the European Union do not require such a matter to be reopened by the national court concerned, even if it is clear that European Union law was misapplied or wrongly interpreted in the case in question.

65. Accordingly, even if EU law applies in the manner asserted by Mr. Coyle, these principles are fully engaged and EU law would have to give effect to them: the High Court has decided that the Company should be wound up at a hearing in which the underlying debt was admitted, the operation of its discretion was both argued and addressed and indeed contentions based upon proportionality were advanced to and rejected by, this court in hearing the appeal against the winding up order. The issues have been finally determined. This is the case whether the arguments derive from national law or European law.

66. Second, the assumptions underlying Mr. Coyle's essential arguments in this regard are founded on a mistaken interpretation of the law. The Recast Insolvency Regulation does not, in fact, mandate the rescue of an insolvent company. While it provides that the Regulation applies to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs (Recital 10) and indeed requires that such procedures be used in the case of a company that is likely

to be insolvent for the purpose of enabling it to survive (see Article 1(1)), it does not impose an obligation on a member state to decline to put into a liquidation a company found in accordance with national law to be insolvent. In Ireland, the policy of protecting ailing companies is given effect to by the process of examinership, and it is to my mind difficult to see on what basis it could be concluded that the High Court must exercise its winding up jurisdiction so as to give effect to a policy which is enabled by a distinct statutory procedure. Principles of proportionality are accommodated by the residual discretion of the court and by the fact that the jurisdiction invoked in this case was operative only if the Company was determined in accordance with CA 2014 to be insolvent, and by evidence that it was under a liability for a debt which it both accepted was owing yet which it had consistently refused to discharge.

67. Third, and following from this, it must be stressed that the winding up order was made in a context in which Mr. Coyle admitted the failure to pay which, under national law, was an act which generated both a presumption of insolvency and a general entitlement on the part of the creditor to seek an order liquidating the Company. Indeed, it is a striking feature of his case that although Mr. Coyle has delivered a remarkable volume of affidavit evidence and legal submissions, he has little to offer by way of explanation to the court for the fact that he acknowledged on oath that the debt was due, said it ought to have been paid and contended that had he been aware of the statutory notice he would have discharged it. What he does say seems to amount to a suggestion that he was in some sense unfairly coerced into these averments, and in oral submissions before this court said that with hindsight he ought not to have accepted that the sums claimed were in fact due. The matter is put thus in his note of his oral submissions to this court:

'*Mr. McHugh alludes to the fact that the Applicant admitted the debt was due and owing. This is misconceived. The Applicant was faced with a prospect that his entire life's work would be eradicated before him if he did not succumb to the demands of the said Mr. McHugh. The facts of the matter are that the Applicant on behalf of the company disputed the debt and looked to set aside the decrees obtained in the District Court ...*'

68. This is, with respect, difficult to understand. The subsequent applications to set aside the District Court decrees (decrees which it must be repeated the Company never defended and never appealed on the merits) do not erase either the averments he chose to make before the High Court at the petition or the submissions made on his behalf by his counsel. It was entirely open to Mr. Coyle to deny the debt on oath (if he believed it to be the case that there was no such debt), to aver that the District Court judgments were under appeal, to state in his affidavit why the debt was not due, to make any averments he believed relevant to the entitlement of Mr. McHugh to bring the petition in the first place,[10] to aver that the other purported creditors were not creditors and to lay before the High Court judge hearing the petition all of the other manifold grounds upon which he now relies in support of his claim that the petition ought not to have been granted. Much of what follows in this appeal arises from his erroneous belief that having failed to do this, he has free reign to come back to Court and advance these arguments now or, as he puts it, '*at any time*'.

[10] Mr. Coyle's oral submissions and the written submission prepared by Mr. Moffatt of 29 April 2019 suggest that it was only following a hearing in this Court on 12 April 2019 that Mr. Coyle or his advisors decided to research the question of whether a rates collector had the legal power to initiate a winding up Petition.

69. As a matter of national law he does not, and there is nothing in European law that changes this. The winding up order was presented in accordance with the procedures and processes provided for by law and was – as the trial judge correctly stated in the course of his judgment – ultimately precipitated (and it might be added, granted) because of '*the company's steadfast refusal to pay its bills*' (at para. 91). While in the course of his oral submissions Mr. Coyle went to some pains to explain how the Company did generally pay its debts, the fact is that it did not pay the debts which led to the application to wind it up. While he stressed that the Company was involved in legal action in relation to those liabilities, it was legal action of an unusual, indirect and protracted kind ultimately directed to the target that - for reasons that remain hazy - it had no liability to pay rates on the premises in question, or at least no liability to do so in the amounts sought. As of the date of the liquidation of the Company the first decree was final, unappealed and over two years old. The second and third decrees had been made seven months earlier, had not been appealed on the merits, and the District Court had found that the Company was in fact on notice of the hearing at which they had been granted (a hearing, to repeat, which occurred on a day when Mr. Coyle was present in court). If there was a valid factual basis on which the Circuit Court could plausibly have concluded on appeal that the Company was, in fact, not on notice of those proceedings, it was not disclosed to this court in the course of this appeal. In the absence of a basis for such a conclusion, there was nothing to appeal.

70. Fourth, this is but one of the reasons the decision in *Rousk v. Sweden* does not avail Mr. Coyle. As I outlined in the course of my judgment in *Fennell v. Corrigan* [2021] IECA 248 at paras. 105 and 106, that was an extreme case. There, the court found actions of the Swedish tax authorities to be a disproportionate interference with the

property rights of the applicant under Article 1 of the First Protocol to the ECHR in circumstances where those authorities caused the applicant's home to be sold at public auction and him to be evicted from it. All of this occurred on foot of a very small tax liability when the applicant was not formally served with the relevant writ of execution, where the writ had not obtained legal force at the time of the sale, where the court found that the applicant had been effectively deprived of the opportunity to exhaust all rights of appeal against the execution, where the tax authority had granted a respite either shortly before or shortly after the time at which the execution authority proceeded with the sale but before his eviction, where the ground on which that respite was sought included the medical condition of the applicant and where there were other assets of the applicant that could have been seized and sold to meet the small debt without the necessity for an eviction.

71. That decision does not carry over to the circumstances of a winding up procedure in which a debtor company decides at the last minute to tender payment of a long outstanding liability which it does not dispute. It is of no application to a situation in which there was one outstanding judgment which was *never* appealed, and another which was never appealed on the merits, the appeal that was brought depending on proof that the Company was unaware of the proceedings in which the judgment was granted. It is of no application in a context in which the Company's right of appeal against the decision of 27 June was not extinguished by the winding up order, and in which the underlying debt was admitted. And, perhaps most importantly and most obviously, it is of no application in which the findings to which I have earlier referred and by which this court is bound are that the Company was duly served with the pre-petition statutory demand in good time to discharge it.

72. It follows that even if European law was engaged and imposed a mandate of the kind referred to by Mr. Coyle (which I very much doubt) this does not avail him. He had his chance to resist the winding up of the Company on these grounds and rather than availing of it in the manner he now seeks to do, he accepted that the debt was due. He cannot reverse out of that position by denying the truth of that averment and invoking in its place a new battalion of arguments, many of which are predicated upon the contradiction of his own earlier sworn position and of that adopted by his counsel before the court at the time of the hearing of the petition.

(viii) Issues of Constitutional law

(a) <u>The issues.</u>

73. In the course of the hearing in this court Mr. Coyle sought to raise two further arguments based upon his constitutional rights and those of the Company. The first was to the effect that the presentation of the winding up petition was impermissible because the debt on which it was based was alleged to pre-date the coming into force of CA 2014. Reference was made to various authorities re-stating the difficulties arising in certain circumstances from the retrospective operation of legislation (*Hamilton v, Hamilton* [1982] IR 466*, Dublin City Council v. Fennell* [2005] IESC 33 and *Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill* [2005] IESC 7, [2005] 1 IR 105). Reference was also made to s. 27 of the Interpretation Act 2005, which addresses the effect of the repeal of legislation.

74. The second argument in this regard was that the procedure by which the Company was wound up violated Mr. Coyle's constitutional rights and those of the Company, and in particular his property rights, in that that he was denied fair procedures, and because the effect of the order was to prevent him from pursuing the appeal against the District Court ruling of 27 June. Mr. Coyle in this regard attached particular significance to the decisions in *Dellway Investments Ltd. and ors. v. National Asset Management Agency and ors.* [2011] IESC 13 and 14, [2011] 4 IR 1 and in *Apperley Investments Ltd. and ors. v. Monsoon Accesorize Ltd. and ors.* [2020] IEHC 523. As to the former, specifically, he persistently claimed that he was in the same position as '*Paddy McKillen*' (the shareholder plaintiff in that case) and demanded that if the Court determined he was not that it should give reasons specifically explaining why it had so concluded.

75. It may be glib to respond that the most important difference between Mr. Coyle's position and Mr. McKillen's is that Mr. McKillen brought all of his arguments forward at the earliest possible opportunity, and that he did not permit a binding court determination to issue before doing so. Whether glib or not the point is a dispositive one. The case law is clear that principles of *res judicata* and issue estoppel apply to constitutional questions, and to that extent the points that have been made earlier apply here also. That said, Mr. Coyle's contentions are misplaced and based upon a misunderstanding of the relevant principles. I will take the liberty of briefly explaining why.

(b) <u>The retrospectivity argument.</u>

76. Article 15.5 of the Constitution prevents the enactment of legislation declaring acts to be infringements of the law which were not so at the date of their commission. In certain circumstances the courts have found legislation which retrospectively affects property rights to be invalid under Article 40.3.2 or Article 43 of the Constitution. Allied to the principles underlying these authorities, the law applies a presumption in the construction of legislation that it does not operate with retrospective effect. However, expressing the position at its most general, these provisions and principles are engaged only where legislation purports to, or would if construed in a particular way, impose a sanction, or attach an injurious or disadvantageous consequence to an event that predated the statute in question.

77. This is not the case in relation to the provisions of CA 2014 to which Mr. Coyle refers. Those provisions are exclusively concerned with whether *at the date of the serving of the demand* there was an outstanding liability. They were directed to a state of affairs occurring only after the enactment of the legislation - the fact of a debt being due at that time. The legislation is thus not '*retrospective*' in operation. It affects only a liability existing at the time of its enactment. A person who owes such a debt (whenever it was incurred) can avoid a winding up by paying it. In any event, the provisions largely replicate the law in place when the debt was incurred, itself a compelling answer to any point based upon arguments of retrospectivity (see by way of analogy *Chestvale Properties Ltd. and anor. v. Glackin (No. 2)* [1993] 3 IR 35 at 45-46).

(c) <u>Property rights and fair procedures.</u>

78. A second constitutional argument was framed by Mr. Coyle by reference to what he consistently described as *his* right of appeal against the order of the District Court of 27

June. The effect of the petition, he said, was to effectively remove his right of appeal, thereby infringing his constitutional rights. He makes reference in this regard to principles of fair procedures and proportionality, suggesting that all of these combine to create a free-standing basis on which this court can and should now annul or set aside the winding up order.

79. The argument is doomed for any one of a number of reasons. Aside from the issues of *res judicata,* arguments around the appeal and/or the alleged lack of proportionality must immediately fail given that there was one un-appealed decree, which had been outstanding for two years in respect of which there was no credible justification for non-payment. But even leaving this aside, the Company's right of appeal was never extinguished, and Mr. Coyle had no right of appeal of any kind. It is to avoid that division of entitlement between the Company and him that Mr. Coyle invokes the decision in *Dellway Investments Ltd.* However, his arguments insofar as based upon that decision betray a misunderstanding of both the facts of that case, and the generally applicable law.

80. The essential point in that complex decision lay in the finding of the Supreme Court that the provisions governing the acquisition from financial institutions of loans by the National Asset Management Agency in its eponymous constituting statute of 2010 had to be construed as implicitly incorporating an entitlement on the part of affected borrowers to make representations prior to any acquisition. The judgments of both the Supreme Court and the Divisional Court referred constantly to the rights of the *applicants*, these being Mr. McKillen and companies in which he owned the entire or a majority of the shareholding, and it was upon passages to that effect that Mr. Coyle relied. However, Mr. McKillen was himself a borrower, so it is unsurprising that the

judgments referred to his rights and those of the companies collectively. None of this avails Mr. Coyle. He certainly enjoys property rights in his shareholding in the Company, but those rights were conditioned and qualified by the fact that they were invested in a distinct legal entity and thus subject to the operation of the general principles of company law and the specific constraints of the Companies Acts. Indeed, it is for this reason that the Supreme Court has held that a shareholder in a company whose interests have been allegedly devalued by the wrongful acts of third parties has no cause of action against those third parties, even where he asserts a constitutional injury *and* a breach of EU law (see *O'Neill v. Ryan* [1993] ILRM 557).

The refusal of the trial judge to make orders under ss. 179, 566, 634, 680, 681, 684, 686, 687, and 689 of the Companies Act 2014 or to refer matters to the ODCE (Grounds 7, 8, 9, 10, 11, 18 and 21)

(i) Section 179

81. Section 179 CA 2014 empowers the Court to make an order requiring the holding of a general meeting of the company. It enables application to that end to be made by a director of the company, a member of the company who would be entitled to vote at a general meeting of the company, and personal representatives of a deceased or the assignee in bankruptcy of a bankrupt, member. This is merely a procedural section intended to enable company business which needs to be conducted at a general meeting to be so conducted (*Vectone Entertainment Holdings Ltd. v. South Entertainment Ltd.* [2004] EWHC 744, [2004] 2 BCLC 224 at para. 32). While upon the commencement of a winding up the shareholders retain their residual powers, given that the power

conferred by this provision must be exercised cautiously and that it will not usually be available where there are other procedures available under the Act to allow the meeting to be called, it is to my mind unlikely that the provision has any function where a company is in liquidation. In those circumstances any such application falls to be addressed under other provisions of the legislation, and in particular ss. 566 and 689.

(ii) Section 566

82. Section 566 CA 2014 empowers the court in all matters relating to the winding up of a company to have regard to the wishes of creditors or contributories of the company and enables it to direct meetings of those creditors or contributories so as to ascertain those wishes. In his affidavit of 5 October 2018, Mr. Coyle suggested that the Court might consider following disclosure of the '*current position*' of the liquidation and '*the present financial status of the company*' that a meeting might be required '*to ascertain the creditors opinions of the situation*'. In that context he made specific reference to Liquidator's remuneration and legal costs to date. I have explained earlier that Mr. Coyle's complaints in relation to these matters have been emphatically rejected by this court in its decision ([2021] IECA 254) so they do not afford a basis for directing a meeting. In any event, the application appears to me, essentially, to be but a different way of presenting a series of complaints Mr. Coyle makes regarding the conduct of the Liquidator which, for reasons to which I will return later, are without foundation. It follows that the application for meetings to address these issues is similarly misplaced.

(iii) Section 634

83. Section 634 CA 2014 provides that a person shall not be qualified for appointment as Liquidator unless there is in place sufficient professional indemnity covering the conduct of the winding up of the company. In his affidavit of 28 June 2017 sworn for the purposes of the application for the appointment of a provisional liquidator, Mr. De Lacy identified the nature and extent of the professional indemnity insurance held by his firm, exhibiting the relevant details. Obviously, the High Court judges making the orders for the appointment of a Provisional Liquidator and for the winding up of the company were satisfied that the insurance so identified met the statutory requirement. In his affidavit of 4 June 2019 Mr. Coyle asserts that he has '*discovered anomalies*' in the indemnity insurance policy in question. He complains that the insured is not identified as the Liquidator but as three legal commercial entities, and refers to correspondence in which he sought production of the full policies in question. The essential point seems to be that as Liquidator, Mr. De Lacy is a sole practitioner and is not operating as a member or partner of a commercial entity.

84. If Mr. Coyle wishes to make a case that the Liquidator is by reason of this provision disqualified from holding his position, he must adduce some basis for his claim that the insurance held by the Liquidator is inadequate. The only material of any kind to that effect in the affidavit grounding this application is his assertion that in some sense because the insurance provided to the Court is of the firm of which Mr. De Lacy is a member, that it does not cover him in his activities as Liquidator. No ground has been disclosed for that conclusion, which does not at all necessarily follow from its premise. The trial judge said that Mr. Coyle's complaints in relation to the Liquidator's professional indemnity insurance were misplaced as these were a matter between the Liquidator and the Court and they had been adjudicated upon. The matter was being

raised by Mr. Coyle, Allen J. said, in order to '*harry*' the Liquidator. It is very difficult to avoid the conclusion that this was a correct analysis of the situation.

(iv) Section 680

85. Section 680 CA 2014 provides *inter alia* that if a winding up by the court continues for more than 12 months, then after the first anniversary of the winding up and each subsequent anniversary the Liquidator is under a duty to summon the holding of a meeting of a meeting of any committee of inspection appointed or if no committee is appointed, of the creditors. As clear from the detailed consideration of issues around the constitution of the committee of inspection in the next part of this judgment, the Liquidator duly convened a meeting of the committee of inspection on 7 November 2017 but it was abandoned after three hours. Attempts by Mr. Coyle to convene such meetings in May 2018 were – as I also explain later – ineffective. The Liquidator sought to convene a meeting on 21 August 2018 but was threatened by Mr. Moffatt with legal proceedings if he proceeded to do so. That prompted the application for directions by the Liquidator, and a counter motion by Mr. Coyle, pending the resolution of which a meeting of the committee of inspection was not possible at the time of the bringing of those motions and the hearing in the High Court (matters have subsequently changed consequent upon the order of O'Connor J. enabling the committee of inspection to proceed with creditor members only). In these circumstances it cannot be said that the Liquidator was at these times in default of any obligation around the convening of meetings of the committee of inspection.

(v) Section 681

86. Section 681 CA 2014 requires the Liquidator of a company the winding up of which is not concluded within twelve months of its commencement to file at specified intervals a statement in the prescribed form containing particulars about the proceedings in and position of the winding up. These include the amounts in which the company is indebted to secured creditors. The form was not delivered within the prescribed period and the Liquidator sought to extend the time for compliance while Mr. Coyle sought an order requiring compliance.

87. Allen J's conclusion on this issue was that the Liquidator had not made out a case for the extension of time. The Court felt that he had failed to specify what remains to be done to allow him to comply with this obligation or when it is thought likely that it would be possible to do it.

88. The necessary return was in fact delivered on 15 January 2020. The issue is therefore moot, and there is now no basis for making any order on the application brought by either the Liquidator or by Mr. Coyle.

(vi) Section 684

89. Section 684 CA 2014 provides that the court may, at any time after making a winding up order make such order for the inspection of the accounting records, books and papers of the Company by creditors or contributories as the court thinks just. The Liquidator opposed Mr. Coyle's application for orders that he be permitted to inspect the books, records and accounts of the company on the basis (as explained in his affidavit of 12

September 2019) that Mr. Coyle and his family members were conducting business in direct competition with the Company from one of the retail premises previously occupied by the Company, that there was a clear conflict of interest, that the Company accounts contain confidential and sensitive information and that the parties were embroiled in significant and vigorously contested litigation with each other.

90. In refusing to grant Mr. Coyle these orders, the trial judge accepted the correctness of the position of the Liquidator as thus explained. Allen J. observed that it was the declared objective of the appellant to gather information which he believed would assist him in removing the Liquidator and in which they were not therefore sought for the benefit of the liquidation generally. This was a correct application of the court's discretion under the provision. A creditor or contributory of a company in liquidation who has established a business that is in competition with that of the company cannot expect to obtain court orders allowing it to obtain access to the books, records and accounts of the business of the company in liquidation, and it is not appropriate to deploy that jurisdiction so as to fish for evidence to substantiate claims of wrongdoing by the Liquidator (see *Sheeran and ors. v. Fitzpatrick and ors.* [2021] IEHC 488 at para. 76 *et seq.*).

(vii) Section 686

91. Section 686 CA 2014 provides for the admissibility in evidence of any fact therein of information contained in every book and record of the company and of the Liquidator. The provision applies to all civil proceedings between members, officers and

contributories of the company and between any of those persons and the Liquidator and the Director of Corporate Enforcement.

92. It is unclear to what end Mr. Coyle seeks to rely upon this provision, as it does not confer any particular power or jurisdiction on the court – other than the facility to admit the evidence to which it applies. Section 686 deals only with the admissibility of evidence, it does not determine how and when persons should be afforded access to that evidence.

(viii) Section 687

93. Section 687 CA 2014 provides that a Liquidator may have regard to the wishes of the creditors, contributories and any committee of inspection in the administration and distribution of company property. It stipulates that in the event of conflict between directions of the creditors and of the contributories, the directions of the former shall prevail and posits a similar relationship between directions of the creditors and those of the committee of inspection. It empowers the Liquidator to convene meetings of the creditors or contributories for the purposes of ascertaining their wishes, and mandates such meetings where directed by resolution of the creditors or contributories or where requested to do so by one tenth in value of the creditors.

94. This section does not make any provision for any court application, and I cannot find in the evidence any basis for concluding that the Liquidator has failed to comply with the section. There is no resolution of the kind referred to in the provision before the court.

(ix) Section 689

95. Section 689 CA 2014 makes provision for orders directed to the administration of meetings in a winding up directed by the court, such as notice, proof of authority of the chairperson and the making of a report of the result of such a meeting. Having regard to the conclusions I have reached and outlined above regarding the holding of a meeting, it obviously does not arise.

(x) Reference to ODCE: Part 14 Chapter 1 of the Companies Act 2014

96. Reference is made in the papers to, variously, the failure of the trial judge to '*refer*' matters to the Office of the Director of Corporate Enforcement, and the power conferred by Part 14 of Chapter 1 of CA 2014 and, specifically, s. 797 of the Act to make orders requiring compliance by a company or officer (the latter of which includes a Liquidator). The court is not required to '*refer*' anything to the Director of Corporate Enforcement (to whom Mr. Coyle is free to make any complaints he wishes) and, as is apparent from the next following section of this judgment, no ground has been identified for the making of any orders under s.797.

The application to remove and/or discharge the Liquidator and/or to 'issue an order … for misfeasance' and/or to issue orders for the protection of the assets of the creditors and management of the liquidation and/or bias in the appointment of the Liquidator (Grounds 13, 16, (in part) 17, 19 and 20)

(i) The principles

97. The power to remove a liquidator arises from s. 638(1) of CA 2014. The provision is framed in very general terms:

> '*In any winding up, the court may, on the application by a member, creditor, liquidator or the Director or on its own motion –*
>
> *...*
>
> *(b) on cause shown, remove a liquidator and appoint another liquidator*'.

98. The jurisdiction was examined in *Re Ballyrider Limited* [2016] IECA 228. There Irvine J. (with whose judgment Finlay Geoghegan J. and Hogan J. agreed) identified the following principles as governing the issue of whether a liquidator should in any given case be removed (at para. 27):

> *(i) The burden of proof is on the applicant to show good cause for the removal of the Liquidator.*
>
> *(ii) Whether good cause has been shown is to be measured by reference to the real and substantial interests of the liquidation and the purpose for which a Liquidator is appointed.*

(iii) The Court has a wide discretion as to the circumstances in which it may remove a Liquidator and it is not dependent on proof by the applicant of misconduct, personal unfitness or any particular breach of their statutory obligations. What will amount to good cause will depend upon the particular circumstances of each individual case.

(iv) Failure on the part of a Liquidator to conduct the liquidation in a vigorous, efficient and cost-effective manner may provide good cause, as may a conflict of interest or loss of confidence in the liquidator on the part of one or more creditors. However, in the latter case the creditor/creditors concerns must be real and reasonable.

(v) The fact that a Liquidator's conduct has been shown in one or possibly more than one respect to have fallen short of ideal will not afford good grounds to support an application to remove a liquidator.

(vi) The Court, amongst other considerations, ought to pay due regard to the potential impact of the proposed removal on the Liquidator's professional standing and reputation. If he has been generally effective and honest, the Court should think carefully before deciding to remove him.

(vii) The Court must bear in mind that in almost any case where an order to remove the Liquidator is made the same will likely have undesirable consequences in terms of costs and delay.

(viii) In seeking to strike a careful balance in each case the Court should take into account whether, on the evidence before it, it could be confident that if left in situ the Liquidator would not repeat matters complained of and could be relied upon to complete the liquidation in accordance with his obligation.

99. This is the legal context against which the suite of complaints which, Mr. Coyle says, should result in the removal of the Liquidator falls to be judged. I set out here those complaints I understand to be made in this context by reference to para. 45 of Mr. Coyle's affidavit of 5 October 2018, where they are iterated (being, broadly, repeated by Mr. Moffatt at para. 39 of his affidavit of 2 October 2018). However, the end point can be shortly stated. The removal of a liquidator – as indeed the principles enunciated in the decision in *Re Ballyrider* make clear – is a significant step that cannot be taken lightly. Generally, it should be acceded to only where the moving party has established '*substantial grounds to satisfy a court as to why such relief should be granted*' (*Re Ballyrider Ltd.* at para. 23). Specifically, where grounded upon an allegation of misconduct (and this is the basis on which Mr. Coyle has framed the application in that affidavit) it is to be taken only where the court is satisfied that the objector has clearly established the truth of the allegations underlying the application, and where those allegations are of sufficient gravity to justify the prejudice and disruption entailed by a replacement of the Liquidator for such cause. Here, the trial judge emphatically found that Mr. Coyle had not made out those allegations. I think the judge was correct in so concluding.

(ii) The O'Mahonys

100. The trial judge was highly critical of the profusion of unsubstantiated allegations of fraud made by Mr. Coyle throughout this application. The position regarding the O'Mahonys is a case in point. The claim is framed in Mr. Coyle's affidavit as follows:

> '*Declan De Lacy has acted in a premeditated manner and conspired with individuals to defraud the creditors of the Company, knowingly declaring to the Court that Barry and Lee O'Mahony were creditors of the Company*'.

101. To put this ground in context, the O'Mahonys (a retired couple) were the landlords of premises occupied by the Company at Units 1, 2, 5 and 6 of Clane Business Park, Naas County Kildare. Mr. O'Mahony has since passed away. Mr. and Mrs. O'Mahony contended that Mr. Coyle had refused to discharge rent owing on the premises as it fell due. They said that as of February 2016 arrears of rent were owing on the Units from 2010 to 2016 in the sum of €81,572, with a sum of €14,000 being due in respect of insurance. The leased property, they said, was their pension. They sought to exercise an asserted right of forfeiture by re-entering the property and changing the locks. In an affidavit sworn by their solicitor, Mr. Millar, in proceedings brought by the Company against them on 17 February, it was averred that on 15 February 2016 Mr. Coyle and others proceeded to enter the premises by force. The Company then sought injunctive relief against the O'Mahonys seeking to restrain any further entry on the property. Underlying all of this was an issue between the Company and the O'Mahonys as to whether a reduction in the rent reserved by the lease was temporary or permanent.

102. An agreement was entered into on 8 March 2016 pending the trial of the action (then fixed for 23 June). One of the terms of that agreement was that the Company would lodge €31,941.55 in court in respect of arrears of rent. On 23 June a further document (entitled '*Heads of Agreement*') was executed providing that the sum lodged in respect of arrears of rent would be released '*to the credit of the action to the solicitors for the Defendants in full discharge of any arrears of rent for 2010/2016 and the March 2016 rent*'. Another term of those Heads of Agreement required the plaintiff to take a new lease on the properties in question, same to be negotiated between the solicitor for the defendants and a conveyancing solicitor appointed by the plaintiff. The O'Mahonys said that they sought to negotiate a new lease, but that Mr. Coyle frustrated this. Mr. Coyle in the proceedings before Allen J. relied upon an affidavit from Mr. Moffatt who pointed to clause 7 of the Heads of Agreement which stated that nothing was agreed until everything was agreed, and a new lease executed.

103. The essential point made by Mr. Coyle is that having regard to all of these circumstances, the O'Mahonys were not creditors of the Company. He relied upon correspondence from the Company's solicitor to the Liquidator of 17 July 2017 in which the solicitor had said that his client owed no arrears of rent to the O'Mahonys at the time Mr. De Lacy was appointed as Provisional Liquidator and that the €32,000 had been lodged in court '*to abide by the outcome of the litigation*'. Mr. Coyle further claimed that Mr. Millar had confirmed this in his affidavit, and that the Liquidator was aware of this affidavit at the time of the hearing of the winding up Petition. From there, complaint is made of the fact that the Liquidator had recorded in his Provisional Liquidator's report that the O'Mahonys were owed €95,572. It is said that Mr. De Lacy deliberately included these amounts in his report to overstate the debt of the Company. Complaint is made that thereafter, and in particular in connection with the affairs of the

committee of inspection, the Liquidator relied upon the fact of this debt when he knew it was not outstanding.

104. The claims made by Mr. Coyle in this connection are groundless in fact, and based upon a misunderstanding of the law. First, and as the trial judge observed (at para. 84 of his judgment), the money that had been paid into court had not been delivered to the O'Mahonys. Unless and until the monies were released, they were owed that money and the debt was owed by the Company. The point being made by their solicitor in his affidavit was that the monies lodged in court had been earmarked for them (as opposed to monies to be shared amongst the general body of creditors). Whether or not that was correct as a matter of law (an issue on which I express no view) the liability to pay was that of the Company's, and unless and until the monies were paid over, the O'Mahonys remained creditors in respect of the debt. It will be noted in this regard that the position of the Liquidator was that because the terms of settlement were expressed not to be binding until a new lease of property was agreed, the O'Mahonys' application for payment out could not succeed (a view in which Mr. Moffat seemingly agreed).

105. Second, and apart from those monies (which reflected a compromise of *arrears* of rent), the claims made by the O'Mahonys included monies said to be due for periods subsequent to termination of the leases. That is not disputed. Insofar as the Company had remained in occupation after the purported forfeiture and – if there had been a valid forfeiture – was liable for mesne rates (to which the rent agreed was a reliable benchmark) and – If there had been no valid forfeiture – was liable for rent. This, incidentally, is aside from the fact that Mr. Millar in his affidavit had not only made it clear that the monies lodged in court were in respect of '*arrears of rent*' but that his clients were unsecured creditors in respect of insurance premia which the Company

was obliged to pay and had failed to do (at para. 27). I have noted earlier that the claim attributed to the O'Mahony's by the Liquidator included a sum of €14,000 in respect of that insurance.

106. The essential point made by Mr. Coyle, and supported by submissions purportedly tendered on behalf of Mr. Moffat, is that once a forfeiture notice is served by a landlord, no rent whether past or future, is due and owing. The interpretation of the law thus urged by Mr. Moffat in the affidavit sworn by him for the purposes of the Liquidator's directions application ('*under long established Landlord and Tenant law and practice … the consequence of the Landlord's repossession by re-entry is the termination of the contractual right to any historic rent default claims*') was wrong, and plainly so. There is here no (as Mr. Moffat described it) '*legal twilight zone*'. The position was explained by Laffoy J. in *Moffatt and anor. v. Frisby and anor.* [2007] IEHC 140 by reference to quotation from Wylie ('*Irish Landlord and Tenant Law*' 2nd Ed.) at para. 24.22 where, speaking of a landlord who has forfeited a lease, the following is observed:

> '*By electing for the remedy of forfeiture he thereafter deprives himself of remedies based upon the continued existence of the lease or tenancy.* ***He cannot sue, therefore, for rent accruing due after the forfeiture has been effected, though he can sue the tenant or any guarantor for rent accruing due up to that time.*** *The same applies to enforcement of other provisions in the lease, such as covenants for repair. Since forfeiture involves, as again Henchy J. explained, an election by the landlord for a particular remedy, it would seem to follow that he cannot use this election to found a claim against the tenant in respect of matters which are a consequence of that election.*'
>
> (Emphasis added).

107. The proposition that in these circumstances the O'Mahonys were owed no money by the Company at all is misplaced, and the claim that the Liquidator was acting fraudulently on that basis should never have been made.

(iii) The composition of the Committee of Inspection

108. The second complaint relates to events around the membership of the committee of inspection. It is put as follows by Mr. Coyle:

> '*Declan De Lacy with premeditation, sought to manipulate the composition of the Committee of Inspection voted on 6th October 2017.*'

109. The background to this allegation is involved. A meeting of the committee was convened for 7 November 2017. It lasted over three hours and ended with the Liquidator asking the members' nominees to withdraw in order that he could brief the committee about the proceedings against Mr. and Mrs. Coyle. The Liquidator says that Mr. and Mrs. Coyle and Mr. Moffatt refused to do this. Mr. Coyle says that the members' nominees agreed to absent themselves from the meeting to permit the Liquidator to address the meeting and then requested that the Liquidator would absent himself while Mr. Coyle addressed the committee. As I explain at paragraph 123 below, neither account is incorrect. The meeting ended inconclusively. The Liquidator alleged in his affidavit evidence that the meeting could not proceed to any business in circumstances where the members' nominees sought to argue at length every issue raised by the Liquidator during the course of the meeting. The trial judge referred to the meeting as one '*that went on for hours without making any progress*.' The transcript

of the meeting (which was exhibited in the Liquidator's affidavit of 12 November 2018) confirms the accuracy of this description of the proceeding.

110. Mr. Coyle attempted to convene a further meeting on 30 May 2018 which the creditor nominees refused to attend in the absence of the Liquidator (he was on holidays). Mr. Coyle purported to notify the creditors' nominees by circulating an e-mail to their appointors and the Liquidator (whom he requested to circulate formal notice of the meeting). This meeting was therefore inquorate. Mr. Coyle sought to arrange another meeting for 6 June 2018. Essentially, the creditor nominees resolved not to attend that meeting, and (at the suggestion of the Liquidator) each of those nominees gave a leave of absence to the others. This was done so as to forestall an argument by Mr. Coyle that if those persons did not attend the meeting on 6 June they would have absented themselves from two consecutive meetings and would thus have vacated their offices in accordance with s. 668(4)(b) of CA 2014. That, indeed, was the claim made by Mrs. Coyle in correspondence she sent to those members on 8 June. The Liquidator then sought to arrange a further meeting for 21 August, which prompted Mr. Coyle to write to what he described as '*the former members*' demanding that they acknowledge that they had vacated office and threatening an application to Court.

111. This was the general context in which the Liquidator issued his motion seeking directions as to the composition of the committee of inspection. That move appears to have prompted the applications by Mr. Coyle to remove Mr. De Lacy as Liquidator, to annul the winding up and for orders of the court summoning a creditors' meeting or an extraordinary general meeting of the Company.

112. Mr. Coyle has not established any error in Allen J.'s analysis of this issue. He concluded, first, that neither the meeting purportedly convened for 30 May, nor that meeting sought to be held on 6 June had been properly called because Mr. Coyle had failed to give notice of them to the members of the committee. In point of fact – as the trial judge observed – the time and venue of the proposed meetings was decided upon by Mr. and Mrs. Coyle and Mr. Moffatt without consultation with the Liquidator or the creditor members and, in any event, no member of a committee of inspection is entitled to require the Liquidator to convene a meeting or to relay to the other members a request for a meeting. The fact that he notified the appointing creditors or that the Liquidator advised the members was not sufficient, the court referring to an authority in which it was held that the absence of proper notice vitiated a meeting of directors of a company, irrespective of the fact that they were aware from another source of it (*Portuguese Consolidated Copper Mines, Limited* (1890) 42 Ch. D 160). Because the meetings were not validly called, Allen J. found that there was no obligation on the part of members of the committee of inspection to attend the meetings and no consequences of non-attendance. That is all, it seems to me, entirely correct.

113. Even were that not so, Allen J. proceeded to find that the leave of absence was validly granted. He referred to s. 668(4)(b) of CA 2014. This provides that the absence of a person from two consecutive meetings of a committee of inspection only applies where the absence is '*without the leave of those persons who, together with himself or herself, were appointed as members of the committee by the creditors or, as the case may be, members of the company*'. The members of the committee are subject to removal by the constituencies by which they are appointed and to be filled by the constituency in which the vacancy occurred (Courtney '*The Law of Companies*' 4th Ed. at para. 25.073).

Therefore, any issue as to whether a member had leave is a matter between the member and those other members with whom he or she was appointed so that it is not open to the members' appointees to challenge the non-attendance of a creditor's appointee. Nor, he held, was there any requirement in the legislation that the grant of leave of absence be unanimous. There was nothing wrong with each of the creditors' nominees giving leave of absence to all of the others. Mr. Coyle has not identified any error in that analysis.

114. And if that were wrong, the court further concluded that the members did not vacate their office by their non-attendance without leave at two consecutive meetings. If validly called, the meeting of 30 May was not quorate. While doubting that s. 697(3) CA 2014 (which had been relied upon by Mr. Coyle) applied to meetings of a committee of inspection, if it did its effect was that if a meeting is not quorate it is to be adjourned to the same day of the following week at the same time or such other day time or place as the chairman may appoint. That meeting was not, however, adjourned. Again, this seems to me to represent a correct explanation of the factual and legal position.

(iv) The voting by the O'Mahonys at the creditors' meeting

115. The next complaint falls to be resolved on the same basis as the first. It is expressed by Mr. Coyle as follows:

> '*Declan De Lacy knowingly permitted Malcolm O'Mahony, proxy for Barry and Lee O'Mahony to vote at the creditors meeting of 6th October 2017 while aware that they were not creditors*'

116. I have explained earlier that the O'Mahonys were creditors, and the point falls away on that basis. In fact, they reduced their claim for pre-forfeiture rent to €30,000 – close to the amount lodged in Court to which they clearly had a strong claim on any version of events.

(v) TIO

117. Targeted Investment Opportunities ('TIO') was the landlord of the premises occupied by the Company at 26 Bachelor's Walk (the landlord for 3/4 Bachelors Walk was Real Estate Holdings). It claimed outstanding rent of €35,979 and issued an Ejectment Civil Bill on 30 November 2016 seeking possession of the property. That relief was claimed on the basis of a purported termination of the lease on 11 April 2016. Mr. Coyle frames his complaint against the Liquidator arising from this, as follows:

> '*Declan De Lacy knowingly permitted David Kiernan, proxy for Targeted Investment Opportunities ICAV to vote at the creditors' meeting of 6th October 2017 while aware that they were not bona fide creditors of the Company.*'

118. No challenge was made at the meeting of the creditors to Mr. Kiernan's right to vote at that meeting or to TIO's status as a creditor (the meeting of 7 November seems to have been the first at which the issue was raised). Mr. Moffatt's affidavit suggests that the claim that TIO was not a creditor is based upon the same erroneous legal foundation as the objection to the O'Mahonys claimed status as creditors. It was correctly found by the trial judge to have failed for the same reason. To that extent other similar grounds – presented for some reason by Mr. Coyle as distinct cause for removal – are also

groundless. These are his claims that the Liquidator wrongly failed to preclude the proxies for TIO and the O'Mahonys from election to the committee of inspection and/or thereafter failed to correct that appointment and/or that claims advanced by employees were wrongly admitted. Mr. Coyle has failed to identify any basis on which the Liquidator had any power to exclude the votes of these creditors or indeed to preclude any person from being elected to membership of the committee of inspection.

(vi) Non-engagement with the committee of inspection

119. The complaint here is stated by Mr. Coyle as follows:

'*Declan De Lacy has deliberately sought not to engage with the Committee of Inspection and has avoided calling meetings and obstructed other meetings properly summoned*'

120. I have addressed the essential point made here in the context of the issues around the committee of inspection in section (iii) of this part, and the consideration of s. 680 in the previous part of this judgment. For the reasons explained there, there is no substance to the point.

Failure to provide information to the committee of inspection

121. Mr. Coyle next says:

'*Declan De Lacy has refused or neglected to provide trading figures, accounts and information requested by the Committee to facilitate oversight into the Liquidation*'

122. The first point about this ground – as stated by the Liquidator in his affidavit of 12 November 2018 and as accepted by the trial judge in his judgment – is that the committee of inspection never actually asked the Liquidator for this information. Mr. Coyle and Mr. Moffatt did make such a request, but they did not enjoy the right to do so on behalf of the committee of inspection. That being so, the entire basis of this complaint is misconceived.

123. Mr. Coyle complains that the Liquidator refused to provide him and Mr. Moffatt with information they sought at the time of the first meeting of the committee of inspection. In fact, the Liquidator sought to furnish the committee of inspection with information as to the Company's post liquidation trading figures and the viability of the Company at the first meeting held on 7 November. He adopted the position that the information was commercially sensitive having regard to the fact that Mr. and Mrs. Coyle and their daughters had established a new business in direct competition with the Company. He also adopted the view that it would be appropriate to discuss the ongoing legal proceedings in the presence of the shareholders, directors and their nominees. For that reason, the Liquidator requested that Mr. Coyle, Mrs. Coyle and Mr. Moffatt leave the meeting while these matters were discussed. Mr. Moffat's response was to say '*I won't leave*'. Mr. Coyle asserted that *because* he and his wife were the other parties to the legal proceedings '*that's exactly why we should be here*' while those proceedings were being discussed. Mr. Coyle then suggested that he, Mrs. Coyle and Mr. Moffat would

leave, the meeting would proceed and that they would then return and the Liquidator would and they could address the meeting. The Liquidator eventually said he thought that the meeting should be adjourned and resumed at a future date with those members of the committee whom he did not believe to have a conflict of interest. Mr. Moffat objected to this and threatened to injunct the holding of such a meeting. At that, the meeting adjourned.

124. It was in those circumstances that Allen J. rejected the claim that the Liquidator had done anything wrong in refusing to provide this information to a meeting attended by Mr. and Mrs. Coyle or their nominee. He said that Mr. and Mrs. Coyle were '*hopelessly conflicted*' (at para. 80). Their object in demanding the information sought and in seeking to participate in the discussion at the first meeting of the committee of inspection was to promote their own interests and not the progress of the liquidation and it was entirely appropriate that the Liquidator should have briefed the committee of inspection in relation to trade and litigation in their absence. This is also correct: the Liquidator is fully within his rights in refusing to disclose confidential information to parties who he believes on good grounds are likely to use that information to the detriment of the liquidation.

Legal proceedings against Mr. Coyle

125. Mr. Coyle then says this:

> '*Declan De Lacy has caused unnecessary cost to the Company by way of extensive and unnecessary legal fees brought by myself and my family, Margaret Coyle, Amy Coyle and Emily Coyle.*'

126. The trial judge refused to accept that the conduct of the litigation against Mr. Coyle and Mrs. Coyle disclosed any basis for removal. It was, the judge said, wrong in principle that the court should be asked to review the conduct of pending litigation. What Mr. Coyle was asking the court to do was to conclude that the action against him and other members of his family was so bound to fail that Mr. De Lacy should be removed as Liquidator for bringing it. That, Allen J. said, was something the court could not possibly do. That was clearly correct. Issues in the litigation between the Liquidator and Mr. Coyle and his family fall to be determined in that litigation, and not by means of collateral attack on the application for the removal of a Liquidator.

Other legal cases

127. Mr. Coyle says:

> '*Declan De Lacy has failed to communicate with the Committee of Inspection in relation to the legal cases which he brought and/or defended in the Companies' name*'

128. The proceedings initiated by the Liquidator against members of the Coyle family were commenced prior to the appointment of the committee of inspection. It would be absurd to expect the Liquidator to keep those representing the members of the Company appraised of his strategy in the proceedings brought against Mr. Coyle, and indeed the same applies to proceedings brought by him or members of his family. He offered to provide such information at the meeting on 7 November in the absence of the members'

representatives, but they declined to facilitate this. He has said that the creditor members of the committee of inspection were provided with such information and, in the circumstances, by doing so he has discharged his obligations.

Miscellaneous

129. The final complaint is this:

> '*Declan De Lacy has not acted in the utmost good faith, has wasted large amounts of Creditor's funds, has acted in a fraudulent manner which may have criminal consequences for him*'

130. In a subsequent affidavit sworn in December 2017, Mr. Coyle has purported to add to the list of grounds for the removal of the Liquidator complaints around (a) the alleged involvement of the Liquidator in the publication of defamatory statements about him, (b) the allegedly unnecessary crediting of a sum of €138,917.26 to the Department of Social Protection, and (c) the making of claims by the Liquidator as to ownership of certain intellectual property rights which Mr. Coyle claims belong to him. None of these matters disclose a basis for the removal of the Liquidator. The issue of whether defamatory statements were published of Mr. Coyle is a matter between him and the alleged publisher. I do not believe that Mr. Coyle has established that the debt to the Department of Social Protection is invalid, and he has certainly not established that the Liquidator acted improperly in deciding that it was otherwise. The issue of ownership of the intellectual property rights is a matter for resolution in the plenary proceedings between the Liquidator and Mr. Coyle.

The 'release of discovery motion', evidence from other cases and the memory stick (Grounds 25, 26 and 27)

131. The notice of motion issued by Mr. Coyle on 23 August sought an order releasing the discovery obtained in the plenary proceedings so that the judge hearing the Companies Act applications could '*determine the relevance of material facts contained within the said discovery to the motions to remove the liquidator for cause shown or in the alternative to annul the liquidation of Decobake limited*'. Such an application had been made in the plenary proceedings and refused by McDonald J. ([2018] IEHC 428) on the basis that Mr. Coyle had failed to provide any evidence as to what the documents he wanted were, why they were said to be relevant to the Companies Act applications or that there were other circumstances that would justify the grant of that relief. Allen J. refused the relief in the application before him on the basis that it was identical to the motion heard and refused by MacDonald J. and that it failed to address the fundamental frailties identified by McDonald J. I can see no error in that conclusion. The court does not have an inquisitorial function in taking discovery made in one action and perusing it so as to decide if it would be helpful to one or other of the parties in another suit and releasing that party from the implied undertaking given at the time discovery is made, if it does. It is instead incumbent on the party seeking to be released from that obligation to identify the documents discovered it says are relevant to the other action, and to specify why the undertaking should be released so as to enable their use in that suit. Mr. Coyle did not do this, and Allen J. had accordingly little option but to refuse the application on that basis.

132. Mr. Coyle also complains that in the course of the proceedings Allen J. received a memory stick and pen drive and retained these until the conclusion of the trial. He says that he was not privy to the material on the drive and says that he does not know if the judge placed any reliance on its contents. The Liquidator in his oral submission confessed to some confusion on his part in relation to this matter. In his respondent's notice for the purposes of this appeal, he denied that any such material had been provided to the court. However, in the course of submissions to this court he said that he believes this to be a reference to video footage averred to at para. 19 (viii) of an affidavit sworn by the Liquidator on 14 December 2018. There he refers to a video of an incident in which Mr. Coyle is seen to chain himself to a motor vehicle to prevent members of the Gardaí from seizing it and in which he refers to those members of the Gardaí in derogatory terms. This is asserted to be taken from Mr. Coyle's Facebook page. Counsel advised this court that it was this video that was furnished to Allen J. and that it was believed that this was provided to Mr. Coyle (and indeed Mr. Coyle acknowledged in the course of the appeal that it was sent to him in the post after the hearing). The averment was made in the context of the Liquidator's explanation of why he had retained security personnel to assist with taking and retaining possession of the Company's premises. The Liquidator stresses that this was never opened to the court and that Allen J. said when returning the papers to the Liquidator's solicitors that he had never accessed it. If it was referred to in the affidavits it could have been sought by Mr. Coyle and it is not suggested that he was unaware that it was furnished to the judge. The contents do not appear to have any bearing on what was decided by the judge.

Failure to make references to the ECHR and/or CJEU (Ground 24)

133. Before the High Court, Mr. Coyle sought a reference to the Court of Justice of the European Union on seven questions. These included whether the court was making the correct decision by refusing his discovery application, whether the court had dealt with him fairly, whether the court was depriving itself of the evidence it required to reach a just and fair decision and whether it was appropriate that the court would assist in with-holding evidence that the court required that would establish misfeasance and malfeasance of its own officer. There was one that referred to EU law – '*Is it obvious that EU law is being applied in relation to data and discovery and that I'm getting due process*'.

134. In his notice of appeal six quite different questions were formulated, this time directed to various theories of EU law (although also addressing Article 29.6 of the Constitution). In his written legal submissions delivered as part of this appeal, the questions are reduced to four in number, and are as follows:

i. Does an application under ss. 569 & 570 of CA 2014, preclude the rights of a litigant under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) whereby the company applicant becomes disabled in executing procedural domestic court remedies, that would provide the distressed company a second chance of recovery?

ii. If the above is negative, are the domestic courts precluded from proceeding with applications under s. 570 of the act, until all of those domestic remedies are exhausted?

iii. If the above is affirmative, does the provisional liquidator have an obligation under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) to protect the Company from compulsory Insolvency Proceedings and does a liquidator have discretion to refuse a stateable appeal and ignore shareholders and company officers wishes?

iv. When a court issues a petition under ss. 569 & 570 of the Act, does a company officer's right to request company records become redundant, under the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)?

135. The questions which Mr. Coyle thus seeks to raise are not related by him to any particular provisions in the Recast Insolvency Regulation. For reasons I have explained earlier, that Regulation is not related in any way to the issues which it is thus sought to have referred. But more fundamentally, the questions are theoretical. To begin with, they are predicated upon the claim that Mr. Coyle never received the statutory demand. The High Court judge hearing the petition and this court on appeal determined that the notice was duly served. Given that fact, the undisputed evidence of the fact that the post box at the Company's registered office was screwed closed, that Mr. Coyle was e-mailed a copy of the demand by the Council's solicitor but had consigned e-mails from that source to 'spam', that someone arrived at that solicitor's office with the demand in

an attempt to return it, it is difficult to see how any court could conclude that Mr. Coyle could be given any indulgence for the failure of the Company to pay the rates it accepted before the High Court were due. There is no provision of the Recast Insolvency Regulation that mandates the refusal of a petition to wind up a company because the company has belatedly tendered payment of a debt it admitted was due and, in consequence, was found to be insolvent in accordance with national law.

136. Insofar as complaints around the appeal or the institution or non-institution of legal proceedings are concerned, company law in Ireland – and indeed elsewhere – entrusts to the Liquidator the function of determining whether legal proceedings should be brought by the company. National law does not in this regard fail to comply with any aspect of the Recast Insolvency Regulation. Here, the Liquidator determined that it was not in the interests of the Company to proceed with such litigation. This was not a surprising conclusion in circumstances in which Mr. Coyle had been present in the District Court when the proceedings for judgment came before it. Moreover, he had conceded on affidavit that monies were due and owing, and it is impossible to see how it would have been in the interests of the Company or the creditors as a whole to expend funds in litigation around a debt which it had been accepted was owing.

137. Mr. Coyle further contends that the trial judge failed '*to provide any clear reasoning as to why he would not refer any question to the CJEU*'. This, it is said, was in dereliction of his obligation under the law of the European Union which, he stresses, is supreme. The judge appears to me to have been quite clear on these issues. A reference was refused because Mr. Coyle did not identify any issues of European law that fell for determination. It is only such issues that can be the subject of a reference to the CJEU.

The order for costs (Grounds 5, 6 and 14)

138. It is my provisional view that Mr. Coyle having failed on all aspects of the appeal, the costs of the Liquidator and of the petitioner and the parties associated with the Council who participated in the appeal should (save in one respect) be ordered in their favour and against Mr. Coyle. The exception is the costs of the application under s. 681 which is now, as I have explained, moot. I am of the initial view that no order should be made in respect of the appeal insofar as that application is concerned. I am also of the provisional view that the Court should not interfere with the orders as to costs made by the High Court. Mr. Coyle is free to dispute this provisional view should he wish to do so, in which case the Court will convene a further hearing to address any issues of costs he wishes to so raise.

139. Collins J. and Pilkington J. are in agreement with this judgment and the orders I propose.