THE COURT OF APPEAL

[2019] IECA 231
Record No. 2017/457

Peart J.
Whelan J.
Costello J.

IN THE MATTER OF STAR ELM FRAMES LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN:

MYLES KIRBY, OFFICIAL LIQUIDATOR OF STAR ELM FRAMES LIMITED (IN LIQUIDATION)

APPLICANT/RESPONDENT

- AND -

ANTHONY FITZPATRICK

RESPONDENT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 30TH DAY OF JULY, 2019

1. By order of the High Court (Faherty J.) dated 10th May 2017 the appellant, Mr Fitzpatrick, was found beyond a reasonable doubt to have breached an order of the High Court (Humphreys J.) dated 10th August 2016 by which, *inter alia*, it was ordered as follows:

> " ... pursuant to section 572 (1) (b) of the Companies At 2014 that Mr Anthony Fitzpatrick present all books, records, accounts and property of the company to Myles Kirby Liquidator of the Company as soon as possible and no later than the close of business on Monday the 15th August 2016. "

2. Despite that finding of breach, the trial judge stated that "at this juncture however it is a historical breach and I regard it as a limited breach since it was remedied on 5th September, 2016 and in circumstances where, as of 26th of August, 2016, Mr Fitzpatrick

was stating via his solicitor that he was proposing to effect delivery of all relevant materials on 2nd September, 2016, in Limerick".

3. When concluding that in all the circumstances she was not satisfied that the imposition of a fine was warranted, the trial judge noted that the relevant books and records had been handed over by Mr Fitzpatrick, albeit some two weeks beyond the date specified in the order. The trial judge also took into consideration that "while the terms of the order were entirely clear as to the date and time specified for the handing over of the relevant books and materials and while the obligation was on Mr Fitzpatrick to comply, the Order was silent as to the location where the handover was to be effected".

4. Nevertheless, Mr Fitzpatrick appeals to this court against finding made by the trial judge that he was in breach of the order dated 10th August 2016, and I will come the grounds upon which he relies for that submission.

5. The relevant facts by way of background can be summarised adequately by reference to paras 2 and 3 of the judgment of the trial judge [2017] IEHC 376 as follows:

> "2. The relevant background leading to the appointment of Mr Kirby is as follows: on 24th June, 2016, the Revenue Commissioners presented a petition in the High Court seeking to have the company wound up. The petition was given a return date of 18th July, 2016. The petition was presented following service by the Revenue Commissioners of a demand dated 10th March, 2016 for the repayment of the total sum of €582,523.35 which the Revenue Commissioners asserted was due and owing by the company. The members of the company subsequently nominated Mr Anthony J Fitzpatrick, Chartered Accountant, Clonmaney House, Newenham Street, Limerick as liquidator of the company in a creditors' voluntary winding up. Mr Fitzpatrick's appointment terminated on 10th August, 2016 following the appointment of Mr Kirby by order of the High Court.

3. In addition to ordering the company to be wound up and appointing Mr Kirby as official liquidator, it was ordered by Humphreys J. on the 10th August 2016 that "pursuant to s. 572(1)(b) of the Companies Act 2014 Mr Anthony Fitzpatrick present all books, records, accounts and property of the company to Miles Kirby, liquidator of the company as soon as possible and no later than close of business on Monday, 15th August 2016. On 16th August, 2016, the company and Mr Fitzpatrick lodged a notice of appeal against the High Court order".

6. It can be noted also, though not particularly relevant to the issues now arising on this appeal, that having lodged a notice of appeal, Mr Fitzpatrick brought an unsuccessful application to this Court seeking a stay on the said order pending the determination of his appeal.

7. Not having received the books, records and other documents belonging to the company by close of business on the 15th August 2016, nor indeed by the 30th August 2016, the liquidator, Mr Kirby, issued a notice of motion on the 30th August 2016 seeking a number of reliefs, including orders of attachment and committal against Mr Fitzpatrick for his failure to comply with the order of Humphreys J. dated 10th August 2016.

8. That motion was grounded on two affidavits, one by Mr Kirby and another from John Healy, one of Mr Kirby's staff members. In his affidavit Mr Kirby outlined the general background to his appointment as official liquidator by the Court, and to the history of relevant events, and the fact that he had not yet received the book and records of the company from Mr Fitzpatrick as had been ordered by Humphreys J. by order dated 10th August 2016. He went on to express his concern that Mr Fitzpatrick was attempting to frustrate and prevent him from carrying out his role as court-appointed liquidator by, *inter alia*, removing records from the company's premises after Mr Fitzpatrick had ceased to be the liquidator of the company. At para. 7 of his affidavit, Mr Kirby stated:

"At a meeting which was arranged with Mr Fitzpatrick for the afternoon of Monday, 15 August 2016 in Limerick, two representatives of Mr Fitzpatrick refused to deliver any books, records, accounts or property to two members of my staff, namely Mr Patrick McCoy and Mr John Healy. Mr Healy swore an affidavit on 18 August 2016, outlining the events which took place. That was in the context of an application brought in the Court of Appeal by, among others, Mr Fitzpatrick, seeking a stay on the winding up of the company. I am aware that Mr Healy is to swear a further affidavit today for the purpose of the present application, outlining the same events."

9. Mr Healy's affidavit described in some detail the events of the 15th August 2016 as he sees them. Having noted that Mr Fitzpatrick was represented by solicitor and counsel at the hearing on 10 August 2016, he stated the following at para.10 of his affidavit:

"Following the conclusion of the hearing, my colleague, Mr Patrick McCoy of Ferris & Associates emailed Mr Fitzpatrick requesting to meet on the following day at the company's premises. Mr Fitzpatrick replied at 6.20 p.m. that evening, stating "the earliest contact to be made with you is Monday next, 15 August 2016 at 5.00 p.m.", and declining to meet the following day. On Monday, 15 August 2016, it was arranged that a meeting would take place at the company's premises at 5.00pm. At our request the meeting was then brought forward to 4.00 p.m, because Mr McCoy and I would be meeting Mr Robert McKay, valuer and auctioneer, at the company's premises at 3.15 p.m. I beg to refer to an exchange of emails in this regard, at Tab A of the Booklet."

10. At paras. 18 et seq. Mr Healy described what occurred at 4pm on 15th August 2016, being the time that had been arranged to meet with Mr Fitzpatrick at the company's premises as described above. He stated:

"18. By appointment, we had arranged to meet with Mr Fitzpatrick at the company's premises on 15 August 2016 at 4.00pm, in order to facilitate the handover of the company's books, records and property in his possession. Mr McCoy and I had travelled to Limerick on behalf of the Official Liquidator, as a matter of courtesy, in order to facilitate Mr Fitzpatrick.

19. Two individuals arrived at 4.45pm. They introduced themselves as Michael Murphy and John Kirby. Mr McCoy and I spoke with them and Mr McKay was also present as an independent witness.

20. Patrick McCoy asked them if they worked for Mr Fitzpatrick. Michael Murphy stated in response that he was a "representative of Mr Fitzpatrick's as you are the representative of Mr. Kirby". Patrick asked them what records they had with them to hand over. Michael Murphy stated that they had no records with them. Mr McCoy asked why. Michael Murphy stated that "there was a major problem with the Order" and that "the Court does not have jurisdiction to make an order in relation to another liquidator". Michael Murphy stated that they were acting on counsel's advice which they were bound to follow and that an appeal would shortly be lodged against the Order. He produced an email which he stated to contain such advice, which he did not hand to us, but on which a line was highlighted stating that the Court did not have jurisdiction to make an order against a liquidator. He stated that this email had just been received "half an hour ago".

21. Mr McCoy pointed out that there was a Court Order compelling Mr Fitzpatrick to hand over the records and property no later than 5.00pm on 15 August 2016. He said that the failure to hand over the records, particularly in relation to the employee claims and debtor collections was preventing the Official Liquidator from doing his

job and we needed to know where to begin working from. In response, Michael Murphy stated that all of this work was already done.

22. Mr McCoy stated that a witness had seen two individuals from Mr Fitzpatrick's office removing computer hard drives and records from the company's offices between 8.30am and 11.30am that morning. Michael Murphy responded that "the records were actually removed between 8:30am and 10:30am not 11:30am". Michael Murphy confirmed that he and his colleague, John Kirby had removed the records to safeguard same. Mr McCoy asked what they had removed and Michael Murphy stated that it was the "remainder of the books and records". Patrick asked if they had a list of what was removed. Michael Murphy said there was no list but it was mainly computers and hard drives.

23. Mr McCoy asked why the records had been removed given that Mr Fitzpatrick was no longer the liquidator. I pointed out to Michael Murphy that there was no stay on the Court Order relieving Mr Fitzpatrick as voluntary liquidator and appointing Myles Kirby as Official Liquidator. Michael Murphy stated that they did not accept the Court Order, and that, in his opinion, Mr Fitzpatrick was still the liquidator of the company. He repeated a number of times that Mr Fitzpatrick was "still the liquidator", despite the Court Order being clear that this was no longer the case.".

11. In response to the motion for attachment and committal, two affidavits were sworn. The first affidavit is sworn by Herbert Kilcline, solicitor on record for both the company and for Mr Fitzpatrick. Having made a preliminary point that in his opinion Mr Kirby had no standing to bring the motion without being granted leave to appear under O. 74, r.5 RSC, and further that Mr Fitzpatrick was not a proper respondent to the motion, he stated at para. 4 as follows:

"4. I am instructed that Mr Kirby's agents attended at the company's factory premises to accept delivery of company material on 15 August 2016. The court order specifies Mr Kirby as the intended recipient and our client had not agreed to hand over the books and records to other parties. In any case, the factory had been locked by the landlord and it was not possible for my client to deliver relevant items to Mr Kirby's agents. The Order of Mr Justice Humphries required amending on 15 August 2016 and my office filed a notice of appeal and seeking a stay on the same date. I am instructed that my client was never personally served with a copy of the order of Mr Justice Humphries with the penal endorsement. My office received a letter from Maples (solicitors for Mr Kirby) dated 18th August 2016 which, inter alia, stated:

'We are in receipt of the said Notice of Motion which is returnable from 19th August 2016 in the Court Of Appeal. Having considered the matter, our client does not propose to issue a motion seeking the attachment and committal of your client pending the outcome of your application to the Court of Appeal for a stay".

12. In the same affidavit, under a heading '**Details of determined efforts by Mr Fitzpatrick to deliver relevant items to Mr Kirby**', Mr Kilcline then refers to a letter dated 26th August 2016 which he wrote to Messrs. Maples & Calder, solicitors from Mr Kirby, and in which he stated, *inter alia*, the following:

"As you are aware, Section 644 (2) (b) (i) of the Companies Act 2014 states: 'the former liquidator shall deliver custody of the relevant items to the new liquidator'. My client desires to make an arrangement to give effect to the foregoing provision. On Friday, 2 September 2016 my client proposes to deliver custody of all relevant items to your client at my client's offices at Clonmoney House, Newenham Street, Limerick. I respectfully suggest that your client to liaise with my client to agree a

mutually suitable time on 2nd September 2016 for the delivery of the relevant items to your client".

13. Mr Kilcline then avers that notwithstanding this letter, no such time was offered by Mr Kirby and further that his office was surprised to receive a letter from Maples on the same day which attempted to revisit the events of 15th August 2016 already referred to. He also stated "my client instructs that he never instructed Mr Kirby to send staff to Limerick on 15th August 2016 and my client intends to comply with the order of the court".

14. At paragraph 7 of his affidavit, Mr Kilcline referred to his further letter to Messrs. Maples & Calder dated 28th of August 2016. He refers to a passage from the said letter in which, *inter alia*, the following is stated:

> "... My client has proposed an arrangement to implement compliance with the order and with section 644 (2) (b) (i) of the Companies Act 2014 which states: "the former liquidator shall deliver custody of the relevant items to the new liquidator". Neither the Order [nor] the Companies Act stipulates any time limit or venue for the delivery of the relevant items to take place so the only reasonable presumption is that it is to take place as soon as practicable. To this end, Mr Fitzpatrick proposes to deliver custody of all relevant items to your client on 2nd September 2016 at Clonmoney House, Newenham Street, Limerick. Your client may nominate any time on that date which suits him. If your client has any particular difficulty with taking delivery of the relevant items on 2nd September 2016 then he may propose an alternative subsequent date and my client will endeavour to accommodate. However, my client feels that an effort should be made to effect delivery on 2nd September 2016 in order that the liquidation may proceed without further delay. My client denies that he, or any agents on his behalf, obstructed your client's agents in any way on 15th August 2016 and he is a stranger to the allegations in your letter ... As my client is making

arrangement to deliver the relevant items to your client on a specific day at a specific venue in the very near future, we see no basis for any application to court in this regard. The only matter in issue between our respective clients is the time of delivery of the respective items. This issue may be instantly resolved by your client nominating a time on 2nd Sept or else by nominating a subsequent date if 2nd Sept does not suit him. This is a timetabling issue, not a legal issue and may be resolved by our respective clients liaising with each other."

15. Mr Kilcline then went on to express surprise that he received a letter from Messrs. Maples & Calder dated 30th August 2016 threatening a motion. He responded *inter alia* by saying that his client was awaiting contact from Mr Kirby in order to arrange a specific time on 2nd September 2016 for the delivery of the relevant items "in accordance with the order of the court and with s.644 of the Companies Act 2014". He went on to say that it was in the interests of all parties concerned that such an arrangement be put in place as soon as possible, and further that having regard to Mr Fitzpatrick's repeated requests that Mr Kirby would make an arrangement for the delivery of the relevant items on 2nd September 2016, it was "unnecessary and wasteful for any motion to be issued to compel him to do a task which he was seeking your client's cooperation to do". He went on to state that he would be relying upon that letter in relation to the question of costs of defending the motion, which it appeared to him was unnecessary in the circumstances.

16. This affidavit went on to state that Mr Kirby did not make arrangements as had been requested and he refers to the fact that subsequently he received a reply "seeking to have the books and records delivered to Mr Kirby at his office, which was after the motion had been issued and served on me". He went on to state:

"I say my client is willing and always was willing to deliver the books and records to Mr Kirby from our client's office and nowhere is it specified that my client should travel to Dublin with a van of books and records and property of the company".

17. Mr Fitzpatrick also swore a replying affidavit. He refers to what he considers to be the lack of engagement by Mr Kirby in relation to firming up on arrangements for the handover of the book and records of the company, and says that at all times he was ready and willing to hand same over, but that Mr Kirby failed to make the necessary arrangements in this regard. He considers Mr Kirby's behaviour to have been unreasonable and intransigent. Prior to those particular averments, Mr Fitzpatrick stated as follows at para. 4 of his affidavit in relation to the events of the 15th August 2016 already referred to, as follows:

"4. In response to paragraph 7,I say that the factory premises had been locked by the company's landlord without my consent (even though I had paid the rent to 14th August 2016). On 13th August 2016 Mr Madden, the landlord, contacted me to advise that he, in turn, had been contacted by Myles Kirby to advise that he was now acting as official liquidator appointed by the High Court. Arising from this contact, Mr Madden advised that he had changed all the locks to the premises and held the keys in his possession. His objective was to hold control over the building subject to negotiations he intended to have with Mr Kirby. In my capacity as former liquidator, I needed to ensure the company's records were protected and not in the landlord's control. I fully intended to hand over these records to the new liquidator in line with what the Court had ordered. With the knowledge that there were some of the books/records and computer hard drives remaining at the company's offices, which had previously been under my security and control having changed these locks and a potential breach of security of these records was now a possibility as third party

appeared to be in control of the premises, I decided to instruct my staff to attend at the company's offices on Monday, 15th August 2016, with a view to taking possession of any and all remaining computer hard drives and manual records including my own record for safekeeping. During the course of Monday, 15th August 2016, I was advised that Myles Kirby's representatives would be meeting both the landlord and a professional equipment valuer at the premises at 16.00hrs. Given my caretakers role as former liquidator and my obligations to safeguard same for hand over to the new liquidator I received an email from my solicitor confirming that the Court erred in law in directing the handover of books and records on that day and he was putting in an appeal for a stay on that basis. At approximately 16.00hrs I was verbally advised that a stay on the order and an appeal against the appointment of Myles Kirby were being entered in the Court and until these matters were finalised by the High Court I was to maintain the status quo and none of the books and records were to be handed over to Myles Kirby for the time being. My staff, Mr Michael Murphy and Mr John Kirby met with Mr Patrick McCoy of Ferris & Associates, who said he was representing Mr Myles Kirby, recently appointed official liquidator of the company and Mr John Healy at approximately 16.50hrs on Monday, 15th August 2016, and explained the position to them. In any case Mr Kirby had no personal appointment to meet me on 15th August 2016 and did not attend personally, as required by the Order. As Official Liquidator, Mr Kirby had a responsibility to attend to accept delivery of the books and records. No subsequent appointment was made by Mr Kirby to accept delivery of the books and records despite repeated requests by my solicitor for him to do so as evidenced by the inter partes correspondence between my solicitor and Mr Kirby's solicitors, which is exhibited in the affidavit of my solicitor, Herbert Kilcline, of 1st September 2016."

18. It was in the light of the above evidence which I have set forth in some detail that the trial judge concluded that Mr Fitzpatrick was beyond any reasonable doubt in breach of the order of the High Court dated 10th August 2016. The appellant has argued that the trial judge was wrong to so conclude, but also makes some more technical objections such as, *inter alia*, (a) that Mr Kirby lacked *locus standi* to bring such an application, (b) that the said order with a penal endorsement thereon was not properly served on Mr Fitzpatrick, (c) that it was an error to permit the attachment motion to proceed in circumstances where it was known that the order made under s. 572(1)(b) of the Companies Act was under appeal to this Court.

The trial judge's judgment

19. The trial judge firstly addressed the objection raised as to the standing of Mr Kirby to bring the application. She concluded on the 2nd September 2016 that as official liquidator he had such standing. I have no doubt whatsoever that she was correct to so conclude. I am satisfied that in fact he, as official liquidator, was the appropriate party to take any steps necessary to obtain the books and records of the company, including by way of application for the attachment and committal of any person, including Mr Fitzpatrick, who might be considered to be impeding the efficient progress of the liquidation and/or impeding the liquidator in the lawful exercise of his powers and functions. In fact, it is difficult to see who else besides the official liquidator would have the necessary entitlement, and therefore standing, to bring such an application. He was, after all, the person to whom the High Court had directed that the books and records of the company were to be delivered by Mr Fitzpatrick in his official capacity as the duly court-appointed official liquidator.

20. The trial judge also referred to the fact that following some prompting from the Court on the 2nd September 2016 Mr Fitzpatrick and Mr Kirby reached some agreement as to how the books and records should be delivered to Mr Kirby. That delivery ultimately occurred in Athlone on the 5th September 2016, which led to counsel for Mr Kirby informing the trial judge on the 6th September 2016 that Mr Kirby was no longer seeking to have Mr Fitzpatrick attached and committed for his contempt, and nor to have his assets sequestered as sought in the motion. However, the trial judge stated that the question of an historic breach of the order remained a question to be determined, and how it ought to be dealt with. I will return to that question later on.

21. The trial judge is to be commended for "prompting" the parties to come to some consensual arrangement for the delivery of the books and records of the company to Mr Kirby. Having said that, it is extraordinary that it was only upon such prompting that common sense entered into the equation, to replace a completely unnecessary stand-off in relation to such a simple matter as the hand-over of documents.

22. The trial judge next addressed the objections raised by Mr Fitzpatrick that he had not been properly served with a copy of the order of the 10th August 2016 with a penal endorsement thereon. The trial judge noted that Mr Fitzpatrick's solicitor, Mr Kilcline had been served with a copy of the order with penal endorsement thereon, by email. Nevertheless, it was contended by Mr Fitzpatrick that this was not proper service, and that this alone merited the striking out of the application for his attachment and committal.

23. The trial judge concluded that service upon Mr Kilcline by email of a copy of the order with the penal endorsement thereon was sufficient service of the order upon Mr Fitzpatrick where Mr Kilcline was on record in the proceedings at all relevant times. It had been submitted that the wording of O. 41, 4. 8 RSC itself mandated that a copy of the order must be served by way of personal service upon Mr Fitzpatrick before he could be bound

by it. The respondent relied upon a judgment of mine in *Laois County Council v. Scully* [2007] IEHC 262 for his submission that personal service of the order was not required by the rule where service was effected upon his solicitor on record. The trial judge noted that the unsuccessful efforts of Ms. O'Reilly of the Revenue Commissioners to personally serve the order upon Mr Fitzpatrick as averred by her in her affidavit sworn on the 30th August 2016.

24. While the trial judge did not set out Ms. O'Reilly's efforts to effect personal service, it is worth doing so. Ms. O'Reilly stated that on the 11th August 2016 she attended at Mr Fitzpatrick's office at Clonmoney House, Newenham Street, Limerick at 2.40pm and spoke to his secretary informing her that she was there in order to deliver a document to him. She was informed that he was on a late lunch and was not available. This secretary texted Mr Fitzpatrick, but there was no response to that, and Ms. O'Reilly was requested to wait a while to see if a response could be got from Mr Fitzpatrick. Ms. O'Reilly asked if the secretary could sign for the document, but she declined, and stated that Mr Fitzpatrick himself would have to authorise someone else to sign for the document. It appears that Ms. O'Reilly left for a while and returned at 3.38pm and on that occasion the secretary informed her that legal advice had been received from Mr Kilcline advising that nobody in Mr Fitzpatrick's office was authorised to sign for the document. Ms. O'Reilly stated also that she did not know whether or when Mr Fitzpatrick would be returning to his office. At that stage Ms. O'Reilly simply left an envelope containing the document, addressed to Mr Fitzpatrick, on a ledge next to the secretary's desk, and departed. She returned again on the 15th August 2016 in an attempt to serve the order on Mr Fitzpatrick personally at his office. On that occasion she was informed by the same secretary that Mr Fitzpatrick was unavailable to sign for the document, and that neither was there any other person who was

in a position to do so, including her. She again left a copy of the order in an envelope addressed to Mr Fitzpatrick in the place where she had done so on the 11th August 2016.

25. What is not in doubt is that Mr Kilcline was on record for Mr Fitzpatrick both when the order was made and thereafter, and that Mr Fitzpatrick was represented in court by solicitor and counsel on the 10th August 2016 when the order was made. What is also not in doubt, indeed it is not even submitted to the contrary, that Mr Fitzpatrick was fully aware that the particular order had been made. He decided to lodge an appeal against it, as he was entitled to do, but he was aware that the lodgment of an appeal did not operate to stay the operation of the order and his obligation to comply with it. Having lodged the appeal, he was refused a stay on the order by the Court of Appeal pending the determination of the appeal.

26. It is also not in doubt that Mr Fitzpatrick did not comply with the order in respect of the delivery of the books and records of the company by close of business on 15th August 2016. He states in his replying affidavit that he did not and was not wilfully withholding these books and records, and then blames Mr Kirby for failing to make an appointment to attend to his office in order to have these books and records delivered to him. That in my view does not absolve Mr Fitzpatrick from seeking to comply with the order that was made in the presence of his own solicitor and counsel. If he had any issue with the wording of the order for lack of clarity as to what was required of him there was nothing to prevent him from seeking clarification or a more specific direction. In my view Mr Fitzpatrick was under an obligation to do what was ordered to be done under the order once he became aware of the order.

27. This is not a case where the application for attachment and committal needed ultimately to be proceeded with. Such enforcement applications are in the main aimed at compelling compliance with the order. They are coercive measures in the main, and to be

followed through upon only where their coercive purpose is frustrated or fails to achieve compliance. Indeed, the words of the penal endorsement required to be put on the copy order to be served makes that purpose clear. It was through the good offices of the trial judge that a consensual arrangement for delivery of the documents was made. It was no longer necessary thereafter for the court to consider the application for attachment and committal. But the trial judge was entitled to consider whether Mr Fitzpatrick had failed to comply with the terms of the order, and to consider what if any penalty short of attachment and committal was appropriate.

28. In fact, once attachment and committal were no longer being pursued by the respondent, given that albeit late in the day the order was complied with, the question of whether or not personal service of a copy of the order with penal endorsement was required fell away as a relevant issue. The question of whether the appellant had failed to comply with the order, in other words in breach of it, was a separate question which involves a consideration of whether the appellant was aware that the order had been made requiring him to do something by a particular date, and whether he either did or did not do it as ordered. The determination of that discrete matter is not in my view dependent upon service, personal or otherwise, of the particular order, once it is clear that the person who is required by the order to do the thing ordered is fully aware of what has been ordered to be done. In this case what was required to be done was clear, and Mr Fitzpatrick was aware of what he was required to do. It was to deliver to Mr Kirby the books and records of the company by close of business on the 15th August 2016. He knew where Mr Kirby's office was. He makes the point that he could not be expected to put all the books and records of the company into a van and drive to Mr Kirby's office. But he misses the point in so submitting. The order was clear in respect of what had to be done. Mr Fitzpatrick nor his lawyers ever sought to suggest to the High Court that Mr Fitzpatrick would not know

where to deliver the books and records to. If they had, the matter would have been easily addressed.

29. I fully appreciate that Mr Fitzpatrick may have been disappointed to say the least that the High Court replaced him as voluntary liquidator by Mr Kirby. I have no doubt that Mr Fitzpatrick felt that such an order was made in error, hence his appeal against it to the Court of Appeal. But that does not entitle Mr Fitzpatrick to indulge in what I consider to have been a tactic of frustrating the High Court's order by conducting himself as he did, as deposed to by both Mr Healy and Ms. O'Reilly. A reasonable interpretation of his actions as evidenced by those affidavits, and which I would accept as to their veracity, is that Mr Fitzpatrick was intent upon making it as difficult as he could for the order to be implemented. In saying that I am not overlooking that he has averred that he offered to hand over the documents if Mr Kirby would specify a time and date on which he would call to collect the materials. But it is not up to Mr Fitzpatrick to impose an obligation upon Mr Kirby in the face of an order that placed the obligation upon him to deliver the materials to Mr Kirby.

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

31. As I have said, issues such as the requirement for personal service of a copy of the order with penal endorsement did not arise given that the application for attachment and committal were not proceeded with by the respondent. I refrain therefore from making any determination of the question of service, and the reliance placed upon my judgment in

Laois County Council v. Scully, which was a case decided on its own facts and circumstances.

32. In truth the main issues argued on this appeal were the question of *locus standi* of the respondent to bring the applications for reliefs sought in the notice of motion dated 30th August 2016, and the question of whether there had been compliance with the requirement in O. 41, r. 8 RSC as regards service of the order. I have found against the appellant on those issues. In so far as other grounds are relied upon in written submissions and raised in the notice of appeal, I would uphold the trial judge. It is unnecessary to address them in any detail.

33. For these reasons I would dismiss the appeal.

The costs appeal and cross-appeal

34. The trial judge ordered that Mr Fitzpatrick pay 75% of the respondent's costs. The respondent cross-appealed that order on the basis that he should have been awarded 100% of his costs of the application.

35. The appellant submitted that in circumstances where all but one relief sought in the notice of motion was not granted, he should be awarded his costs in the High Court either as costs in the liquidation or as costs against Mr Kirby personally.

36. The appellant submits that there was no necessity for the motion for attachment and committal to be brought at all, given that Mr Fitzpatrick had requested Mr Kirby to make arrangements to call to his office to collect the books and records of the company. He suggested that the hearing of the motion was lengthened considerably by the respondent's application for a finding of contempt against Mr Fitzpatrick notwithstanding that by the time the motion was fully heard the books and documents had been handed over.

37. In view of the facts and circumstances as outlined above, it was undoubtedly correct that a costs order be made against Mr Fitzpatrick. The motion was clearly necessitated by the actions and inactions of Mr Fitzpatrick not complying with the order of the court as required by it. I agree that the motion should not have been necessary, since there was no intrinsic impossibility or even real difficulty in carrying out the terms of the order, despite the fact that an address for Mr Kirby's office was not stated. It is not as if that address was not well known to Mr Fitzpatrick. In circumstances where the order was complied with only when the court itself on the 2nd September 2016 prompted the parties to get together and make a suitable arrangement that the application for attachment and committal was no longer pursued. But in my view the trial judge was entitled to make an order for costs against Mr Fitzpatrick. She had a discretion in that regard, and an award of costs against him was an appropriate exercise of that discretion.

38. The question remains however as to whether it was an appropriate exercise of the trial judge's discretion to award only 75% of the costs against Mr Fitzpatrick. Under normal circumstances in *inter partes* litigation, the trial judge's exercise of discretion in relation to costs should not be lightly interfered with unless some manifest error of principle can be identified.

39. It appears that the reason that the trial judge stated for giving a discount of 25% to Mr Fitzpatrick was that he had received some advice from Mr Kilcline that he should not comply with the order made. I do not consider that the trial judge was correct to reduce the costs award for that reason, particularly where in the present liquidation proceedings it is in effect the creditors who will bear that 25% of the costs incurred by Mr Kirby in bringing the application. Such proceedings are very different in nature to normal *inter partes* litigation and different considerations are at play in relation to how the discretion as to costs should be exercised. Insolvency proceedings are brought for the benefit of the

general body of creditors. It remains a puzzle to me why Mr Fitzpatrick is so exercised in his opposition to the appointment of Mr Kirby as official liquidator where he is a professional chartered accountant who acts as a liquidator when requested to do so, and if he chooses to accept the appointment. It is unclear why in the present case he has chosen not only to oppose the petition by the Revenue Commissioners, but then to appeal against the order made appointing Mr Kirby to act as court-appointed liquidator. The liquidation is for the benefit of the creditors and not the liquidator, although clearly the liquidator is entitled to be remunerated for his work following appointment. His opposition to the petition involved no doubt a considerable cost incurred in the liquidation. It was heard over some three days in the High Court, notwithstanding that there was never any doubt about the insolvency of the company. These comments however do not determine how this cross-appeal should be determined. The question is whether the trial judge erred in principle, notwithstanding the wide discretion that she enjoys in relation to costs, by giving a reduction of 25% in relation to the costs otherwise to be paid by Mr Fitzpatrick.

40. In my view, given the collective nature of liquidation proceedings which are for the benefit of all the creditors of the company, the trial judge erred in the exercise of her discretion by reducing the award of costs to 75%. I would allow this cross-appeal and replace the costs order made and order that all the costs in the High Court be paid by Mr Fitzpatrick, those costs to be taxed and ascertained in default of agreement.