[2021] IEHC 166

THE HIGH COURT
CHANCERY

[2019 No. 301 COS]

IN THE MATTER OF ELVERTEX LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN
ANTHONY J. FITZPATRICK AS LIQUIDATOR OF ELVERTEX LIMITED (IN LIQUIDATION)
APPLICANT

AND
JOHN O'SULLIVAN AND GERALDINE LYONS

RESPONDENTS

RULING of Mr Justice David Keane delivered on the 12th March 2021

Introduction

1. On 20 January 2021, I gave an *ex tempore* judgment refusing Mr Fitzpatrick's application for various reliefs against Mr O'Sullivan and Ms Lyons under ss. 596, 604 and 608 of the Companies Act 2014. To avoid confusion between the first respondent John O'Sullivan and his son, Roger O'Sullivan, I will refer to them for the remainder of this ruling as, respectively, Mr O'Sullivan Senior ('Snr') and Mr O'Sullivan Junior ('Jnr').

2. Each of the respondents now seeks an order against Mr Fitzpatrick for the costs of that application.

3. Mr Fitzpatrick states his intention to appeal against the refusal of the application and submits there should be no costs order against him (or, in the alternative, that a stay should be placed on that order pending a directions hearing in the Court of Appeal). Mr O'Sullivan Snr and Ms Lyons each seek their costs of the application against Mr Fitzpatrick personally.

4. To assist in the conduct of Mr Fitzpatrick's intended appeal and to give context to the costs ruling that follows, I will first describe the background to, and procedural history of, the application; next, briefly summarise the issues raised and evidence adduced in it; and then recapitulate – and, perhaps, expand upon – the ex tempore judgment that I gave.

Background

5. Mr Fitzpatrick was appointed liquidator of Elvertex Limited ('the company') on 19 February 2019. The company operated a business known as the Galleon Restaurant in premises at 210 Upper Salthill Road in the city of Galway ('the restaurant premises').

6. Mr O'Sullivan Snr and his wife, Nives O'Sullivan ('Mr and Mrs O'Sullivan'), purchased the restaurant premises in 1987. A restaurant named the Galleon Grill had been in operation there since the mid-nineteen sixties. In January of that year, the couple acquired a shelf company named Elverta Limited ('Elverta') to operate the restaurant business, which they renamed the Galleon Restaurant. Mr O'Sullivan Jnr was an employee of Elverta. In 2010, Mr O'Sullivan Snr, who was then in his late-sixties and was suffering from health problems, decided to retire and to liquidate Elverta, which was wound up between August of that year and February 2013, when it was dissolved. From then on, Mr and Mrs

O'Sullivan's principal source of income was the rent they received as owners and landlords of the restaurant premises. Mr O'Sullivan Snr is now 78 years old.

7. On 20 July 2011, Mr O'Sullivan Jnr incorporated the company. Mr and Mrs O'Sullivan agreed to lease the restaurant premises to the company, which commenced trading there on 1 September 2011.

8. On 24 April 2012, Mr and Mrs O'Sullivan, as landlords, and the company, as tenant, executed a formal lease of the restaurant premises ('the lease') for a term of 4 years and 9 months backdated to run from 1 September 2011. By a deed of variation made on 6 September 2017, the duration of the lease was extended to run instead for a period of 10 years from 1 September 2011. The deed of variation confirmed the terms of the lease in all other respects.

9. Under clause 3.1 of the lease, the company, as tenant, covenanted to pay the rent monthly in advance and to pay the service charge (effectively, the cost of insuring the premises) on demand. Under clause 3.11.1, the company was entitled to assign the lease with the landlord's consent in writing, which consent could not be unreasonably withheld. On the other hand, under clause 5.1, the landlords had a right to re-enter the premises and, by doing so, to terminate the lease in certain specified circumstances, including: (1) if any rent or other sum due under the lease was unpaid for 21 days after becoming due (whether formally demanded or not); or (2) if the company, as tenant, went into liquidation.

10. On 16 January 2019, Mr and Mrs O'Sullivan wrote to the company through their solicitors, asserting that it was in arrears of three months' rent and two years' service charges and demanding possession of the premises. The company ceased trading on 27 January. Mr O'Sullivan Jnr surrendered the keys on 1 February and Mr and Mrs O'Sullivan re-entered the premises that day, thereby terminating the lease.

11. Geraldine Lyons began working in the restaurant as an employee of Elverta in 1996 and continued working there as an employee of the company after it took over the operation of the restaurant in 2011. From 2012, Ms Lyons was a senior supervisor and, from April 2017, she was acting general manager, prior to the closure of the restaurant on 28 January 2019. On that date, with the assistance of the restaurant's head chef, Ms Lyons compiled an inventory of the fixtures and fittings in the restaurant premises ('the Lyons inventory').

12. Shortly after the restaurant closed, Ms Lyons approached Mr O'Sullivan Snr to express an interest in leasing the restaurant premises. Mr and Mrs O'Sullivan were anxious to continue receiving a rental income and to protect the goodwill in the restaurant premises from any loss that extended closure might cause. On 4 February, Ms Lyons signed an agreement to act as caretaker of the restaurant premises for Mr and Mrs O'Sullivan and, on 8 February, the restaurant re-opened. Since then, Ms Lyons has operated the restaurant as a sole trader, employing 33 staff.

13. On 15 February, the company entered a deed of renunciation with Mr and Mrs O'Sullivan, whereby it formally surrendered its interest in the lease of the restaurant premises in consideration for being released from its obligations under it ('the deed of renunciation').

14. The position of Mr and Mrs O'Sullivan is that, while the lease had already terminated in accordance with its terms when, as landlords, they re-entered the restaurant premises on 1 February, the execution of the deed of renunciation simplified the process of granting a new lease to Ms Lyons. For example, it facilitated Ms Lyons' subsequent application to the District Court for the transfer of the special restaurant licence attached to the restaurant premises from the company to her.

15. Mr Fitzpatrick contends that the deed of renunciation is invalid under s. 604 of the 2014 Act because it has given Mr and Mrs O'Sullivan an unfair preference over other creditors of the company. That is because Mr Fitzpatrick asserts that there was no valid prior termination of the lease, so that it remained an asset of the company until its renunciation. Since, as the parents of the sole director of the company, Mr and Mrs O'Sullivan fall within the definition under s. 220 of the 2014 Act of persons connected with a director, and since the deed of renunciation was executed within 2 years – in this instance, within 4 days - of the start of the winding up, Mr Fitzpatrick relies on the presumption that applies in those circumstances under s. 602(4) of the Act, whereby an act by a company in favour of a connected person is deemed to have been done to give, and to have given, that person an unfair preference over other creditors, and to be invalid accordingly, unless the contrary is shown. In the alternative, Mr Fitzpatrick submits that the deed of renunciation should be set aside under s. 608 of the 2014 Act as a disposal of the lease as company property, the effect of which was to perpetrate a fraud on the company, its creditors or members.

16. While I have not been shown the relevant Companies Registration Office ('CRO') records, it appears to be common case that Mr O'Sullivan Jnr was the sole shareholder in, and sole director of, the company at the commencement of its winding up. The documents I have seen include a certificate from Mr O'Sullivan Jnr, as chairperson of an extraordinary general meeting of the company on 19 February 2019, that it was resolved – presumably, by Mr O'Sullivan Jnr - that the company should be wound up as insolvent and that Mr Fitzpatrick should be appointed its liquidator. Those documents also include a directors' statement of the affairs of the company, as those affairs stood on 19 February. As sole director, Mr O'Sullivan Jnr estimated that the company then had a deficit of liabilities over assets of €1,464,041.

17. In the same statement of affairs, Mr O'Sullivan Jnr estimated that the assets of the company comprised: (i) fixtures, fittings and equipment worth €10,000; (ii) leasehold additions (whatever they may be) worth €12,000; (iii) cash on hand of €7,675; and (iv) stock worth €7,500, giving a total realisable value of €37,175, against preferential debts of €309,552 and unsecured debts of €1,195,664.

18. Shortly after his appointment, Mr Fitzpatrick attended at the restaurant premises, accompanied by Mr O'Sullivan Jnr, to conduct a stock take. Mr Fitzpatrick avers that he

valued the food and beverage items ('the stock') at €7,500 (plus VAT) and the fixtures, fittings and equipment ('the fixtures and fittings') at €53,390.

19. On 27 February, Mr Fitzpatrick wrote to Mr O'Sullivan Snr referring to the figures contained in Mr O'Sullivan Jnr's statement of affairs, before continuing in material part:

> 'I am alarmed to note ... that your solicitor is in the process of drawing up a lease with a view to delivering the inventory of fixtures and fittings to a third party, which assets are part of [the company]. These assets must be delivered to me as they are assets of the company and do not belong to you or any third party. Please desist from including these in the proposed lease.'

Mr Fitzpatrick went on to seek the return of the company's stock held on the restaurant premises or an equivalent cash payment.

20. Mr O'Sullivan Snr replied promptly, through his solicitors, on 1 March, seeking an inventory of the assets to which Mr Fitzpatrick was laying claim on behalf of the company.

21. On 25 March, Mr Fitzpatrick wrote back, stating 'the fixtures and fittings are currently under your control and you are best placed to provide a listing of same, the provision of such list I would appreciate as soon as possible.' It is very difficult to reconcile Mr Fitzpatrick's adoption of that position with his later averments to the effect that he had already by then carried out a stocktake at the restaurant premises and found fixtures, fittings and equipment there to which he had ascribed a realisable value of €53,390.

22. In the same letter, Mr Fitzpatrick adopted the position that the lease on which he now seeks to rely had ceased to exist because the deed of variation, extending its duration, was not executed until after the original term of the lease had expired and could not revive it. Mr Fitzpatrick now avers that he did so only because he was not then in possession of the full facts, although he does not identify what relevant facts he later learned, when he learned them, or why they caused him to change his position.

23. On 1 April, Mr O'Sullivan Snr, through his solicitors, wrote to Mr Fitzpatrick, setting out 'the relevant factual and legal history' as follows:

> '[Mr and Mrs O'Sullivan] purchased "The Galleon Grill" in February 1987 and they traded there as a restaurant and licensed premises with the benefit of all fixtures and fittings acquired by them for the premises up to the lease which was effected with the company by agreement of the 24th April 2012.
>
> [Mr and Mrs O'Sullivan] then leased the property to [the company]. That lease included the furniture, furnishings and fittings owned [by them]. That lease specifically identifies that the demised fittings "means the furniture, furnishings and fittings included in this demise and any replacement furniture, furnishing and fittings substituted therefor during the term". The term was extended but default in payment of rent occurred during the extensions leading to the surrender of the property including the furniture, furnishings and fittings.

> The only assets of [the company] on the property at the time of the surrender were the stock.'

24. On 10 April, Ms Lyons, as tenant, entered into a formal lease of the restaurant premises with Mr and Mrs O'Sullivan, as landlords, for a two-year term with a deemed commencement date of 1 March 2019 ('the new lease'). The Lyons inventory of fixtures and fittings is scheduled to that lease. It runs to four pages and over one hundred and forty categories of item, ascribing a specific value to each, amounting to an aggregate total value of €36,330. On the same date, Ms Lyons paid €7,500 to the solicitors for Mr and Mrs O'Sullivan in respect of the stock that was on the restaurant premises when she went into occupation of them.

25. On 4 June, through his solicitors Mr Fitzpatrick wrote to Mr and Mrs O'Sullivan, calling on them to cease and desist using the name "The Galleon Restaurant" or face legal action, before continuing in material part:

> '[Y]ou have not handed over other property belonging to the company situate within the premises at 210 Upper Salthill Road, Galway, mainly being equipment, furniture and crockery (list enclosed). This property is the property of the company, as is evidenced by [Mr Fitzpatrick's] inventory and the company is entitled to this. The enclosed schedule lists the property.'

26. While the list, inventory or schedule enclosed with that letter has not been exhibited, I am given to understand that it is the same as a document headed 'Galleon Inventory' later exhibited on affidavit by Mr Fitzpatrick (for ease of reference, 'the first Fitzpatrick inventory'). It is unsettling to note that the categories of item listed in the first Fitzpatrick inventory are identical in number, description and order of categories, and in quantity of items within each category, to those in the earlier Lyons inventory, right down to identical mis-spellings and typographical errors, given Mr Fitzpatrick's averment that he prepared his own inventory of fixtures and fittings to which he ascribed a realisable value of €53,390 when he conducted a stocktake at the restaurant premises shortly after his appointment as liquidator.

27. The solicitors for Mr O'Sullivan Snr wrote to those of Mr Fitzpatrick on 10 June, stating:

> '[Y]ou have forwarded to us an inventory which has already been the subject matter of correspondence with [Mr Fitzpatrick] and again our letter of the 1st April last remains un-replied to. [Mr and Mrs O'Sullivan's] position has been set out sufficiently in that letter. We take issue with [Mr Fitzpatrick's] re-assertion of title to that equipment.
>
> Entirely without prejudice and strictly on the basis that [Mr Fitzpatrick] is prepared to accept the value of the stock realised we have to hand in our client account a sum of €7,500 which is available to [Mr Fitzpatrick] but only when the claims advanced in his correspondence with us and [Mr and Mrs O'Sullivan] and the

threats, claim and intended actions as outlined in your letter of 4th June have been entirely withdrawn.'

28. A month later, on 11 July, Mr Fitzpatrick's solicitors wrote again in the following terms:

> 'The net issue remains. [Mr O'Sullivan Snr] is a "connected person" within the definition set out in the Companies Acts and he is directly or indirectly a beneficiary from what [Mr Fitzpatrick] believes is a "phoenix operation" trading from 210 Upper Salthill, Galway. [Mr O'Sullivan Snr] is the landlord of Galleon Restaurant's premises where the items detailed on the list of 4th June 2019 are being used and to which the company has an entitlement.
>
> [Mr O'Sullivan Snr] is part of the passing off of the new entity as the Galleon Restaurant in circumstances where his son allowed creditors to lose amounts as at the date of the liquidation of [the company].
>
> [Mr Fitzpatrick] also instructs us €7,500 your client agreed to pay previously is for stock … [which is] not part of the items detailed on the schedule included with our letter of 4th June 2019.'

29. After a further exchange of letters on 19 and 25 July, in which each side reiterated its position, the solicitors for Mr and Mrs O'Sullivan wrote on 26 July to confirm that they were authorised to accept service of proceedings.

Procedural history

30. On 2 August, during the Long Vacation, Mr Fitzpatrick made an *ex parte* application to Barton J for liberty to effect short service of an originating notice of motion. I do not know what grounds of urgency were invoked – certainly, none are obvious, and any claim of urgency is entirely belied both by the desultory nature of the prior correspondence and by the subsequent history of the application. Nonetheless, Barton J granted the application, and, on 6 August, Mr Fitzpatrick procured the issue of an originating notice of motion (wrongly described simply as a notice of motion, as though it were an interlocutory application in proceedings already in being), returnable for the following day.

31. That motion is grounded on an affidavit of Mr Fitzpatrick, sworn on 2 August ('the first Fitzpatrick affidavit') and an affidavit of Herbert Kilcline, Mr Fitzpatrick's solicitor, sworn on 4 August ('the Kilcline affidavit'). The first Fitzpatrick affidavit exhibits the first Fitzpatrick inventory, which is identical to the earlier Lyons inventory, save that the value ascribed to each individual category of item and the aggregate total of those values are absent from it.

32. When the matter came before me on 7 August, counsel for Mr Fitzpatrick sought to proceed with the application. Unable to see any urgency that would require it to be dealt with during the Long Vacation, I adjourned it to give Mr O'Sullivan Snr and Ms Lyons a reasonable opportunity to respond.

33. Mr O'Sullivan Snr swore a replying affidavit on 4 October ('the first O'Sullivan affidavit'). Ms Lyons swore one on 8 October 2019 ('the first Lyons affidavit').

34. Mr Fitzpatrick swore two separate affidavits in response on 16 December 2019 ('the second Fitzpatrick affidavit') and 9 January 2020 ('the third Fitzpatrick affidavit'), both of which were filed on 10 January 2020.

35. The second Fitzpatrick affidavit exhibits another inventory of fixtures and fittings ('the second Fitzpatrick inventory'). The second Fitzpatrick inventory differs from the first in that values are ascribed to each category of item, and an aggregate total value of €53,369 is included.

36. The third Fitzpatrick affidavit exhibits yet another inventory ('the third Fitzpatrick inventory'). This one is in tabular, or spreadsheet, form. It differs from the first and second Fitzpatrick inventories in that both a value and a realisable value are ascribed to each category of item, neither of which corresponds with the value attributed to each category of item in the second Fitzpatrick inventory. It records an aggregate total realisable value of €28,388.

37. On 29 January 2021, Mr O'Sullivan Snr swore a further affidavit ('the second O'Sullivan affidavit'), exhibiting – although it is in fact a separate affidavit, which should have been separately filed – an affidavit of Barry Gavin, a partner in the solicitors' firm of W.B. Gavin & Company, sworn on the 29 January 2020 ('the Gavin affidavit'). Mr Gavin acted for Mr and Mrs O'Sullivan in respect of the forfeiture of the lease of the restaurant premises.

38. Mr Fitzpatrick swore two separate affidavits in response to the second O'Sullivan affidavit and the Gavin affidavit, each on 14 February 2020 ('the fourth and fifth Fitzpatrick affidavits').

39. On the same date, Ms Lyons swore a further affidavit ('the second Lyons affidavit') and, on 18 February, Emer Johnson, who had been employed by the company as an accounts manager and who was then carrying out similar work in a self-employed capacity for Ms Lyons, swore an affidavit ('the Johnson affidavit') on Ms Lyons' behalf.

40. Mr O'Sullivan Snr swore another affidavit on 27 February ('the third O'Sullivan affidavit').

41. Finally, Mr Fitzpatrick swore three separate additional affidavits on 13 March, one in response to the Johnson affidavit, another in response to the third O'Sullivan affidavit, and the last in response to the second Lyons affidavit ('the sixth, seventh and eighth Fitzpatrick affidavits').

42. The arrival in Ireland of the Covid-19 pandemic caused some delay in arranging for the application to be heard.

43. The hearing took place before me on 20 January 2021 and I gave an ex tempore judgment at its conclusion.

The reliefs sought

44. In the course of the hearing on 20 January 2021, counsel for Mr Fitzpatrick applied for leave to amend the originating notice of motion that had issued almost eighteen months earlier on 6 August 2019. In the absence of any objection on behalf of Mr O'Sullivan Snr or Ms Lyons, I permitted that amendment.

45. While neither iteration of the motion is a model of clarity, the four reliefs that Mr Fitzpatrick now seeks are, in substance, as follows: -

    (1) An order pursuant to s. 596 of the 2014 Act directing the respondents, or either of them, to surrender immediately to Mr Fitzpatrick the property described in the third Fitzpatrick inventory, a copy of which is appended to the amended originating notice of motion.

    (2) Further or in the alternative, an order pursuant to s. 608(2) of the 2014 Act directing the respondents, or either of them, to deliver up to Mr Fitzpatrick the property described in the third Fitzpatrick inventory or to pay Mr Fitzpatrick the sum of €55,000 instead.

    (3) An order pursuant to s. 596 of the 2014 Act directing Ms Lyons to surrender immediately the sum of €7,500 to Mr Fitzpatrick, as the value of the company's stock when the liquidation commenced.

    (4) A declaration that the deed of renunciation of the lease of the restaurant premises is invalid under s. 604(4) of the 2014 Act as an act done with a view to giving Mr and Mrs O'Sullivan, as connected persons, an unfair preference over other creditors, or an order pursuant to s. 608(2) of that Act setting aside the deed of renunciation, as a disposal of company property the effect of which was to perpetrate a fraud on the company, it creditors or members.

Argument and analysis

i. section 596 of the Companies Act 2014

46. The written legal submissions on behalf of Mr Fitzpatrick did not refer to the decision in *Re SJK Wholesale Ltd (In liquidation)* [2020] IEHC 196, (Unreported, High Court (Keane J), 29 April 2020) and while, in oral argument, counsel for Mr Fitzpatrick did acknowledge the existence of that decision, he did not engage with it.

47. The judgment in that case states (at para. 49):

> `... I cannot accept the proposition that s. 229(1) of the Act of 1963 or s. 596(1) of the Act of 2014 empowers the court in any circumstance to order summarily the delivery up to the liquidator of property to which the company in liquidation is, or appears to be, entitled. The only summary jurisdiction of that kind vested in the court is the one created and constrained by the provisions of s. 673 of the Act of 2014 (and, formerly, by s. 236 of the Act of 1963 in conjunction with the old O. 74, r. 91 of the RSC). Under both the Act of 1963 and that of 2014, a liquidator is

> authorised to take custody of any property to which a company in liquidation is, or appears to be, entitled, but the court may only summarily direct the delivery up to the liquidator of property to which the company is prima facie entitled and, even then, such direction can only be made against a person in one of a number of specified categories, each of which demonstrates a close connection with, or involvement in, the company or its affairs.'

48. In reliance on that analysis, I concluded that Mr Fitzpatrick's application for the first and third reliefs that he seeks must fail.

49. Lest I was wrong in that conclusion, I went on to consider, as I had done in *SJK Wholesale Ltd*, whether on the evidence before me I could be satisfied that the items concerned are the property of the company.

ii. the fixtures and fittings

50. The evidence on the ownership of the fixtures and fittings listed in both the Lyons inventory and each of the Fitzpatrick inventories is, in broad summary, as follows.

51. In the first Fitzpatrick affidavit, Mr Fitzpatrick avers that he has reconciled the contents of the first Fitzpatrick inventory with the accounts of the company thereby establishing that the company acquired all of the fixtures and fittings now present in the restaurant premises to the value of €53,390 while trading there between 2011 and 2019. How that inventory and those accounts were reconciled in that way is not explained and is difficult to comprehend. The affidavit exhibits the company's unaudited financial statements for the year ended 31 August 2017 and points to the statement in the appended notes that the company's fixed assets on that date – to the value of €154,542 – included 'fixtures, fittings and equipment' to the value of €119,986. Of course, those statements were prepared by Mr O'Sullivan Jnr as the sole director of the company and the accountants' report appended to them contains the usual recital that those accountants had not been instructed to carry out any review or audit of the statements' contents, before concluding:

> 'For this reason, we have not verified the accuracy or completeness of the accounting records or information and explanations that you have given to us and we do not, therefore, express any opinion on the statutory financial statements.'

52. I pause here to note that, as the sole member and director of the company at the material time, Mr O'Sullivan Jnr is the absent prince in this production of Hamlet. Given the serious allegations that Mr Fitzpatrick makes against Mr O'Sullivan Snr and Ms Lyons based on statements he attributes to Mr O'Sullivan Jnr, it is extraordinary that Mr Fitzpatrick is silent on what steps, if any, he has taken to obtain sworn evidence from him.

53. In the first O'Sullivan affidavit, Mr O'Sullivan Snr avers that he and his wife acquired all of the furnishings, fixtures and fittings in the restaurant premises and that those items were already there when the company began to trade on 1 September 2011. To the extent

that the company acquired any replacement or substitute items, Mr O'Sullivan Snr points to the lease, which defines 'demised fittings' by reference to an inventory annexed to it as Appendix A (which is not in evidence), together with 'any replacement furniture, furnishings and fittings substituted therefore during the term.' Mr O'Sullivan avers that the statement of Mr O'Sullivan Jnr in the company's unaudited financial statements for the year ending 31 August 2017 that the company's fixed assets included fixtures, fittings and equipment with a value of €119,986 is, in effect, unsupported and insupportable.

54. In the first Lyons affidavit, Ms Lyons avers that all of the fixtures and fittings that were used by the company when it traded there between 2011 and 2019 had been used by Elverta before that and are still in use now, save for a limited number of replacement items that have become the property of the landlords under the terms of the lease.

55. The second Fitzpatrick affidavit exhibits the liquidator's statement of account of 5 November 2012 on the winding up of Elverta, which records that its 'furniture, fittings and utensils etc' were realised for €5,000. Mr Fitzpatrick asserts that this establishes the disingenuousness of Mr O'Sullivan Snr's claim that he and his wife own the fixtures and fittings in the restaurant premises. For my part, I fail to see how that follows. There is no evidence before me identifying the specific assets covered by that description, nor any evidence identifying the purchaser of them. Mr Fitzpatrick then repeats his earlier unsupported averments that the company acquired the fixtures and fittings during the currency of the lease and that those assets have a realisable value of €53,000.

56. In the third Fitzpatrick affidavit, Mr Fitzpatrick again repeats the unsupported assertion that the company purchased the fixtures and fittings during the period in which it traded at the restaurant premises.

57. In the fourth Fitzpatrick affidavit, Mr Fitzpatrick avers that he has reviewed the company's unaudited 2017 financial statements and has satisfied himself that the value of €119,986 attributed there to the company's 'fixtures, fittings and equipment' is correct and was arrived at in accordance with standard accounting practice. How Mr Fitzpatrick can have substantiated a bare assertion that was neither audited nor reviewed by the company's accountants at the material time simply by reviewing it now he does not attempt to explain.

58. On the evidence I have just described, I concluded that Mr Fitzpatrick could not succeed in an application for an order directing the surrender to him of the property described in the Lyons inventory and the various Fitzpatrick inventories, even if the court had jurisdiction to grant such an order under s. 596 of the 2014 Act.

59. I reached that conclusion for the following reasons:

    (1) Mr Fitzpatrick bears the burden of proof on this – his – application.

    (2) This is an application for final orders against Mr O'Sullivan Snr and Ms Lyons, so that – as with an application for judicial review – the exception under Order 40, rule

4 of the Rules of the Superior Courts ('RSC'), whereby statements of belief with the grounds thereof may be admitted as evidence *on interlocutory motions*, does not apply; *RAS Medical Ltd v Royal College of Surgeons in Ireland* [2019] 1 IR 63 (at 86).

(3) Thus, there is no meaningful conflict between the sworn direct evidence of Mr O'Sullivan Snr that he and his wife own the relevant property, corroborated by the sworn direct evidence of Ms Lyons that the property was present in the restaurant premises prior to 2011, and the inadmissible and unsupported statements Mr Fitzpatrick attributes to Mr O'Sullivan Jnr that the company purchased that property while trading at the restaurant premises between 2011 and 2019.

(4) Mr Fitzpatrick cannot rely on the provisions of the Civil Law & Criminal Law (Miscellaneous Provisions) Act 2020 for the purpose of his application because he has not identified the business records that he seeks to prove and he has not complied with the procedural requirements under s. 15 of that Act that would allow that to be done.

(5) Mr Fitzpatrick did not apply for leave to cross-examine Mr O'Sullivan Snr or Ms Lyons. As Clarke CJ pointed out in RAS Medical Ltd (at 88 and 90), it is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned.

(6) Even if the hearsay of Mr O'Sullivan Jnr in unsupported statements to Mr Fitzpatrick or in the company's financial statements were admissible evidence on this application, and I have found that it is not, it would be entitled to limited weight at best.

(7) Even if a contested issue of fact did properly arise in accordance with the rules of evidence, it would be impermissible for me to attempt to resolve it on the basis of affidavit evidence or documentation alone; *RAS Medical Ltd* (at 89).

60. Thus, I could not be satisfied that the company owns the fixtures and fittings at the restaurant premises. Rather, I have concluded that, on the balance of probabilities, they belong to the owners of the restaurant premises, Mr and Mrs O'Sullivan.

iii. s. 608 of the Companies Act 2014 and the fixtures and fittings

61. On the same evidence and for the same reason, I concluded that Mr Fitzpatrick's application for an order under s. 608 of the 2014 Act, directing Mr O'Sullivan Snr or Ms Lyons to deliver up the fixtures and fittings to him, must also fail. The situation before me was very different from that in *Le Chatelaine Thudicum Ltd v Conway* [2010] 1 IR 529 in which a landlord, who was owed both rent and money for goods delivered, took possession of stock and cash that was the property of the debtor company shortly before it went into liquidation. Here, Mr Fitzpatrick failed by a large margin to satisfy me that the

fixtures and fittings at issue are the property of the company. It follows I cannot be satisfied that Mr and Mrs O'Sullivan's retention of them was a disposition of company property, much less one with the effect of perpetrating a fraud on the company, its creditors or members.

62. Mr Fitzpatrick's application in the alternative for an order directing Mr O'Sullivan Snr or Ms Lyons, or both, to pay him '€55,000 and costs' in lieu of delivering up the property to him failed both for the reasons already given and because it would be impossible to be satisfied that the value he attributes to the property is correct.

63. One of the few hearsay statements of Mr O'Sullivan Jnr that Mr Fitzpatrick does not seek to rely upon – indeed, which he ignores – is the recital in the directors' statement of affairs to the company creditors' meeting on 19 February 2019 that the company held fixtures, fittings and equipment with a value of €10,000.

64. In exhibiting the first Fitzpatrick inventory, which is identical in content to the earlier Lyons inventory, save that the former omits the item values (totalling €36,330) that are contained in the latter, the first Fitzpatrick affidavit instead attributes an unsupported total value of €53,390 to those items. The second Fitzpatrick inventory, exhibited to the second Fitzpatrick affidavit, includes values for each item, supporting the same total value of €53,390. However, the third Fitzpatrick inventory, exhibited to the third Fitzpatrick affidavit, includes both an acquisition value and a realisable value for each category of item, neither of which corresponds with the value given to each in the second Fitzpatrick inventory, and provides a total realisable value of €28,388.

65. To cement, rather than dispel, this confusion, Mr Fitzpatrick's amended originating notice of motion now seeks an order directing the payment to him of '€55,000 and costs' in lieu of the delivery up to him of the appended inventory of items, which inventory records on its face that those items have a total realisable value of €23,080, to which 23% VAT is added, bringing the total figure up to €28,388.40. Nowhere in any of the eight affidavits that Mr Fitzpatrick has sworn for the purpose of the present application does he acknowledge, much less attempt to explain, these glaring discrepancies.

66. For those reasons, I concluded that Mr Fitzpatrick's application for the second relief he seeks must fail.

iv. the stock

67. The third relief that Mr Fitzpatrick seeks is an order, under s. 596 of the 2014 Act, directing Ms Lyons to pay over to him the sum of €7,500 representing the value of the stock on the restaurant premises at the commencement of the winding up.

68. The following facts are not in dispute. Ms Lyons acknowledges that, having been in occupation of the restaurant premises as a sole trader since February 2019, she has had the benefit of company stock there to the value of €7,500. On 10 April 2019, Ms Lyons paid over that sum to the solicitors for Mr and Mrs O'Sullivan. Through her solicitors, Ms

Lyons confirmed to Mr Fitzpatrick that that had been done in a letter dated 28 June 2019. In the meantime, on 10 June, the solicitors for Mr O'Sullivan Snr wrote to those of Mr Fitzpatrick stating that the sum of €7,500 was available to him but only when his other claims against their client had been withdrawn.

69. In the first Fitzpatrick affidavit, Mr Fitzpatrick makes the unsupported allegation that Mr O'Sullivan Snr 'incorrectly pressurised' Ms Lyons to pay the sum of €7,500 to him rather than Mr Fitzpatrick. In the same affidavit, Mr Fitzpatrick avers that Mr O'Sullivan has failed to hand over that sum to Mr Fitzpatrick, despite Mr Fitzpatrick's request to him to do so, but does not acknowledge the contents of Mr O'Sullivan Snr's letter of 10 June and, indeed, omits it from the inter partes correspondence that he exhibits.

70. In the first O'Sullivan affidavit, Mr O'Sullivan Snr denies that he put any pressure whatsoever on Ms Lyons to make the payment of €7,500 to him. In the first Lyons affidavit, Ms Lyons avers that she was not incorrectly pressurised by Mr O'Sullivan Snr to pay him the sum of €7,500 but, rather, paid him that sum as the landlord from whom she received possession of the premises.

71. On the evidence I have just described, I concluded that Mr Fitzpatrick could not succeed in an application for an order directing Ms Lyons to pay him the sum of €7,500 as the value of the company's stock, even if the court had jurisdiction to grant such an order under s. 596 of the 2014 Act. I reached that conclusion for the following reasons:

    (1) Mr Fitzpatrick bears the burden of proof on this – his – application.

    (2) Even if s. 596 of the 2014 Act conferred the summary jurisdiction upon the court to order a person to surrender company property to the liquidator, the order sought by Mr Fitzpatrick is not one directing the immediate surrender to him of identified stock, but rather one directing Ms Lyons to make an immediate payment to him of €7,500. The stock that was on the premises on 19 February 2019 has in all probability been largely, if not entirely, consumed and replaced in the course of Ms Lyons' business. The uncontroverted evidence before me is that Ms Lyons has paid over the sum of €7,500 as the value of that stock to the solicitors for Mr and Mrs O'Sullivan who remain willing to make that sum available to Mr Fitzpatrick once his other claims against Mr O'Sullivan Snr have been disposed of. While I took the view that it was wrong for Mr O'Sullivan Snr, through his solicitors, to delay making that payment, I concluded that, even if I had the jurisdiction under s. 596 to direct him to surrender that sum immediately to Mr Fitzpatrick (although I have already found that I do not), there would remain the insuperable difficulty that Mr Fitzpatrick did not seek any such order against Mr O'Sullivan Snr but only one against Ms Lyons.

    (3) In so far as it is material, I could find no meaningful conflict between the sworn direct evidence of Mr O'Sullivan Snr and Ms Lyons that the former did not incorrectly pressurise the latter to pay him the sum of €7,500 and the unsupported, bare assertion of Mr Fitzpatrick that that is what occurred.

(4) Finally, on this question, even if a contested issue of fact did properly arise in accordance with the rules of evidence, it would be impermissible for me to attempt to resolve it on the basis of affidavit evidence or documentation alone; *RAS Medical Ltd* (at 89).

v. the lease

72. Mr Fitzpatrick submits that the deed of renunciation of the lease of the restaurant premises, made on 15 February 2019, whereby the company surrendered its interest in the premises in consideration for being prospectively released from its obligations under the lease, represents either an act done to give Mr and Mrs O'Sullivan an unfair preference over other creditors of the company, which is invalid under s. 604 of the 2014 Act, or a disposal of company property that perpetrated a fraud on the company, its creditors or members, which should be set aside as such under s. 608 of that Act.

73. Mr O'Sullivan Snr submits that the lease had absolutely ceased and determined when, as landlords, he and his wife re-entered the property on 1 February 2019, in exercise of their unequivocal entitlement to do so under clause 5.1 of the lease, since the rent and service charges had by then been in arrears for significantly longer than 21 days. As the forfeiture of the lease had already occurred, the company had no subsisting interest in the lease, so the deed of renunciation could give Mr and Mrs O'Sullivan no unfair preference over other creditors of the company.

74. In the first O'Sullivan affidavit, Mr O'Sullivan Snr avers that, while the deed of renunciation was unnecessary to effect the termination of the lease of the restaurant premises, it did facilitate the operation of the restaurant by Ms Lyons, in particular by making it easier to transfer the special restaurant licence from the company to her.

75. In the second Fitzpatrick affidavit, Mr Fitzpatrick avers broadly as follows. Mr and Mrs O'Sullivan did not re-enter the restaurant premises on 1 February 2019, as they aver, but instead obtained a wrongful surrender of the lease from Mr O'Sullivan Jnr. While the solicitors for Mr and Mrs O'Sullivan may have 'composed' a letter to the company, dated 16 January 2019, demanding possession of the restaurant premises for non-payment of rent, that letter was not 'acted on'. Mr O'Sullivan Jnr told Mr Fitzpatrick that Mr and Mrs O'Sullivan did not re-enter the premises.

76. In the Gavin affidavit, Mr Gavin avers that he wrote the letter of 16 January 2019 to the company on behalf of Mr and Mrs O'Sullivan, invoking their right to re-enter the restaurant premises and forfeit the lease for non-payment of rent and service charges. Mr Gavin further avers that Mr O'Sullivan Jnr formally surrendered possession of the restaurant premises on behalf of the company by handing the keys of the premises to him on the afternoon of 1 February 2019. In the second O'Sullivan affidavit, Mr O'Sullivan Snr avers that, on 1 February 2019, he and his wife re-entered the restaurant premises and took possession of it.

77. In the fourth Fitzpatrick affidavit, Mr Fitzpatrick avers that the fact that the forfeiture of the lease only came to his attention when the first O'Sullivan affidavit was filed in October 2019 calls into question whether that forfeiture actually occurred. Mr Fitzpatrick goes on to aver that the lease cannot have been genuinely forfeited on 1 February 2019 because, if it had been, the deed of renunciation made on 15 February 2019 would not have been necessary. Mr Fitzpatrick repeats the same argument in the fifth Fitzpatrick affidavit.

78. On the evidence I have just described, I concluded that Mr Fitzpatrick could not establish an entitlement to an order declaring the deed of renunciation invalid under s. 604 of the 2014 Act as an act done to give Mr and Mrs O'Sullivan an unfair preference over other creditors of the company, nor an entitlement to an order setting aside the deed of renunciation under s. 608 of that Act as a disposal of company property that perpetrated a fraud on the company, its creditors or members. I did so for the following reasons.

79. As I have already pointed out, Mr Fitzpatrick bears the burden of proof on this, his application for final orders against Mr O'Sullivan and Ms Lyons. Statements of belief are not admissible as evidence of the truth of those matters. Thus, there is no meaningful conflict between the sworn direct evidence of Mr O'Sullivan Snr and Mr Gavin, on the one hand, and the inadmissible evidence of Mr Fitzpatrick's expressions of his own belief and his attribution of statements to Mr O'Sullivan Jnr, on the other. Mr Fitzpatrick did not apply for leave to cross-examine Mr O'Sullivan Snr or Mr Gavin. Even if Mr Fitzpatrick has succeeded in properly raising a contest of facts on the affidavits, I could not resolve any such contest on the basis of affidavit evidence or documentation alone.

80. Under clause 5 of the lease, Mr and Mrs O'Sullivan (as landlords) had a right to re-enter the restaurant premises, thereby terminating the lease, should any rent or service charge remain unpaid for 21 days after becoming due (whether formally or legally demanded or not). The evidence that the company was more than 21 days in arrears of both rent and service charges is uncontroverted. I accept the sworn evidence of Mr Gavin that, on behalf of the company, Mr O'Sullivan Jnr surrendered the keys of the restaurant premises to him, as solicitor for Mr and Mrs O'Sullivan, on 1 February 2019. I accept the sworn evidence of Mr O'Sullivan Snr that he and his wife re-entered the restaurant premises on the same date. Thus, I am satisfied that the lease was forfeited on 1 February 2019.

81. It follows that the company held no property in the lease when the deed of renunciation was made on 15 February 2019. I do not accept that the execution of that deed undermines the claim that the lease had been earlier terminated for non-payment of rent by the landlords' re-entry onto the restaurant premises. I accept that the deed of renunciation had certain practical advantages that made its creation desirable despite the earlier termination of the lease.

82. Hence, I concluded that, because the company held no property in the lease when it was created, the execution of the deed of renunciation could not have been an act done with a view to giving Mr and Mrs O'Sullivan, as creditors of the company, an unfair preference over other creditors, nor could it have a disposition of company property the effect of which was to perpetrate a fraud on the company, its creditors or members.

vi. the new lease

83. In seeking to meet Mr Fitzpatrick's claims, Ms Lyons avers that, even if the deed of renunciation could be construed as an act done to give Mr and Mrs O'Sullivan an unfair preference over other creditors of the company, s. 604(5) of the 2014 Act would operate to prevent her rights from being affected, as she acquired a lease of the restaurant premises in good faith and for valuable consideration through Mr and Mrs O'Sullivan as creditors of the company.

84. In the third Fitzpatrick affidavit, Mr Fitzpatrick avers that Ms Lyons may have been a shadow director of the company. Under s. 221(1) of the 2014 Act, a shadow director is defined as a person in accordance with whose directions or instructions the directors of a company are accustomed to act. Thus, Mr Fitzpatrick is asserting, without adducing any evidence, that Mr O'Sullivan Jnr, as the sole director of the company, was accustomed to acting in accordance with the directions or instructions of Ms Lyons. In the same affidavit, Mr Fitzpatrick goes on to aver that Ms Lyons has commenced operating what he describes as 'a phoenix operation' from the restaurant premises. Courtney, *The Law of Companies* (4th edn, Bloomsbury Professional, 2016) (at para. 29.074) describes the 'so-called phoenix syndrome' as 'the situation where the controllers of a company that becomes insolvent by reason of their acts or omissions, walk away from their failed company (and especially its debts) and immediately re-establish themselves in a new company doing the same business, again availing of the advantages of limited liability.'

85. In the second Lyons affidavit, Ms Lyons denies on oath that she was a shadow director of the company.

86. On the evidence before me, I could not possibly conclude that Ms Lyons was a shadow director of the company or that her operation of the restaurant is an instance of the 'phoenix syndrome'.

87. It follows that, even if Mr Fitzpatrick had been able to establish that he was otherwise entitled to relief under s. 604 (although, by a large margin, he had not been able to do so), it would have been inappropriate to make an order under that section affecting the rights of Ms Lyons under the new lease.

The costs of the application

88. In his judgment for the Supreme Court in *Eteams International v Bank of Ireland* [2020] IESC 23, (Unreported, Supreme Court, 8 May 2020), MacMenamin J cited the following passage from the judgment of McKechnie J in *Revenue Commissioners v Fitzpatrick in his capacity as liquidator of Ballyrider Ltd (in liquidation*) (Unreported, Supreme Court, 31 July 2019) on the principles governing an application for costs against a liquidator ('the *Ballyrider* principles') (at para. 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-à-vis an adverse litigant will apply.

(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 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 [Companies Act 1963] and the relevant case law [under it]. 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.

These statements are of a generalised nature and may have to yield to individual but rather specialised circumstances where required.'

89. Applying the *Ballyrider* principles to the facts and circumstances of the present case, I conclude as follows.

90. First, these proceedings have been brought by Mr Fitzpatrick in his own name, so that the first principle is not engaged and, under the second, which is, the normal rule on costs applies; namely, that the costs of the application follow the event. The event in this

instance is the refusal of all of the reliefs that Mr Fitzpatrick has sought, so that he has entirely failed in his application and, as a corollary, Mr O'Sullivan Snr and Ms Lyons have been entirely successful in opposing it. Thus, Mr O'Sullivan Snr and Ms Lyons are each entitled to their costs of the application against Mr Fitzpatrick, subject to the discretion of the court under s. 169(1) of the Legal Services Regulation Act 2015 to order otherwise, having regard to the nature and circumstances of the case, and the conduct of the proceedings by the parties. I can find nothing in the nature and circumstances of this case, or in the conduct of the parties, that would warrant the exercise of that discretion to depart from the fundamental rule.

91. Second, applying the third principle, this is not a case in which public policy requires Mr Fitzpatrick, as liquidator of the company, to be protected against a personal costs order in litigation forced upon him in that capacity. Mr Fitzpatrick initiated this application.

92. Third, as the first principle is not engaged, nor is the fourth.

93. The fifth *Ballyrider* principle deals with the circumstances in which a liquidator will be entitled to have recourse to the assets of the company to discharge both his own costs and any costs awarded against him in proceedings taken in his own name for and on behalf of the company. Ordinarily, that recourse will be permitted, unless the liquidator has committed acts or omissions amounting to misconduct. In that context, 'misconduct' is defined to include – as examples – misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.

94. In considering the issue of misconduct, so defined, I consider the following features of the case to be significant.

95. Given the Supreme Court's decision on 5 February 2019 in *RAS Medical Ltd*, re-iterating the well-settled principles that govern the trial of issues on affidavit evidence, I am satisfied that Mr Fitzpatrick's application for orders under s. 604 and 608 of the 2014 Act was, from the outset in August 2019, doomed to fail. Given the decision of this court on 29 February 2020 in *SJK Wholesale Ltd*, Mr Fitzpatrick's application for orders under s. 596 was doomed to fail from that point on, unless he could persuade the court that that case was wrongly decided – something he did not attempt to do. Nonetheless, Mr Fitzpatrick insisted upon having his application heard and determined. As MacMenamin J observed in *Eteams International*, already cited, there comes a point when perseverance in litigation becomes pertinacity in error.

96. Further, the affidavits that Mr Fitzpatrick swore in profusion in support of his application are repetitive, argumentative, prolix and replete with a range of unsupported allegations against Mr and Mrs O'Sullivan and Ms Lyons, most notably: that Ms Lyons may have been a shadow director of the company; that Mr O'Sullivan Snr incorrectly pressurised Ms Lyons to pay him €7,500; that Mr and Mrs O'Sullivan falsely claimed to have terminated the lease by re-entering the restaurant premises at the beginning of February 2019; and that Ms Lyons is now operating a phoenix business there.

97. Moreover, while few affidavits nowadays entirely avoid it, Mr Fitzpatrick's eight affidavits are a particularly florid example of the problem that Clarke CJ described in the following way in *RAS Medical Ltd*, already cited, (at 90):

> '[94] One further matter of general application should be noted at this stage. It has in my experience, become increasingly common for affidavits to go well beyond setting out the facts. In some limited cases there may be merit in permitting the parties to set out the basis of their claim for relief in an affidavit, not least in circumstances where there may be no other documentation in which the case sought to be made is set out in writing. For example, in the context of an application for an interlocutory injunction, the only documentation necessarily before the court would be the notice of motion, the pleadings to date, and any affidavits filed together with the exhibits. Some leeway in such a situation may make senses so that the parties might be permitted to go beyond including material in affidavits which can properly be described as evidence.
>
> [95] However, there is a strong case to be made that, in many cases, the current style of drafting affidavits has gone far beyond what is appropriate even allowing for some leeway of the type which I have described. The place to make argument is either in written submissions filed with the court or in oral argument before the judge. It is not the function of affidavits to be argumentative about the issues in the case including issues of fact. It is one thing to swear a replying affidavit which gives a different account of events and points to what is said to be objective evidence which might suggest that the account being given should be regarded as credible and reliable in distinction to an account given by an opponent. It is another thing altogether to include in affidavits the sort of argumentative material which more properly forms the basis of submissions, whether written or oral.
>
> [96] The comments which I have just made concerning evidence, or uncontested evidence, contained in affidavits or in documents exhibited in affidavits, need to be seen against that background. Those comments apply to evidence properly so-called and not to argumentative material which could not reasonably be seen as forming part of the evidence in a case. It is important that parties should realise first that it is inappropriate to use affidavits as a form of quasi-legal or factual argument with a detailed analysis of the facts and arguments as to why the facts proposed on one side should be accepted. Such material has no place in an affidavit, which should be confined to evidence. Second, it is important that parties realise that the inclusion of argumentative material in an affidavit does not give it any greater status than it would have had if it had been included, where it should have been, in submissions written or oral.'

98. Several other features of the application give rise to particular concern:

    (a) The invocation of urgency in bringing an application that was said to require short service and the return of the originating notice of motion during the Long Vacation

in 2019, although no greater need for prompt resolution than that applicable to litigation generally has ever been established.

(b) The confusing and contradictory nature of the reliefs sought in the originating notice of motion, a problem exacerbated rather than resolved by the application to amend that document, made only at the hearing of the application almost eighteen months after the motion issued.

(c) The failure to explain what attempts if any had been made to obtain sworn evidence from the sole member and sole director of the company, Mr O'Sullivan Jnr, while inviting the court to prefer hearsay attributed to him over the sworn evidence of Mr O'Sullivan Snr, Ms Lyons and Mr Gavin.

(d) The failure, in doing so, to seek leave to serve a notice to cross-examine those persons in challenging the credibility of their sworn evidence.

(e) The unexplained fact that the Fitzpatrick inventories of fixtures and fittings, ostensibly prepared in the context of a stocktake conducted shortly after Mr Fitzpatrick's appointment as liquidator, are each identical in number, description and order of categories, and in quantity of items in each category, to the earlier Lyons inventory, right down to identical mis-spellings and typographical errors.

(f) The various different valuations of the same inventory of fixtures and fittings produced without explanation by Mr Fitzpatrick at various times, including the two conflicting valuations of that inventory now evident on the face of his amended originating notice of motion.

99. Having carefully considered the features of the application that I have just described, I conclude that Mr Fitzpatrick has breached the duty of care that he owes to the company as its liquidator in bringing and, to a still greater degree, in maintaining the present application. Mr Fitzpatrick's actions in doing so amounted to negligence, disentitling him to have recourse to the assets of the company to discharge either his own costs or those awarded against him in favour of Mr O'Sullivan Snr and Ms Lyons. This is not a case of mistake; Mr Fitzpatrick still contends, as he has from the outset, that he is entitled to the orders he seeks on the evidence he has adduced. In the first O'Sullivan affidavit, in adopting the position that the application was misconceived, Mr O'Sullivan put Mr Fitzpatrick on notice of his intention to seek his costs against him personally.

100. If this were a borderline case, it would be significant that Mr Fitzpatrick elected not to avail of the provisions of s. 631 of the 2014 Act, whereby he was empowered to apply to the court to determine any question arising in the winding up, including any question in relation to the proposed exercise by him of any power.

101. It would also be significant that Mr Fitzpatrick chose not to invoke the provisions of s. 687 of the 2014 Act, whereby he was empowered to convene a general meeting of the creditors of the company to ascertain their wishes before initiating the present

application, which had the potential, if unsuccessful, to significantly deplete the pool of funds available for distribution, if he were permitted to have recourse to it to discharge the associated legal costs.

102. In addition to seeking an order for her costs against Mr Fitzpatrick, Ms Lyons seeks a direction, under O. 99, r. 7(3) of the RSC, that she produce an estimate of her costs; to be followed by an order, under O. 99, r. 7(2), measuring a sum in gross to be paid to her in lieu of her adjudicated costs. Ms Lyons submits that this would avoid the additional costs and further delay associated with an adjudication. That submission assumes that Ms Lyons costs cannot, or will not, be agreed, and overlooks the additional cost and delay associated with a further adjudication in this court. For those reasons, I do not propose to accede to that application. Rather, I will grant the more usual order that Mr Fitzpatrick pay the reasonable costs of Mr O'Sullivan Snr and of Ms Lyons, to include all reserved costs, which costs are to be adjudicated upon in default of agreement.

103. Finally, Ms Lyons makes a novel application for an order directing that the sum of €7,500, representing the value of the stock held by the company at the commencement of the winding up, be paid into court to the credit of the company, pending the determination of separate plenary proceedings entitled *Elvertex Ltd (In Voluntary Liquidation) v Lyons*, Record Number 6175P of 2019. It appears that Allen J granted Ms Lyons an order for security for costs against the company in those proceedings on 11 September 2020, together with an order for her costs of that application, which orders are under appeal. Ms Lyons submits, and I accept, that if the order of the High Court is upheld on appeal, she will be entitled to her costs of that application in priority to all other claims in the liquidation, on the authority of the decision of McCarthy J for the Supreme Court in *Comhlucht Páipéar Ríomhaireachta Teo v Údarás na Gaeltachta* [1990] 1 IR 320 (at 331). In those circumstances, I see no reason to make any order in respect of the sum of €7,500, which should, as I have already indicated, form part of the pool of assets in the liquidation over which Ms Lyons will be able to claim that priority in that event.

Conclusion

104. In summary, I will make the following final orders:

(1) An order refusing each of the reliefs sought in the originating notice of motion.

(2) An order directing Mr Fitzpatrick to pay Mr O'Sullivan Snr and Ms Lyons their reasonable costs of the proceedings, to include all reserved costs and the costs of submissions, which costs are to be adjudicated upon in default of agreement.

(3) An order prohibiting Mr Fitzpatrick from having recourse to the assets of the company to discharge his own costs of the proceedings or those of Mr O'Sullivan Snr and Ms Lyons for which he is liable.

(4) An order staying the execution of the orders for costs in favour of Mr O'Sullivan Snr and Ms Lyons pending the first directions hearing before the Court of Appeal if an appeal is lodged within time.

Appearances

Ronnie Hudson BL for the applicant, instructed by Herbert Kilcline, Solicitor.

Joe Jeffers BL for the first respondent, instructed by Dillon-Leetch & Comerford, Solicitors.

Emily Farrell SC, with Elizabeth Donovan BL, for the second respondent, instructed by Geraghty & Company, Solicitors.