THE SUPREME COURT

[Appeal No. 148/19]

The Chief Justice
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

BETWEEN:

ETEAMS INTERNATIONAL (IN LIQUIDATION)

APPELLANT

V.

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 8th day of May, 2020

Introduction

1. This appeal arises from a ruling on costs given by the Court of Appeal in proceedings originally brought in the High Court by the appellant company ("Eteams"; "the Company"), against the respondent ("the Bank"). The ruling ([2019] IECA 186), was made consequent on a substantive judgment on the principal issue in the case which was of some legal and commercial significance ([2019 IECA 145]). Prior to the liquidation, Eteams had entered into a debt purchase agreement with the Bank, whereby the Bank agreed to purchase debts owing to that Company by its former customers. When the Company subsequently went into liquidation, the decision was made to challenge the Bank's claim to monies thus collected. The ensuing proceedings were brought in the name of the Company, not the liquidator. The case was made that the agreement in question was actually a loan secured on the Company's debts and therefore not a true sale of Eteams' debts to the Bank. It was contended that the Bank's interest in the debts was to be treated as security rather than actual ownership. From this, it was said to follow that because the agreement had not been registered as a charge as would have been required under the Companies Act, 1963 ("the 1963 Act"), the Bank's claim against the liquidator was void. The High Court determined that the standard form invoice discounting agreement was not invalid by reason of non-registration ([2017] IEHC 393). The Court of Appeal upheld that decision in the substantive judgment. But the issue now before this Court is a net one. In this appeal, brought in the name of the Company, it is argued that the Court of Appeal erred in ruling that the costs of the appeal in that Court should be borne by the liquidator personally rather than by the Company.

2. The liquidator, Anthony Fitzpatrick, was appointed in 2013, when Eteams went into voluntary liquidation. The High Court judgment contained an extensive consideration of legal authorities from the neighbouring jurisdiction. The Court of Appeal delivered a comprehensive judgment affirming the High Court order. As to the merits of the appeal, counsel for the liquidator points out that the substantive issue raised in the case had not previously been determined in the Irish courts, and that the Court of Appeal observed that the appeal was neither frivolous nor vexatious. Counsel for the Bank accepts that this contention might be true of the case, as brought and determined in the High Court, but now submits that the High Court judgment was so definitive as to have militated against the advisability of bringing an appeal to the Court of Appeal. He submits that the Court of Appeal did not err when it determined in its supplemental ruling that the liquidator personally should bear the costs of the appeal, holding that it was clear that the

proceedings should have been brought by the liquidator in his own name. Despite the many other avenues this Court was invited to explore in this appeal, the question actually to be determined is very clear. It is confined to whether the Court of Appeal was justified in making the costs award. That decision turned on the narrow issue of an application of the applicable words of s.280(1) of the 1963 Act which, insofar as material, provided:

> *"(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.*
>
> *(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms as it thinks fit or may make such other order on the application as it thinks just."*

3. The Court of Appeal held that the Company had no *locus standi* to bring the proceedings. It rejected the liquidator's various submissions, which included the contention that, at the application for directions in the High Court, the Bank had successfully applied to have carriage of the proceedings. The application for leave to this Court, as well as the decision on costs, again sought to raise the legal issue on the invoice discounting agreement. But this Court granted leave on the costs issue only, expressing the view that the law on the validity of the charge was clear as determined by the Court of Appeal and, therefore, did not come within the criteria laid down in the 33rd Amendment to the Constitution ([2019] IESCDET 236).

Submissions of the Appellant

4. In this appeal, counsel for the appellant laid emphasis on the fact that Baker J., speaking on behalf of the Court of Appeal (Whelan, Baker and Costello JJ.), had not criticised the appeal as being frivolous or vexatious. He referred to *dicta* of Lynch J., speaking for this Court in *Southern Mineral Oil Limited (in liquidation) v. Cooney* [1997] 3 I.R. 549, submitting that the authority was distinct from the circumstances of the case presently before this Court. While accepting that, in *Tucon Process Installations Limited (in voluntary liquidation) v. The Governor and Company of the Bank of Ireland* [2016] IECA 211, the Court of Appeal had held in rather similar circumstances that the appellant company did not have *locus standi* to bring proceedings, counsel pointed out that

that Court nonetheless had not made a personal order for costs against that company's liquidator - again coincidentally, Mr. Fitzpatrick. Counsel submitted that in *Tucon* and the instant case, the Court of Appeal erred in exercising its discretion in that the liquidator could not, in the circumstances, be deemed to be the Company; the more so in the circumstance that, in the High Court, the Bank had applied for and had taken up carriage of the proceedings. Counsel referred to more recent *dicta* of McKechnie J., on behalf of this Court in *The Revenue Commissioners v. Anthony J. Fitzpatrick in his capacity as Liquidator of Ballyrider Limited (in voluntary liquidation)* (31st July, 2019, Appeal No. 2016/107) to the effect that, in general, a liquidator will not be rendered liable personally in costs.

5. Counsel further submitted that, in the event that this Court concluded that a costs order should be made, Mr. Fitzpatrick should be entitled to an order to have recourse to the assets of the Company. He made the case that, in fact, the substantive decision of the Court of Appeal had turned on the merits of the invoice agreement issue, rather than the *locus standi* question. He argued that there was no indication that the proceeding had caused any loss to the beneficiaries, or that the liquidator had not acted *bona fide* in the interests of the Company. Finally, he contended that the liquidator could not, in all the circumstances as outlined above, be deemed to be the Company and therefore could not be made personally liable.

6. It must be said that in this case there was a dearth of evidence in areas which potentially might have had a significant bearing on the merits on one side or the other. The Court has not been provided with any information regarding what assets had been gathered in on an overall basis. The Company appears to have been a small enterprise. It is not possible to make any estimate as to the economic justification for initiating, or continuing with, the case up to and including the appeal. It is a fact that no satisfactory explanation has been given for the liquidator adopting what, *prima facie*, was an unlawful course of action in breach of s.280(1) of the 1963 Act. There was no evidence that, prior to the initiation or continuance of this litigation, the liquidator consulted with the creditors. Nor was this Court provided with any indication as to the nature of the legal advice given, or as what stage or stages in the litigation that advice was sought and tendered. As against this, on the same issues, some parts of the Bank's case must likewise be seen as being based on assertion, suggesting *mala fides,* misconduct, self-interest and ulterior motive in the conduct of the proceedings and appeals.

7. Counsel on behalf of the appellant company points out that, at a "directions hearing" on the 8th June, 2015, the High Court (Costello J.) directed that the Bank should take up carriage of the proceedings in place of the Company. The consequence of this was that the respondent Bank, as creditor, became the applicant in the motion, and the Company the respondent. This was done in circumstances where, even then, the respondent Bank had expressly objected to the legal standing of the Company as applicant. But this Court has been informed that the High Court, in fact, acceded to the Bank's application at a stage when it appears that the matter had remained static in the High Court directions list for as much as a year and a half. By way of explanation, it is now submitted that the Company was awaiting the outcome of the *Tucon* litigation before proceeding further.

8. Counsel for the appellant points out that, as was acknowledged by letter from the Bank's solicitor dated the 18th June, 2015, Costello J. had not, at the directions stage, actually made an order joining Mr. Fitzpatrick as liquidator as a party to the proceedings, despite the fact that the respondent Bank had strongly intimated such an intention more than once, an intention evinced in correspondence dated the 23rd June, 2015.

9. Counsel for the appellant further points out that, by order of the High Court, Costello J. actually gave liberty to the Bank to issue a motion for directions on notice, not only to the Company but also on notice to Mr. Fitzpatrick as liquidator, but that the Bank never followed through on its threat to join him as a party. It is a fact, also, that no application was made to apply for security for costs.

10. Counsel referred to the fact that the Company had the benefit of legal advice. In itself however, this can only be seen as "value neutral". To have any force, such a point would require that a party such as the appellant would waive privilege and outline to the Court the precise tenor of the advices given.

11. In any legal opinion, counsel may advise that the initiation of proceedings is well warranted with a high chance of success; or that there are chances of a reasonable outcome; or that bringing proceedings might, be, at best, problematic and entirely speculative. This Court makes no assumption in relation to what was said in counsel's advices. But the fact that the proceedings were initiated in the name of the Company rather than in the liquidator's name might be seen as something which, at the minimum, required some explanation.

12. Counsel on behalf of the Company submits that the primary argument made by the Bank with regard to responsibility for the costs of the appeal was simply that the proceedings had not been properly constituted in respect of that section, and that it should not be *assumed* that the decision to bring the proceeding in the name of the Company had been made by the liquidator personally.

13. Counsel for the Company seeks to re-emphasise Baker J.'s comments that the appeal was neither frivolous nor vexatious. It must be said these were indeed observations of some significance, made in the course of a consideration as to how that Court should exercise its discretion on the costs issue. But it is necessary to bear in mind that, ultimately, the question under appeal is quite a narrow one; that is, whether the Court of Appeal erred in exercising its discretion on the costs issue. Absent evidence of an error in how such discretion is exercised, appeal courts will in general be slow to interfere with such orders.

Southern Mineral Oil

14. Consideration of the case law may begin with the judgment delivered by Lynch J. in this Court (Keane, Lynch and Barron JJ.) in *Southern Mineral Oil* (cited at para. 4 above). In that judgment, the Court had to consider the terms of ss.297A and 298 of the 1963 Act, which, albeit in a context different to this voluntary liquidation, addressed applications to the court in the context of allegations of fraudulent trading in the conduct of a company. Addressing those provisions, Lynch J. pointed out that:

> *"They provide that the application shall be brought by the receiver or examiner or liquidator, as the case may be, and in all cases the application may also be brought by any creditor or contributory of the company in question"* (p. 568).

15. But at p. 659 of the Report, Lynch J. went on to point out that on the facts in that case:

> *"The Revenue Commissioners are the real applicants in the proceedings brought against the respondents by the notice of motion dated the 18th August, 1994."*

Referring to the Revenue Commissioners, Lynch J. continued:

> *"In these circumstances it seems to me that it is wrong that they should be enabled to shelter against liability for the respondents' costs if the respondents succeed in the substantive trial of the motion by bringing the proceedings in the names of the two*

companies who have no assets. On my reading of ss. 297 and 298 of the Companies Act, 1963, under which these proceedings are brought neither the Revenue Commissioners nor the liquidator is entitled to bring them in the name of the companies.

I would therefore dismiss the appeal but I draw attention to the probable need to apply to the High Court for a ruling as to whether or not it is necessary to join or substitute the liquidator and/or the Revenue Commissioners as applicants and if so whether or not such an order should be made in this case" (p. 569).

Applicable Principles

16. While those observations were not strictly on the same facts, or in relation to the same provisions, they are nonetheless an apposite and helpful authority. In applications under the Companies Act, courts must look to the precise words of the provision in question in order to determine the appropriate moving party as defined by the Oireachtas. The courts are not entitled to usurp the role of the legislature so as to expand a jurisdiction, where the plain words of the statute are clear. In such a consideration, courts must also assess whether there are "real applicants" in the proceedings, who are not the actual named applicants to the court, and who may not be entitled to be a party to the proceedings. A court will also necessarily have regard to the fact that it would be wrong that such "real applicants" might be enabled to shelter themselves against potential liability for an adverse costs order by seeking to initiate proceedings in the name of a company which is insolvent or has no significant assets.

17. It is, of course, generally true that when proceedings are being taken or defended by a liquidator in the name of the company rather than in his or her own name, he or she will have no personal liability for any award of costs that may be made in favour of the other party to the litigation, provided that there has been no personal impropriety on his or her part. The costs will, however, be classed as a cost or expense of the winding-up and will rank ahead of the liquidator's own remuneration.

18. The 1963 Act provided that certain statutory causes of action had to be taken by liquidators in their own names. These included: fraudulent or reckless trading proceedings under s.297A; and misfeasance proceedings under s.298. Additionally, proceedings under s.204 of the Companies Act, 1990 ("the 1990 Act") to impose personal liability for failure to keep proper books of account came into that category. The policy behind this proviso is obvious. These are instances where the

application is anything but *pro forma.* Rather, it comes within a category of cases where a liquidator will have to arrive at a conclusion that the initiation of such proceedings, effectively imputing unlawful conduct, is warranted. In such situations, an adverse litigant may, if successful, be entitled to look to the liquidator personally to meet any award of costs, albeit that it is the case generally that the liquidator will have a right to be indemnified out of the assets of the winding up (see, Lyndon MacCann and Thomas B. Courtney, *Companies Act 1963-2012* (Bloomsbury Professional 2012), at p. 490: notes on s.231 of the 1963 Act).

19. But the position in this case is very clear. Section 280 of the 1963 Act did not vest any right to initiate a cause of action in a company, or to bring an application to court under that section. To the contrary, it provided that a statutory application can *only* be brought by a liquidator, creditor or contributory of a company. An application under that section could not be brought in the name of a company in liquidation.

Tucon Process Installations Limited (in voluntary liquidation)

20. A relatively recent application of these same principles can be found in *Tucon Process Installations Limited (in voluntary liquidation) v. The Governor and Company of the Bank of Ireland* ([2015] IEHC 312; [2016] IECA 211). The decision has a bearing on this case in more than one way. There, the Court of Appeal (Ryan P., Peart and Costello JJ.) had to consider a situation where the board of the subject company resolved to place the company in voluntary liquidation.

21. At dates proximate to the resolution, three electronic fund transfers were made by debtors of the company to the company's overdrawn bank account. The total effect of the lodgements was to reduce the company's overdraft from €40,400 to approximately €16,000. The liquidator of *Tucon,* again Mr. Fitzpatrick, was of the view that the sums were properly the property of the Company in liquidation, as the retention of the monies by the respondent bank in reduction of the company's overdraft had the effect of preferring the respondent over the other creditors. Accordingly, Mr Fitzpatrick had issued an equity civil bill against the respondent in his capacity as liquidator of the company, but it was entitled "for and on behalf of the Company (in voluntary liquidation)". He sought a declaration that the sum in question was the property of the liquidator, in that capacity, and an order that the sum be lodged to his account, together with damages and interest.

22. The company later brought a notice of motion seeking a declaration that the monies were the property of the creditors and directions pursuant to s.280 of the 1963 Act as to how to secure the return of the sum to the liquidator of the company for the benefit of the creditors of the liquidation. The company also sought directions under the same section as to whether additional proceedings were necessary to recover the monies.

23. The Bank defended the proceedings, arguing that the appellant company in voluntary liquidation had no *locus standi* to bring proceedings pursuant to s.139 of the Act of 1963. It argued that no order should be made pursuant to that section as there was no disposal of a company property such as to perpetrate a fraud on the Company or its creditors or members. The High Court (Hunt J.) held that the Company did not have *locus standi* to maintain the proceedings.

24. Later, speaking for the Court of Appeal, Costello J. had no hesitation in upholding Hunt J.'s judgment (para. 18). She cited the passage from Lynch J.'s judgment in *Southern Mineral Oil Limited*, quoted at paras. 14–15 above. She approved the words of Hunt J. in the High Court which were to the effect that, in the case of an application brought pursuant to a statutory provision, regard must be had to the plain and ordinary meaning of the words of the statute in determining questions such as standing (para. 16 of the High Court judgment). The nomination of specific parties as potential applicants expressly precluded such statutory applications being brought by a party other than those specified by the legislature. Otherwise the precise words used to legislate for classes of applicant would be deprived of ordinary meaning.

25. Hunt J. considered that Lynch J.'s observations represented a correct and precise statement of the law on the legal issue arising in the case. He held that the application should be dismissed on the basis that neither of the sections invoked by the applicant was available to it, in circumstances where it was not within the category of applicants specified by either of the statutory provisions in question (para. 22). Speaking for the Court of Appeal, Costello J. considered that Hunt J. had been correct in his application of the law. She found the judgment of Lynch J. in *Southern Mineral Oil Limited* to be compelling (para. 18). Though not strictly binding on the Court, she considered the decision should be followed in construing s.139 of the 1990 Act, and that it followed inexorably that the Court could not grant a declaration that the liquidator had *locus standi* to bring the application in the name, and on behalf, of the Company. In my view, while the facts of the cases may be different, those observations are very much on point.

26. Counsel for the Company submitted to this Court that the Court of Appeal erred in finding that, as the liquidator ought properly to have been named as applicant, he ought to be responsible for the appeal costs. He submitted that the liquidator cannot be deemed to have been an unsuccessful applicant for the purposes of fixing him with the responsibility for costs, the more so in circumstances where the respondent Bank had been permitted by the High Court to join him as a party, but elected not to do so. I confine myself to expressing the view that the decision of the Court of Appeal in *Tucon* is unimpeachable in its reasoning on this issue. It is necessary to turn next to authorities which consider the question of rendering "third parties" liable in costs, bearing in mind Lynch J.'s *dicta to* the effect that courts should not permit third parties to shelter behind an insolvent company.

Third Party Liability for Costs

27. With regard to rendering the liquidator personally liable, the following features must be borne in mind. First, as is now clearly established, the Company had no *locus standi* to bring the proceedings. But second, there has been no explanation as to why a course of action which obviously contravened s.280 of the 1963 Act was adopted. It has not been suggested that the proceedings were in error brought in the name of the Company. The reason tendered for allowing the matter to remain in the High Court directions list for such a prolonged period was that the Company was awaiting the outcome of the *Tucon* litigation. Yet, despite the outcome in *Tucon*, of which the liquidator must have been well aware, the Company persisted with this litigation which, like *Tucon*, was fundamentally flawed from the very outset. It must also be borne in mind that the indications are consistent with the liquidator having been the only begetter of this proceeding. It was he who swore the grounding affidavit and instructed the lawyers to proceed as far as this Court. Undoubtedly, in the real world of litigation, cases of doubtful merit are sometimes initiated in the hope of an offer and settlement, rather than in the full expectation of vindication on a point of legal principle in a lapidary judgment. But, seen in the round, what occurred here belongs to a different order of things. The *locus standi* issue was, or should have been, abundantly clear. There comes a point when perseverance in litigation becomes pertinacity in error.

28. In *Moorview Developments Limited v. First Active plc* [2018] IESC 33; [2019] 1 I.R. 417, this Court (McKechnie, MacMenamin and Dunne JJ.) held that the Rules of the Superior Courts, 1986 as amended, permitted a court to make a costs order against a non-party in certain circumstances (para. 63). This was particularly so where, as in *Moorview*, that person directed the

litigation be brought in the name of an insolvent company in an attempt to avoid any personal liability for costs (para. 90). At para. 11 of the judgment of the Court of Appeal, Baker J. set out the factors identified by McKechnie J. at para. 125 of *Moorview* which are relevant to the exercise of the Court's jurisdiction to make costs orders against non-parties. These include:

> *"a. the extent to which it might have been reasonable to think that the company could meet any costs if it failed;*
>
> *b. the degree to which the non-party would benefit from the litigation if successful, including whether it had a direct personal financial interest in the result;*
>
> *c. the extent to which the non-party was the initiator, funder and/or controller of, and moving party behind, the litigation;*
>
> *d. any factors which may touch on whether the proceedings were pursued reasonably and in a reasonable fashion; the required assessment of the conduct of the proceedings may of course lean either in favour of or against the making of the order sought;*
>
> *e. there is no requirement that there be a finding of bad faith, impropriety or fraud, though of course the same, if present, will support the ordering of costs against the non-party; and*
>
> *f. whether the non-party was on notice of the intention to apply for a non-party costs order; at what point in the litigation such notice was communicated will also be a relevant consideration, as will the extent of the notice so provided*
>
> *A further consideration to take into account, though rarely likely to be decisive in and of itself, will be:-*
>
> *g. Whether the successful party applied for security for costs in advance of the trial.*
>
> *Finally, and most importantly:-*
>
> *h. The Court's discretion is a wide one, but it must be exercised judicially and, in all the circumstances, must give rise to a just result."*

29. Baker J. addressed the argument that the liquidator must be seen to have initiated and controlled the application in the sense explained by McKechnie J. She observed that:

"As Mr Fitzpatrick swore the affidavit grounding the application and was the only person competent to prosecute the application, albeit he did so wrongly in the name of the Company, that proposition seems to me to be correct" (para. 12).

30. However, she went on to point out that this was not to say that the liquidator was merely on that account to be considered as having a direct personal interest in the result, a further factor that might influence the exercise of discretion identified by McKechnie J. in *Moorview*. In general, the liquidator of an insolvent company who brings an application for directions in his or her personal name is exposed to the costs of the proceedings, but has a right to be indemnified out of the assets in the winding-up and having regard to the statutory preference given to the costs of the liquidator. In many cases, the liquidator will, in fact, be entitled to recover those costs from the company's assets.

31. Baker J. pointed out what was known of the financial state of the Company in the present case. She commented that it was known to be insolvent, but the extent of the insolvency and whether any assets were available to meet the costs of the liquidator, should he be held personally liable to meet those costs, was unclear (para. 13). She observed that, in the absence of such evidence, it would not be safe for her to conclude that Mr Fitzpatrick would financially benefit from the appeal and that argument did not bear on her considerations.

32. Baker J. considered that the situation in the instant case was distinct from *Moorview*, in that McKechnie J. had been considering the proper approach in the context of awarding costs against a "professional funder" with a connection to the litigation (para. 14). Nor did it seem to her that Mr. Fitzpatrick was, in the true sense, a "non-party", as would be true in the case of a shareholder and director of the insolvent company (para. 15). On the other hand, she held that Mr. Fitzpatrick could not be treated as an outsider either, as, had the proceedings, and later the appeal, been commenced or prosecuted in the correct manner and in accordance with the s.280(1) of the 1963 Act, he would in fact have been the named applicant (para. 15).

33. It is true that the Court of Appeal rejected the submission that the appeal was devoid of merit and not reasonably brought in light of case law in other jurisdictions (para. 16). Baker J. acknowledged that the appeal was not frivolous or vexatious. That Court's reluctance stemmed from first principle, the constitutional and common law right of access to the courts, and the view that the right to appeal should not be constrained by an approach to a costs application, which took as a point of departure an argument that a decision to appeal was, in itself, unmeritorious (para.

17). The Court was not persuaded that the decision regarding costs was made on an assumption, which was never established, that the liquidator may not have consulted the Company before embarking on the litigation, or in coming to the decision to appeal, or on the basis that the litigation, and especially the appeal, was not in the interest of the body of creditors as a whole (para. 18).

34. Here it is necessary to further consider the factors identified at (d) - (h) above in *Moorview*. Again, it is not unfair to reiterate that this was an appeal which was strong on assertion but less so on evidence. As to factor (d), on the evidence it cannot be said that the litigation was actually conducted *unreasonably*, though it might be said that the conduct of the litigation pushed the borders of reasonableness close to, but not beyond, their outer boundaries. The delay in processing the litigation at the application stage speaks to this factor. Turning to factor (e), the evidence does not in point of fact, go so far as to establish that the litigation was conducted *in bad faith or with fraudulent intent*. It can arguably be said there was *impropriety*, if only in the sense that the proceeding was commenced in the name of the Company rather than that of the liquidator. As to (f) and (g) and the *notice of intention to apply for a non-party costs order*, it can undoubtedly be said that both the Company, and more importantly the liquidator, were placed squarely on notice of the Bank's intentions whilst the matter was in the High Court, even though an application for security for costs was never made.

35. Like Baker J., I am not persuaded that the failure to join Mr. Fitzpatrick personally is fatal to the Bank's application for costs. In fact, in an affidavit sworn by a Bank official in the High Court, orders were sought against Mr. Fitzpatrick personally. The High Court orders themselves were also directed to the liquidator personally. As this Court held in *Moorview*, courts do have jurisdiction to award costs against non-parties, either by first adding them as party to the proceedings for the purpose of making a costs order under Order 15, Rule 13 of the RSC or, alternatively, on the basis of s.53 of the Supreme Court of Judicature (Ireland) Act, 1877. I am not persuaded either that the fact that the Court of Appeal did not take the formal step of joining the liquidator as a party before making a costs order was of any practical consequence. The liquidator had been formally put on notice almost three years before the appeal hearing that the Bank would be seeking the costs of the appeal against him personally.

36. One cannot entirely ignore, either, the undoubted incongruity that, while the appellant's formal position was that the legal representatives were only ever acting on behalf of the Company and not on behalf of the liquidator, it was submitted without contradiction in this appeal that the

Company's legal representatives were instructed in the Court of Appeal to argue that a costs order *should* be made against the Company and *should not* be made against the liquidator.

37. It is asserted on behalf of the liquidator that he was not using the Company entity in his own self-interest, but to recover assets for the benefit of the creditors and that had he taken the proceedings in his own name, he would be entitled to be indemnified for the costs as he was acting properly in the best interests of the majority of the beneficiaries. It is also asserted that, as the liquidator acted in the interests of the creditors as a whole, and not in his own self-interest, the costs of the proceedings were properly incurred in the recovery of company assets, but to be treated as costs of the liquidation. Just as certain of the Bank's submissions as to bad faith self-interest must be treated as mere assertion, these claims made on behalf of the liquidator personally must be treated likewise There is simply no evidence adduced on these questions. Consequently, they must be disregarded.

38. Observations made by this Court (Hardiman, Fennelly and O'Donnell JJ.) in *Cullen and Ors. v. Wicklow County Manager* [2010] IESC 49; [2011] 1 I.R. 152 also have some bearing on the question of personal liability for costs. There, a judicial review had been commenced in the name of Wicklow County Council on the instructions of three councillors. The High Court ordered that the individuals should be joined in the proceedings and costs awarded against them. This Court upheld the order. In so holding, O'Donnell J. observed:

> *"This was not a situation in which a person who himself having no cause of action, encouraged or controlled litigation by another party who has such a right of action. Nor is it a case where proceedings are commenced by a party and it is subsequently discovered that they lacked the legal title to commence them, and/or that there was a technical defect in the constitution of the proceedings which were otherwise properly commenced. Here, an attempt was made by a party to commence proceedings in the name of another legal entity which the High Court determined, correctly in my view, they had no entitlement to do, whether as a matter of law or fact. In such circumstances, the court was seeking to identify the "true" applicants,* i.e. *the parties who had wrongfully commenced the proceedings in the name of another legal entity. The appellants were not strangers to the proceedings: on the contrary, they were the very people who had instructed the commencement of proceedings, and presumably given instructions for the conduct of the litigation"* (para. 72).

39. Finally, more recently and more directly on point, in *re Ballyrider* (cited at para. 4 above), McKechnie J. summarised the principles applicable in relation to an application for costs against a liquidator - by coincidence, again Mr. Fitzpatrick. McKechnie J. identified the criteria thus:

> *"88(1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.*
>
> *(2) Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules, vis-á-vis an adverse litigant will apply. If a cost order is made the liquidator incurs a personal liability in respect of same: as such the sufficiency or insufficiency of the company's assets is irrelevant.*
>
> *(3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.*
>
> *(4) In the proceedings first mentioned as the liquidator incurs no personal liability the question of seeking to have recourse to the company's assets does not arise.*
>
> *(5) In the proceedings second mentioned, the position will be as follows:*
>
> > *(i) Where acting for and on behalf of the company, the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.*
> >
> > *(ii) Even when acting for and on behalf of the company, if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described, include misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.*

(iii) On the other hand, where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.

(iv) Just as there will be cases which are clear-cut on one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the court will have regard to section 281 of the 1963 Act and the relevant case law above mentioned. In doing so the Court will consider the representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine whether there are sufficient grounds on the balance of probability to deny him such a course."

As to (ii) and (iii) above, it cannot be ignored that there have been here *acts and omissions* in the litigation which at minimum required explanation and which have not been explained. There is no evidence or even indication that what occurred was a result of *mistake.* The fact that the litigation was initiated in the name of the Company called for an explanation in the circumstances. A court might well sympathetically consider mistake as an explanation. No such explanation was proffered in this appeal. In all the circumstances, considering this discretionary order on costs, it is not possible to put to one side Lynch J.'s criticism of non-parties "sheltering" behind an insolvent company. But this appeal must be decided on the information available, and evidence actually adduced, rather than inference.

Conclusion

40. These proceedings were initiated in the name of the Company. But it is clear that they should have been brought in the name of the liquidator. The appeal to the Court of Appeal was brought on the instructions of Mr. Fitzpatrick. So, too, was the application for leave to appeal to this Court. The inescapable fact is that, at all stages, the proceedings under s.280 of the 1963 Act should never have been brought in the name of the Company. As pointed out more than once, the appeal before this Court has been replete with assertions and innuendo on both sides. To take one instance, for the appellant, it was suggested that the liquidator had acted in the interest of the creditors. There was no such evidence. The Bank responded, again without evidence, that the liquidator was acting in his own self-interest.

41. One incontrovertible conclusion emerges from all this. It is simply that the proceedings were not only irregularly initiated, but continued, in the Company's name where - be it said on the basis of some past experience - Mr. Fitzpatrick should have had awareness of the issue himself. But simply because one party seeks to cast an aura of suspicion over the other, or invites a court to draw inferences of bad faith or outright misconduct, will not be sufficient, for any conclusion absent clear and cogent evidence to sustain such findings. I would be content therefore, simply to ground my conclusion on the same limited basis as that of the Court of Appeal, which is that the Company did not have *locus standi* to bring the proceedings, and that from an early date, the liquidator had ample warning of the Bank's intention to render him personally liable. I would dismiss the appeal and affirm the order of the Court of Appeal awarding the costs of that appeal to the Bank against the liquidator personally, and order that the liquidator be precluded from having any recourse to the assets of the Company for the purpose of satisfying the costs order.

11/5/2020.