[2021] IEHC 110

THE HIGH COURT
CHANCERY

[2019 No.88COS]

IN THE MATTER OF BEGGASA LIMITED (IN RECEIVERSHIP)
AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

THE REVENUE COMMISSIONERS

APPLICANTS

AND

AENGUS BURNS AND PAUL MCCANN
(AS RECEIVERS AND MANAGERS OVER THE PROPERTY AND ASSETS OF BEGGASA LIMITED (IN RECEIVERSHIP))

RESPONDENTS

JUDGMENT of Mr. Justice David Keane delivered on the 19 February 2021

Introduction

1. The Revenue Commissioners ('Revenue') move for various directions and declarations of right, pursuant to s. 438 of the Companies Act 2014 ('the 2014 Act') against Aengus Burns and Paul McCann (together, 'the receivers'), as receivers and managers of the property of Beggasa Limited ('the company'). The receivers were appointed under a debenture originally held by Zurich Bank ('the bank'), secured by fixed and floating charges over the company's property. Revenue alleges that the receivers have failed to comply with the requirement under s. 440(1) of the 2014 Act to pay certain taxes as preferential debts of the company in priority to the bank's claim for payment of principal and interest under that debenture.

Background

2. The company was incorporated in 2006. It leased the premises known as the Shannon Oaks Hotel and Country Club in Portumna, County Galway, from the developer of that property, Cosmo Flood. The property comprised a hotel and 39 holiday apartments, both of which the company operated.

3. On 18 July 2007, the company entered into a debenture with the bank as security for loans that the bank made to the company under facility letters of 25 May 2007 and 17 December 2010. The debenture created fixed and floating charges over the company's assets.

4. Mr Flood mortgaged the property to the bank on the same date, as security for loans that the bank made available to him under separate facility letters of 25 May 2007 and 25 February 2009.

5. On 5 September 2011, the bank wrote to the company, asserting that it was in default on its loans and demanding immediate repayment of the aggregate sum of €1,603,502.59 in principal and accrued interest and fees.

6. On the same date, the bank wrote to Mr Flood in similar terms, demanding repayment by him of the sum of €22,165,873.72.

7. To compound those difficulties, two days later, on 7 September 2011, a fire caused extensive damage to the hotel building on the property.

8. Two days after that, by deed made on 9 September 2011, the bank appointed Aengus Burns and Paul McCann as joint receivers and managers over the company's assets secured by the debenture ('the company receivership'). By a separate deed made on the same date, the bank appointed the same persons as receivers over the property mortgaged by Mr Flood ('the Flood receivership')

9. By letter dated 28 February 2012, the bank agreed to provide the receivers with a loan facility of up to €293,000 to fund those receiverships.

10. On 1 December 2015, Revenue wrote to the receivers, outlining the company's outstanding PAYE and VAT obligations and inquiring about the dividend that would be available to the company's preferential creditors. The receivers replied on 11 December 2015 that, according to their records, the sum due to preferential creditors was €100,344, comprising the company's outstanding VAT and PAYE/PRSI liabilities, thus implying that Revenue was the company's only preferential creditor. The receivers' letter continued that the current draft estimated outcome statement showed an 80% dividend available to preferential creditors. On 15 December 2015, Revenue wrote to accept the receivers' proposal of the same date, whatever that may have been, confirming as they did so that the preferential payment due to them from the company was then €87,317.60, comprising PAYE/PRSI of €53,117.60 and VAT of €34,200.

11. Two and a half years later, on 13 June 2018, the receivers wrote again to Revenue, stating in material part:

> 'Please be advised that there is no dividend available to any class of creditor in the receivership. I do note that [we] confirmed in [our letter of 11 December 2015] that a dividend would be available to Revenue of c. €80k. However, this confirmation was issued in error and was not the correct position in the receivership.
>
> In this regard, I have enclosed at Appendix B the receivership's receipts and payments accounts prepared on a fixed and floating charge basis. Please note that the property was sold in 2016.
>
> Please note that the assets subject to the fixed and floating charges were the sale proceeds for the property including fixtures, fittings, hotel furnishings, apartment furnishings, apartment income, debtor receipts, salvage stock and marketing rebate.
>
> The only asset subject to the fixed charge was the insurance settlement received in relation to the damage caused by a storm at the Hotel. The assets captured by the floating charge only included the cash on-hand received at the commencement of the receivership and the debts collected in the receivership.

You will see in the enclosed receipts and payments account that the fixed charge holder was required to provide a loan facility in the receivership in the sum of €234,589 in order to fund and discharge receivership costs as they arose. Following the sale of the Property the fixed charge holder received a payment of €208,570 in relation to the loan provided to the receivership.'

12. The document at Appendix B to that letter is a combined statement of the assets charged by both the company and Mr Flood, intermingling the income and expenditure in the receiverships of each, while allocating those sums between fixed and floating charges. Some income or expenditure is attributed to the fixed charges; some to the floating charge; and some is apportioned between fixed and floating charges in the ratio of 72:28, which was applied by the receivers. So, for example, the receivers' drawdown of the bank's loan of €234,589.33 appears as a receipt in the fixed charge asset column; the company's cash in hand of €70,956.46 appears as a receipt in the floating charge asset column; and the partial repayment of the bank loan in the sum of €208,570, apportioned in the ratio 72:28, appears as a payment of €150,664.33 in the fixed charge asset column and one of €57,905.67 in the floating charge asset column.

13. Revenue wrote to the receivers on 18 August 2018, referring them to the text of s. 440 of the 2014 Act, then continuing:

'In your letter [to us] dated the 13th June 2013 you state that the fixed charge holder was required to provide a loan of 234,589 to fund the receivership and was repaid €208,570 in respect of the said loan. This appears to have been allocated as fixed €150,664.33 and floating €57,905.67.

It is Revenue's contention that the Preferential Creditors should have been paid before the loan repayment and, as such, the €57,950.67 should have been paid out to the creditors. Please advise why this did not occur having regard to the aforementioned provisions of [s. 440 of the 2014 Act].'

14. The receivers replied on 14 November 2018, stating:

'As indicated in our letter dated 13 June 2018, there is no dividend available to the preferential creditors of [the company]. As previously advised [our] letter of 11 December 2015 is incorrect and should not have been issued.

It is the nature of receiverships where there are insufficient funds available to a receiver that the secured charge holder is required to provide funding to the receiver after his appointment in order to enable the receiver appointed to discharge all costs incurred.

There was a requirement for the secured charge holder to provide a drawdown facility to the receiver in order to fund the day to day costs in the receivership. Please note that there was significant outlay required in order to secure and

maintain the Property following our appointment up until the date the sale of the Property was completed.

The provision of this drawdown facility was on the basis that the funds provided for in the receivership would be repaid out of the assets realisation achieved after all receivership costs were paid.

The secured charge holder received only a partial repayment of the drawdown loan facility provided.'

15. Revenue wrote to the receivers on 11 February 2019, stating:

'You have indicated repeatedly that the fixed charge holder suffered losses in relation to a loan facility provided to the company, and as a result certain floating charge asset realisations were applied against those losses. This runs contrary to s. 440 of the Companies Act 2014, as you were advised in [our] letter of 10th August 2018.

Please confirm within 7 days from the date of this letter that, contrary to your previous assertions, the floating charge realisations in this receivership will be made available to the preferential creditors, [subject to the deduction of] the reasonable costs incurred in the realisation of those assets only.'

16. By letter dated 27 February 2019, the receivers responded:

'Please note that following receipt of your letter legal advice was sought in respect of the order of priority. In this regard, it is agreed that [s. 440(1) of the 2014 Act] provides that before the joint receivers can apply the proceeds realised in discharge of the amounts owed to the debenture holder, they are obliged to first adhere to "the provisions of part 11 of the Act, relating to preferential payments" and pay preferential creditors before any distribution to the floating charge holder.

Accordingly, it is accepted that the preferential creditors should be paid before all other "debts" of the winding up.

However, it is noted that [s. 617 of the 2014 Act] provides that costs, charges and expenses incurred in the realisations of assets shall be paid out of the property of the company in priority to "all other claims", including any debts owed to preferential creditors.

It is also noted that [s. 617(4) of the 2014 Act], gives the repayment of a loan the same priority as a "cost or expense" of the winding up, once the loan was used for costs, charges or expenses.'

Procedural history

17. An originating notice of motion issued on behalf of the receivers on 5 March 2019. It is grounded on an affidavit of Tom Blake, an assistant principal in the Collector General's Division of Revenue, sworn on the same date.

18. On behalf of the receivers, Mr Burns swore an affidavit in reply on 10 May 2019.

19. Aileen Stack, an administrative officer in the Collector General's Division, swore a further affidavit on behalf of Revenue on 20 June 2019.

20. Mr Burns swore a further affidavit on 31 January 2020.

21. The hearing of the application commenced before me on the afternoon of 20 October 2020 before resuming, and concluding, two days later on 22 October.

The application

22. The present application is brought pursuant to s. 438 of the 2014 Act, which provides in material part:

> '(1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performance or otherwise, by the receiver, of his or her functions, that is to say:
>
> (a) ...
> (v) a creditor of the company;
> ...
> and, on any such application, the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just.
>
> (2) An application to the court under *subsection (1),* except an application under that section by the receiver, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed action or omission of the receiver as the court may require.'

23. As a creditor of the company, Revenue applies for the following directions and declarations of right:

1. A declaration the receivers failed to comply with the provisions of s. 440 of the 2014 Act in that they discharged certain claims made by the debenture holder in part from assets secured by the bank's floating charge over the company's assets, in priority to the claims of the preferential creditors of the company.

2. A declaration that the receivers, in failing to pay any dividend to the company's preferential creditors, have failed to comply with the requirements of s. 440 of the 2014 Act.

3. An order directing the receivers to discharge the payments due to the preferential creditors of the company in accordance with s. 440 of the 2014 Act.

4. An order determining the sum of money that should have been made available to pay the preferential creditors of the company or an order giving directions on how to determine that sum.

The law

24. Section 440 of the 2014 Act provides, in material part:

> '(1) Where ...
>
> (a) a receiver of the property of a company is appointed on behalf of the holders of any debenture of the company secured by any charge created as a floating charge by the company...
>
> then, if the company is not at the time in the course of being wound up, the debts, which in every winding up are, under the provisions of *Part 11* relating to preferential payments, to be paid in priority to all other debts, shall be paid out of any assets coming into the hands of receiver or other person taking possession as mentioned above in priority to any claim for principal or interest in respect of the debentures.'

25. Part 11 of the 2014 Act consolidates the law on the winding up of companies. Within that part, Chapter 7 deals with the distribution of a company's assets in a winding up. Section 617 is the first section in that chapter. It provides:

> '(1) All costs, charges and expenses properly incurred in the winding up of a company, including the remuneration of the liquidator, remaining after payment of –
>
> (a) the fees and expenses properly incurred in preserving, realising or getting in the assets, and
>
> (b) where the company has previously commenced to be wound up voluntarily, such remuneration, costs and expenses as the court may allow to a liquidator appointed in such voluntary winding up,
>
> shall be payable out of the property of the company in priority to all other claims and shall be paid or discharged in the order of priority set out in *sub-section (2).*
>
> (2) The costs, charges and expenses referred to in *sub-section (1)* shall, subject to any order made by the court in a winding up by it, be liable to the following payments which shall be made in the following order of priority, namely:
>
> (a) First – In the case of a winding up by the court, the costs of the petition, including the costs of any person appearing on the petition whose costs are allowed by the court;
>
> (b) Next – Any costs and expenses necessarily incurred in connection with the summoning, advertisement and holding of a creditors' meeting under *section 587*;

(c) Next – The costs and expenses necessarily incurred in, and about, the preparation and making of, the statement of the company's affairs and the accompanying list of creditors and the amounts due to them as required by section *587(7);*

(d) Next – The necessary disbursements of the liquidator, other than expenses properly incurred in preserving, realising or getting in the assets as provided for in *sub-section (1);*

(e) Next – The costs payable to the solicitor for the liquidator;

(f) Next – The remuneration of the liquidator;

(g) Next – The out-of-pocket expenses necessarily incurred by the committee of inspection (if any).

(3) *Subsection (4)* applies in relation to a person who has provided funds to discharge any such costs, charges or expenses (other than costs or expenses referred to in *subsection 2(b)* or *(c)* as are referred to in *subsection (1).*

(4) Such person shall be entitled to be reimbursed to the extent of the funds so provided by him or her in the same order of priority as to payment out of the property of the company as would otherwise have applied to the costs, charges or expenses concerned.'

26. Later in Chapter 7 of Part 11 of the 2014 Act, s. 621 identifies specific categories of debt to be paid in priority to all other debts – or, differently put, the payments to be accorded preference – in a distribution. It is not in dispute that the company's outstanding PAYE/PRSI and VAT liabilities are preferential debts under s. 621(2) of the 2014 Act.

The debenture and the deed of appointment of the receivers

27. The powers and duties of a receiver appointed by a debenture holder are principally contractual and equitable in nature. They are now supplemented – for receivers appointed after 1 June 2015 – by the express statutory powers conferred, and duties imposed, in Chapter 3 of Part 8 of the 2014 Act. Nonetheless, in considering the powers and duties of any receiver, the starting point remains the terms of the debenture under which that receiver has been appointed and the terms of his or her deed of appointment.

28. Before considering the relevant powers and duties conferred on the receivers in this case, it is worth noting the principal obligations to the bank that the debenture imposed on the company.

29. At clause 2.1 of the debenture, the company covenanted with the bank to repay the secured liabilities, defined to include all monies then *or at any time after that* due and owing by the company to the bank. Revenue's argument centres on this particular covenant.

30. Over twelve enumerated sub-clauses (3.1.1 to 3.1.12), the company gave the bank a fixed charge over each of twelve separate categories of its assets, notable among which are: its chattels (3.1.4); all debts, revenues, claims and money due to it, other than book debts (3.1.5); its insurance benefits and insurance proceeds (3.1.6); its intangible assets, including its goodwill (3.1.7); the benefit of its licences (3.1.8); its rights, title and

interest in its receivables and debts, other than book debts (3.1.9); its receivables account (3.1.10); its rights, title and interest in any lease, licence, guarantee or other security (3.1.11); and the benefit of any covenants, agreements and rights it held in respect of any property (3.1.12).

31. At clause 3.1.13 of the debenture, as continuing security for the payment and discharge of the secured obligations, the company gave the bank a first floating charge over its book debts; its entire undertaking; and all its other property, assets and rights, present and future, including but not limited to all such property, assets and rights over which the bank also had a fixed charge, should that charge prove ineffective in whole or in part. Under clause 1 of the debenture, the company's secured obligations were defined to mean all moneys, obligations and liabilities that it was covenanting to pay or discharge to the bank.

32. Under the deed of appointment made on 9 September 2011, the bank appointed Messrs Burns and McCann as receivers and managers over the secured assets to the intent that they should exercise all the powers conferred on them and on the bank under the debenture or by law.

33. Under clauses 7.4 and 7.4.5 of the debenture, the receivers were given the power to do, in their own names or in the name of the company, the following:

> 'for the purpose of exercising any of the powers, authorities and discretions conferred on [them] by or pursuant to this Deed and/or of defraying any costs, charges, losses, liabilities or expenses (including [their] remuneration) incurred by or due to [them] in the exercise thereof and/or for any other purpose, to make advances or to borrow or raise money either unsecured or on the security of the Secured Assets (either in priority to, pari passu with or subsequent to the security hereby created or otherwise) at such rate or rates of interest and generally on such terms and conditions as [they] may think fit *which borrowings shall be a receivership expense....'*
>
> (emphasis supplied)

34. Thus, the debenture expressly granted the receivers the power to borrow money, in their own names or that of the company, either unsecured or on the security of the secured assets, as a receivership expense.

35. Clause 7.5 of the debenture is worth quoting in full. It states:

> 'Any monies received by the bank or by any receiver shall, after the security hereby constituted has become *enforceable but subject to the payment of any claims having priority to this security*, be applied for the following purposes and unless otherwise determined by the bank in the following order or priority (but without prejudice to the right of the bank to recover any shortfall):-

7.5.1 in payment of *all costs charges and expenses of and incidental to the appointment of any receiver and the exercise of all or any of the powers aforesaid and of all outgoings paid by and receiver and liabilities incurred by the receiver in the exercise of his powers including, but without limitation, any borrowings incurred by the receiver*; and

7.5.2 in payment of remuneration to any receiver at such rate as may be agreed between him and the bank (or failing such agreement at such rate as is fixed by the bank) without being limited to the maximum rate specified in [s. 24(6) of the Conveyancing Act 1881]; and

7.5.3 in or towards payment and discharge of the *secured obligations*; and

7.5.4 any surplus shall be paid to the [company] or other person entitled thereto.'

(emphasis supplied)

36. Hence, the debenture makes clear that any receivership borrowings are distinct from, and to be repaid in priority to, the company borrowings secured by it.

The receivership loan

37. The €293,000 loan facility letter of 28 January 2012, identifies the bank as lender and Mr Burns, as an appointed receiver and manager over certain assets of Cosmo Flood and the company, as borrower.

38. At clause 7.4 of the loan facility letter, the bank acknowledged that, when demanding repayment of the loan, it would discharge all outstanding costs and commitments of Mr Burns as receiver, insofar as there were insufficient funds in the receivership to do so, and that it would indemnify him in that capacity for all costs, liabilities and expenses properly incurred in the receivership as a result of the bank's demand.

39. Clause 8 of the loan facility identifies the purpose for which it was provides as follows:

(a) €90,000 including VAT to fund the ongoing maintenance of the 39 apartments; and

(b) €202,950 including VAT to fund an arbitration claim.

40. Clause 9 of the loan facility letter identifies the security for the loan as the fixed charge that the bank held over the property of Mr Flood.

Relevant aspects of the conduct of the receivership

41. The first Burns affidavit contains the following material averments.

42. The loan funding provided by the bank was essential to the conduct of the receivership, since the hotel on the property was largely destroyed by the fire that occurred on 7 September 2011, two days before the appointment of the receivers.

43. The arbitration claim that was to be funded up to the sum of €202,950 concerned a dispute over the insurance cover for the loss and damage the company incurred due to the fire in the hotel.

44. The funds that were ultimately drawn down and the purposes for which they were actually applied, according to the receivers, are summarised in the following table.

Date	Purpose	Amount (€)
2 March 2012	Insurance premium, Dalata management fee, utility costs, caretaker wages, security costs and various other costs	72,358.25
27 March 2012	Non Principal Private Residence (NPPR) and household charges	11,700.00
22 July 2013	NPPR	7,800.00
8 August 2013	Local Property Tax (LPT), NPPR, repairs, utility costs, receivers fees	34,000.00
14 March 2014	Insurance premium – Jan 14 for 12 months	22,102.08
25 April 2014	Receivers fees, security costs, insurance, tax advice fees and other various receivership costs	86,629.00
		234,589.33

45. On behalf of the receivers, Mr Burns avers that the payments just described were essential to the conduct of the receivership. Of the loan amount of €234,589.33 that was drawn down, the receivership was ultimately only able to repay €208,570.00 from the realisation of the secured assets.

46. As receivers over the whole of the property of the company, appointed by the bank as the holder of a debenture secured by a floating charge, the receivers were required under s. 319(2) of the 1963 Act and, later, s. 430(3) of the 2014 Act, to file abstracts in the Companies Registration Office ('CRO') every six months showing:

(i) the assets of the company taken into their possession since their appointment, and the estimated value and proceeds of sale of any such assets since their appointment,

(ii) their receipts and payments during that period of 6 months, and

(iii) the aggregate amount of all receipts and payments during all preceding periods since their appointment.

47. The receivers filed fourteen such abstracts, covering in aggregate the period between 9 September 2011 and 8 September 2018. In compiling those abstracts, the receivers included the assets, receipts and payments of both the Flood and company receiverships because, as Mr Burns avers on their behalf, they considered that the most practical and

comprehensive approach, given the shared income stream in the receiverships and the cross-collateralisation of assets in the debentures.

48. In his averments on behalf of the receivers, Mr Burns endeavours to clarify the position concerning two separate insurance claims dealt with in the receivership. In the 'Receipts' section of the Appendix B document, a figure of €200,000 appears in the fixed charge receivership column against the heading 'insurance settlement'. That corresponds to the insurance claim receipt of €200,000 that appears in the receivers' abstract for the period between March and September 2015. The settlement concerned arose from a claim for storm damage caused to the roof of a building in 2014. In contrast, the reference in the receivership loan facility letter to an anticipated draw down of €202,950 to fund an arbitration claim against Allianz plc relates to an entirely separate claim for fire damage to the hotel.

49. On the methodology the receivers employed to identify the assets of the company that were subject to the floating charge, Mr Burns avers as follows:

> 'The receivers conducted themselves in the receivership in a professional and appropriate manner. The income which was received into the receivership was split between the fixed and floating assets in a correct manner. The methodology of splitting assets between the fixed and floating assets was explained to representatives of [Revenue] previously but unfortunately the position was not accepted nor did any meaningful engagement take place. It is important to note that a professional valuer calculated a fair percentage split between loose fittings and furniture, which are floating charge assets, and buildings, which are fixed charge assets. This percentage split was also applied to apartment income and floating stock.'

50. For completeness, I should add that a perusal of the Appendix B document suggests that the receivers applied the same methodology in the apportionment of receivership costs and expenses. Hence, the receivers' outlay, legal fees, sales agents fees, marketing fees, security fees, management fees, and so on, were apportioned in the same way. The result is a balance sheet – in the form of Appendix B – in which overall receipts in the Flood and company receiverships of €1,338.916.50 are matched by overall payments in the same amount; overall fixed charge asset receipts of €935,114.61 are matched by fixed charge asset related payments in the same amount; and overall floating charge asset receipts of €403,801.89l are matched by floating charge asset related payments in the same amount.

The arguments

51. It is common case that, in the course of the receivership, the bank provided the receivers with loans in the aggregate sum of €234,589 to defray various receivership costs and expenses ('the receivership loans'), obtaining only part-repayment in the sum of €207,570 from the proceeds of sale of the property.

52. Revenue's argument that the receivers are in breach of s. 440(1) of the 2014 Act rests on two propositions. The first is that, as monies that became due and owing to the bank after the creation of the debenture, the receivership loans fall within the wide definition of 'secured liabilities' under that instrument. The second is that, as 'secured liabilities', the receivership loans became part of the principal or interest claimed under the debenture and were, thus, wrongly repaid in priority to the preferential claims of Revenue.

53. In response, the receivers argue that the reference in s. 440(1) to 'the debts which in every winding up are, under the provisions of *Part 11* relating to preferential payments, to be paid in priority to all other debts' must be read as expressly incorporating into a receivership the provisions of s. 617(1) in *Part 11* on the priority over all other claims to be accorded to the costs, charges and expenses properly incurred in a winding up, including the fees and expenses properly incurred in preserving, realising or getting in the assets, and that the repayment of the receivership loan is just such an expense. The receivers further rely on the incorporation by reference into s. 440(1) of sub-ss. (3) and (4) of s. 617, whereby the reimbursement of a person who has provided funds to discharge the said costs, charges or expenses is entitled to the same priority. Thus, they argue that the bank was entitled to that priority in the repayment of the receivership loans.

Analysis

54. The fundamental difficulty with Revenue's argument is that, in asserting that the receivership loans fall within the broad general definition of 'secured liabilities' in the debenture, it ignores the specific clause in the debenture that deems receivership borrowings to be a receivership expense and directs the repayment of receivership expenses, including receivership borrowings, in priority to the discharge of the secured obligations. In the interpretation of legal instruments, general provisions do not derogate from specific ones.

55. Further, while it is true that the relevant clause of the debenture makes all payments by the receivers subject to the payment of any claims having priority to that security, that does not avail Revenue, as the priority accorded to preferential payments under s. 440 of the 2014 is priority over 'any claim for principal or interest' under the debenture concerned, and not priority over that security more generally.

56. In *Buchler v Talbot* [2004] 2 WLR 582, the United Kingdom House of Lords had to consider, among a wider range of issues, the proper construction of s. 40 of the UK Insolvency Act 1986, which – in terms very similar to those of sub-ss. (1) and (4) of s. 440 the 2014 Act - provided:

> '40(1) The following applies, in the case of a company, where a receiver is appointed on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge.
>
> (2) If the company is not at the time in course of being wound up, its preferential debts (within the meaning given to that expression by section 386 in Part XII) shall be

paid out of the assets coming to the hands of the receiver in priority to any claims for principal or interest in respect of the debentures.

(3) Payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.'

57. The judgment of Lord Millett, with which Lord Hoffman concurred, sets out the following summary of the correct order of priorities under that section (at 602):

> 'Assets subject to a floating charge: (section 40 of the 1986 Act): (i) the costs of preserving and realising the assets; (ii) the receiver's remuneration and the proper costs and expenses of the receivership; (iii) the debts which are preferential in the receivership; (iv) the principal and interest secured by the floating charge; (v) the company'

58. Section 98 of the Companies Act 1963 ('the 1963 Act') was the equivalent under that statute of s. 440 of the 2014 Act. Sub-sections (1) and (5) of s. 98 were very closely similar, if not materially identical, to sub-ss. (1) and (4) of s. 440 of the 2014 Act, as originally enacted. The authors of Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue*, 2nd edn (Bloomsbury Professional, 2012) state (at para. 8.34):

> 'It was held by the House of Lords in *Buchler v Talbot* that the costs of preserving and realising the assets by the receiver and the receiver's remuneration, costs and expenses may be paid first out of the proceeds of the assets before preferential debts are paid. This would also appear to be a correct construction of s 98, which only gives preferential debts a priority to the claims of the debenture holder to 'principal and interest.'

59. That appears to me to be a correct statement of the law. Accordingly, whether the issue is approached as one of the proper construction of the terms of the debenture or one of the correct interpretation of the words 'any claim for interest or principal in respect of the debentures' in s 440(1) of the 2014 Act, I conclude that, although the receivers undoubtedly act as agents for the company both under the debenture and at common law, receivership borrowings (as a receivership cost or expense) are distinct from company borrowings secured by the debenture and are not affected by the priority given to preferential payments under that provision.

60. Although Revenue places strong emphasis on *Re Eisc Teoranta* [1991] ILRM 760 and *Re Manning Furniture Ltd (in receivership)* [1996] 1 ILRM 13 in its submissions, I do not think those cases are relevant to the issue I am required to decide. While each is authority for the settled proposition that the clear statutory duty to pay preferential debts in priority to any claim for principal or interest in respect of the debenture arises at the time of the receiver's appointment, that proposition is not in question here. Unlike *Eisc Teoranta*, there is no argument in this case that the statutory obligation to discharge preferential debts may be suspended until, and then displaced by, the appointment of a liquidator. Nor, unlike *Manning Furniture*, is there any argument in this case that the said

obligation is contingent upon the continuing existence of an undischarged claim for principal or interest under the debenture. The question here is not whether the receivers were, from the date of their appointment, statutorily obliged to pay preferential debts in priority to the repayment of interest or principal in respect of the debenture – they plainly were. Rather, the question is whether the bank's loan to the receivers was part of its claim for principal or interest in respect of the debenture or a separate receivership expense. Neither *Eisc Teoranta* nor *Manning Furniture* speaks to that discrete question.

61. I do not accept that the receivers are in breach of s. 440(1) of the 2014 Act in defraying €57,905.67 of the receivership loan of €234,589.33 from the pool of funds subject to the company's floating charge, as I conclude that the payment concerned is more properly described as the payment of a cost or expense in that receivership than as the repayment of principal or interest under the debenture.

62. For completeness, I should add that I am not persuaded by the receivers' argument that the 'costs, charges and expenses properly incurred in the winding up of a company' identified in s. 617 in Part 11 of the 2014 fall within the description in s. 440(1) of 'debts, which in every winding up are, under the provisions of Part 11 relating to preferential payments, to be paid in priority to all other debts'. As I have already indicated, I believe that the priority accorded to the proper costs and expenses of a receivership over all other claims against the assets covered by it derives from either the law of contract (that is, the binding terms of the debenture) or the common law on receivers (as described in *Buchler v Talbot*) and not from the application to a receivership by s. 440(1) of the statutory priority accorded to the costs of a winding-up under s. 617. It seems to me that the provisions of Part 11 of the 2014 Act relating to the preferential payment of debts are those of s. 621, supplemented by s. 622, whereas s. 617 refers to the antecedent priority of the costs of – rather than 'debts in' - a winding-up.

63. It is, thus, not open to the receivers to seek to rely on sub-ss. (3) and (4) of s. 617, which confer upon a person who has provided funds to discharge winding-up expenses the same priority in obtaining reimbursement as that accorded to the repayment of those costs and expenses under sub-ss. (1) and (2). As Revenue points out, it would not have been open to the receivers to do so in any event, as those provisions were introduced for the first time by the 2014 Act and came into force on 1 June 2015.

64. I base my conclusion on the proposition that, in granting priority in a floating charge receivership to certain preferential payments over any claim for principal or interest in respect of the debenture that created that charge, s. 440(1) does not displace the antecedent priority accorded to the repayment of receivership costs and expenses both by the terms of the debenture at issue and under the common law. As Murphy J concluded in *United Bars Ltd (In receivership) v Revenue Commissioners* [1991] 1 IR 396 on the equivalent provision in the 1963 Act (at 401):

> 'the purpose of s. 98 should be to equate the rights of preferential creditors in a receivership with those in a liquidation, not to improve on those rights.'

65. The funds in question were borrowed in the receivership and were applied to defray various identified costs and expenses associated with it. That loan was secured on the assets charged under the Flood debenture and not those charged under the company debenture. Further, the company debenture distinguishes between the loan obligations it secures and whatever borrowings there may in any receivership for which it provides. In those circumstances, I conclude that it would not be correct to characterise that receivership loan as 'a claim for principal or interest in respect of the debenture' and, thus, one subject to the priority of preferential payments under s. 440(1) of the 2014 Act.

66. It follows that I must refuse Revenue's application for each of the declarations sought at paragraphs 1 and 2 of its motion.

67. At paragraph 3 of its motion, Revenue seeks an order directing the receivers to discharge 'any losses suffered by the preferential creditors of the company' due to the receivers' breach of the requirements of s. 440(1) of the 2014 Act. At paragraph 4, it seeks an order determining the sum that the receivers should have paid out as preferential debts under s. 440(1).

68. Insofar as the basis for seeking those reliefs is that the receivership loan repayments were made in response to a claim for principal or interest in respect of the debentures, I have already rejected that argument.

69. However, in both the affidavit of Ms Stack and the submissions of counsel, Revenue raises other discrete complaints about the conduct of the receivership. For example, Revenue complains that the receivers may have improperly applied floating charge realisations to discharge fixed charge receivership costs, an allegation that the receivers stoutly deny. On Revenue's behalf, Ms Stack takes issue with the manner in which – or methodology whereby – the receivers have apportioned receipts and payments between fixed and floating charge assets. Indeed, Revenue argues that the receivers are in breach of the fiduciary duty to account both for the way in which they have exercised their powers and for the property which they have dealt with. Ferris J identified that duty in *Mirror Group Newspapers plc v Maxwell* [1998] BCLC 638 (at 648), a decision approved on numerous occasions by our courts. Further, in the course of oral submissions, counsel for Revenue suggested that there may be other preferential creditors of the company and that appropriate directions should be given to establish whether that is so.

70. Hence, it seems that Revenue also seeks the directions identified at paragraphs 3 and 4 of its motion as a preliminary step towards a wider review of the conduct of the receivership.

71. For my part, I do not accept that the power to give directions under s. 438 of the 2014 Act can, or should, be exercised in so broad or diffuse a manner.

72. Where a creditor of the company applies for directions under s. 438(1) of the 2014 Act on a matter connected with the receiver's performance of his duties, s. 438(2) stipulates that the application must be supported by such evidence as the court may require that the

applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver. In *Re HSS (in receivership*) [2011] IEHC 497, (Unreported, High Court, 28 October 2011, when considering s. 316(1A) of the 1963 Act, as amended, a provision almost identical to s. 438(2) of the 2014 Act,), Clarke J commented (at para. 4.10):

> '[I]t seems to me that the prejudice that is spoken of in s. 316(1A) is prejudice to the actual rights of individuals. In other words, a creditor applying under s. 316 needs to show that the creditor's rights might be unfairly prejudiced by any action (or, indeed, inaction) of a receiver. It does not give the Court some general jurisdiction to consider whether things are fair or unfair.'

73. In *Re A-Wear Ltd* [2016] IEHC 141, (Unreported, High Court, 18 March 2016), O'Connor J cited the decision in *Re HSS*, before elaborating that, to bring an application within the terms of the section, the burden is on an creditor to establish that the action (or inaction) of a receiver has prejudiced an established right that the creditor holds.

74. In that case, Revenue sought directions under s. 316 of the 1963 Act on whether it was correct to describe assets in eleven separate identified categories as covered by a fixed or a floating charge. In refusing to grant the specific directions sought by Revenue, save those to which the receiver had consented, O'Connor J concluded his judgment with these words:

> '54. ... However, it is open to [Revenue] to seek a more focussed application on another date if the parties think that it is desirable for directions to be made to allow evidence to be adduced.
>
> 56. It may help the parties with grievances relating to determinations by a receiver or liquidator concerning the categorisation of assets which fall within fixed charges or floating charges to explain the difficulties which the Court faces in an application to reverse a decision of a receiver as in this case. The onus remains on an applicant to adduce the relevant evidence. Focussed questions to a receiver should be answered with candour. In the absence of a substantive reply and where injustice can be established, directions may be given to produce a fair and transparent reply.'

75. In this case, Revenue complains, through the averments of Ms Stack, that the receivers have failed to adopt the correct approach to a fixed and floating charge receivership by failing to designate each asset (or category of assets) as specifically covered by either the fixed or floating charge. The receivers, through the averments of Mr Burns, trenchantly insist that the apportionment methodology they have adopted is entirely proper. While I do not overlook the potential significance of that controversy, it is not one that I can resolve on the affidavits before me.

76. There is also the prior difficulty that a creditor's application for directions under s. 438 must be accompanied by evidence of prejudice. It is not sufficient for Revenue to criticise the receivers approach; it must identify the unfair prejudice that it claims to have suffered

in consequence. A creditor must show evidence of prejudice to obtain directions, rather than seek directions to aid the search for evidence of prejudice. As O'Connor J pointed out in *A-Wear Ltd,* Revenue is perfectly entitled to direct focussed questions to the receivers. The receivers, who aver that they remain willing to engage, should answer those questions with candour. Should they fail to do so, then – depending on the circumstances – that may amount to evidence of prejudice sufficient to bring Revenue, as a creditor, within the scope of s. 438 of the 2014 Act. In other words, while appropriate directions may be a fitting remedy for unfair prejudice caused by a receiver's failure to engage, either properly or at all, the directions procedure is not intended to provide a creditor with an alternative to that engagement. As matters stand, I conclude that an application on the grounds identified is, at best, premature and, at worst, misconceived.

77. It follows that I must also refuse Revenue's application for the reliefs sought at paragraphs 3 and 4 of its motion.

Conclusion

78. The application for the reliefs set out in the notice of motion is refused.

Final matters

79. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

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

80. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be electronically delivered to the registrar (rather than physically filed in the Central Office of the High Court) within 14 days, to enable the court to adjudicate upon it.