[2020] IEHC 57

THE HIGH COURT

[2017 No. 225 COS]

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

BETWEEN

DECLAN DE LACY

APPLICANT

AND

PAUL COYLE, MARGARET COYLE, ANDREW MOFFAT,
MALCOLM O'MAHONY, CATHERINE KENNEDY, DEIRDRE MURPHY AND DAVID KIERNAN

RESPONDENTS

AND

BETWEEN

PAUL COYLE

APPLICANT

AND

DECLAN DE LACY, MARGARET COYLE, ANDREW MOFFAT,
MALCOLM O'MAHONY, CATHERINE KENNEDY, DEIRDRE MURPHY AND DAVID KIERNAN

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 18th day of February, 2020

Background

1. On 29th June, 2017 Mr. Denis McHugh, a Dublin City Council rates collector, presented a petition to the High Court for the winding up of Decobake Limited. On the same day, the High Court (Gilligan J.) made an order appointing Mr. Declan De Lacy as provisional liquidator.

2. The petition was heard by the High Court (Keane J.) on 24th July, 2017 when an order was made that the company be wound up and Mr. De Lacy was appointed official liquidator.

3. Mr. Paul Coyle and Mrs. Margaret Coyle, the directors of the company, appealed to the Court of Appeal against the making of the winding up order. For the reasons given in a written judgment of Costello J., delivered on 25th June, 2019, with which Peart and McGovern JJ. agreed, [2019] IECA 169 Mr. and Mrs. Coyle's appeal was dismissed.

4. In the meantime, four motions had been issued in the High Court in the liquidation.

5. By the first, issued on 29th August, 2018 and originally returnable for 8th October, 2018, the liquidator sought directions as to the membership and composition of the committee of inspection.

6. By the second, issued on 5th October, 2018 and originally returnable for 12th November, 2018, Mr. Coyle sought an order for the removal of the liquidator for cause shown, alternatively an order annulling the liquidation, alternatively an order to convene a creditors' meeting and/or an extraordinary general meeting of the company, and a variety of other orders against the liquidator, and directed to the composition of the committee of inspection.

7. By the third, issued on 8th May, 2019 and originally returnable for 15th July, 2019, Mr. Coyle sought an order setting aside the winding up order and a declaration that Mr. McHugh did not have power or standing to present a winding up petition.

8. By the fourth, issued on 4th June, 2019 and originally returnable for 8th July, 2019, Mr. Coyle sought a variety of orders, primarily an order directing compliance by the liquidator with his obligation under s. 681 of the Companies Act, 2014 to file a statement of proceedings and position of the winding up.

9. Following the judgment of the Court of Appeal of 25th June, 2019, a fifth motion was issued in the liquidation on 16th September, 2019 and originally returnable for 15th October, 2019 by which the liquidator sought an extension of time in which to comply with the requirements of s. 681 of the Act of 2014.

10. On 23rd August, 2019 Mr. Coyle issued a motion in plenary proceedings 2017 No. 7252 P., in which Mr. De Lacy is plaintiff and Mr. Coyle and his wife Margaret, and his daughters Emily and Amy are defendants, directing the release to the judge dealing with the applications in the liquidation of the documents which had been discovered by Mr. De Lacy in the plenary proceedings.

11. I heard all six motions over two weeks commencing on 15th October, 2019. The motion papers alone ran to five folders. The motions were unfocussed and there was a good deal of overlap between them. The affidavits were prolix, argumentative and repetitious.

12. The liquidator's first motion - in relation to the composition of the committee of inspection - was made on notice to all of the members of the committee of inspection, including a Mr. Andrew Moffat who had been appointed as a members' nominee. Mr. Moffat was also given notice of Mr. Coyle's motion issued of 5th October, 2018. Mr. Moffat filed a number of prolix and argumentative affidavits and written submissions in support of Mr. Coyle's motion and in opposition to the liquidator's motion, and he appeared in person at the hearing of those motions and was heard.

Recusal application

13. At the sitting of the court on 15th October, 2019 I heard, and in an ex tempore judgment, ruled upon an application by Mr. Coyle that I should recuse myself. Mr. Coyle made a general submission that he did not feel that lay litigants get a fair crack of the whip. Mr. Coyle's objection to my dealing with the motions was that I had been "involved in other proceedings" and that I had "heard applications and made orders in court No. 3".

14. The reference to other proceedings was to a wholly unrelated landlord and tenant dispute between Mr. and Mrs. Coyle and their landlord which I had previously heard and decided. Mr. Coyle may not have been happy with the result, but he did not suggest that he had not been fairly heard. The reference to applications in court No. 3 was to case management directions which I had given in respect of the first two motions which appeared in a directions list on 20th June, 2019. At that time those motions had been listed for hearing on the 2nd July, 2019 and the object of the listing on 20th June, 2019

was to confirm to the court that they would be ready. After the hearing date was fixed, Mr. Coyle had issued the third and fourth motions. On that occasion, counsel for the official liquidator asked that the third and fourth motions, which were returnable for the 8th and 15th July, 2019, should be brought forward to 2nd July, 2019 and heard together with the first two. Mr. Coyle objected, and I ruled in his favour. Mr. Coyle asked that the hearing of the first and second motions be deferred until the third and fourth motions were ready, and I ruled against him. In the event, there was no judge available on 2nd July, 2019 and the third and fourth motions caught up before a new hearing date was fixed.

15. The gravamen of Mr. Coyle's application that I should recuse myself was that there had been a "*confrontation*" in court on 20th June, 2019. The transcript of the DAR shows that Mr. Coyle became frustrated when he was not permitted to speak out of turn, and that he was checked by the court when he suggested that he was being atrociously oppressed and that the court was giving "*better favouritism"* to barristers than to lay litigants. Litigants in person, no less than counsel, need to observe proper decorum in court. Counsel, no less than litigants in person, are liable to be checked if they interrupt or make groundless suggestions of bias. Every judge is entitled and obliged to maintain order in his or her court. There was nothing to see in court No. 3 on 20th June, 2019. There was no basis on which Mr. Coyle or any reasonable observer of the case management application might have feared that Mr. Coyle would not get a fair hearing and I declined to recuse myself.

Application for a reference to the European Court of Justice

16. Mr. Coyle then asked permission to issue yet another motion in relation to discovery. He produced a form of draft notice of motion and grounding affidavit which had been stamped on 14th October, 2019. It was by no means clear what Mr. Coyle hoped to achieve by this further motion, beyond an adjournment of the six motions which were listed for hearing.

17. Mr. De Lacy's application for directions in relation to the composition of the committee of inspection and Mr. Coyle's motion to remove Mr. De Lacy or to annul the liquidation were a year old and had previously been listed for hearing and not reached. Mr. Coyle's proposed further motion had never been mentioned at any of the many case management listings before the chancery list judge. I took the view that this proposed further motion was calculated to disrupt business before the court and I refused the application.

18. Mr. Coyle then applied for a reference to the European Court of Justice. Citing the decision of the European Court of Human Rights in *Baltic Master Ltd. v. Lithuania* (Application No. 55092/16) and recital 83 of Regulation (EU) 2015/848 on insolvency proceedings, he proposed that the court might ask the Court of Justice whether it had been correct to refuse what he called his "*discovery application";* whether it was obvious that E.U. law was being applied in relation to data, discovery and due process; whether he had been dealt with fairly; whether the court was depriving itself of evidence that

would be necessary to allow it to come to a fair and just decision; and whether it was appropriate that the court would assist in the withholding of evidence.

19. I refused that application.

Application in relation to discovery

20. Although it was the second last in time to have been issued, I dealt first with Mr. Coyle's motion to "*release*" the discovery which had been made by the liquidator in the plenary proceedings, which Mr. Coyle said that he needed to deal with the other motions.

21. As framed, the motion was misconceived for it sought an order releasing the discovery to the judge dealing with the Companies Act applications so that he or she might "*determine the relevance of material facts contained within the said discovery to the motions to remove the liquidator for cause shown or in the alternative to annul the liquidation of Decobake Limited".*

22. Mr. Coyle, however, submitted that access to those documents, or more correctly permission to use them in the Companies Act proceedings, was essential if he was to have a fair hearing and I dealt with the motion for what it might have been, rather than as it was framed.

23. By plenary summons issued on 8th August, 2017 under record 2017 No. 7252P. Mr. De Lacy commenced proceedings against Mr. and Mrs. Coyle and their daughters claiming a variety of orders restraining those defendants from publishing defamatory, untrue, malicious and derogatory material in relation to the business and affairs or liquidation of Decobake Limited, or from interfering with the conduct of the business of Decobake Limited, or otherwise obstructing or interfering with the liquidation or the liquidator.

24. A lengthy statement of claim was delivered on 24th November, 2017 and a lengthy defence on 17th December, 2017. On 4th January, 2018 the plaintiff delivered a 32 paragraph reply which was no more than a joinder of issue. On 11th January, 2018 the defendants delivered a form of "*additional defence*" and, separately, a counterclaim by which the defendants counterclaimed against Mr. De Lacy for more or less the same reliefs as had been claimed against them. Finally, on 18th January, 2018 the plaintiff delivered a further form of "*reply to defence and additional defence and defence to counterclaim"*.

25. Without getting bogged down in the detail, the core dispute in the plenary action is whether the business of Decobake Limited could be carried on, or sold, without the permission of Mr. Coyle who claims to be the owner of the intellectual property in the products and production methods on which the company's business is founded. Along the way, Mr. De Lacy makes a litany of complaints of obstruction and interference by the defendants, and the defendants make a litany of complaints of mismanagement by the liquidator of the liquidation. There is a large degree of overlap between the issues in the plenary proceedings and the matters agitated on the Companies Act applications.

26. On 18th July, 2018 for the reasons given in a long written judgment [2018] IEHC 428, McDonald J. made an order and cross order for discovery in the plenary actions. The judgment shows that one of the plaintiff's objections to the making of the orders sought against him was an apprehension – which was abundantly justified by the reasons given by Mr. Coyle in support of his request for voluntary discovery - that Mr. Coyle hoped to gain evidence for separate proceedings. McDonald J., at para. 63 of his judgment, spelled out that it is settled law that any documents discovered in the plenary proceedings could not be used for the purposes of any other proceedings, such as the appeal against the winding up order then pending before the Court of Appeal, in the absence of express leave of the court.

27. On 13th June, 2019 Mr. Coyle issued a motion in the plenary proceedings for an order directing the release of the plaintiff's discovery in the plenary proceedings to the judge who would hear the Companies Act motions so that he or she could determine the relevance of material facts contained within that discovery to the motions to remove the liquidator for cause shown or in the alternative annul the liquidation. The first and second motions now before the court had been listed for hearing on 2nd July, 2019 but the chancery list judge accommodated Mr. Coyle by asking McDonald J. to hear his application, and McDonald J. accommodated Mr. Coyle by doing so on 26th June, 2019.

28. McDonald J. heard Mr. Coyle's motion with his invariable politeness and patience and refused it on the grounds that Mr. Coyle had failed to provide any evidence as to what the documents he wanted were; or why they were said to be relevant to the Companies Act applications; or how they might be used on the Companies Act applications which were to be heard on affidavit in circumstances where the exchange of affidavits was complete; or that there were any special circumstances that would justify releasing Mr. Coyle from his implied undertaking not to use the discovered documents otherwise than for the purposes of the plenary proceedings in which they had been obtained.

29. Mr. De Lacy's motion issued on 29th August, 2018 – the first motion - and Mr. Coyle's motion issued on 5th October, 2018 – the second motion - came into the list for hearing on 2nd July, 2019 but there was no judge available. Reynolds J. then fixed a new trial date for 15th October, 2019 for the four motions and made an order directing that no further motions be issued in the proceedings without the leave of the court.

30. On 4th July, 2019 the matter was mentioned again to Reynolds J. Mr. Coyle then applied for leave to issue a new motion for the release of the discovery, which was refused. Undaunted, Mr. Coyle went ahead and issued it on 23rd August, 2019. The suggestion that the order of Reynolds J. of 2nd July, 2019 was no bar to his doing so because the motion was not "*in the proceedings*" in which that order had been made was unattractive. So also was the suggestion that the order that no further motions issue in the proceedings without the leave of the court only applied to Mr. Coyle and was no bar to the issue of the liquidator's motion of 15th September, 2019. With some misgivings, I agreed to hear the fifth and sixth motions.

31. It is clear that the notice of motion which McDonald J. heard and refused on 26th June, 2019 was identical to the motion issued by Mr. Coyle on 23rd August, 2019. I am uncertain whether the affidavit sworn by Mr. Coyle to ground his first motion was identical to that which he swore to ground his second, but if it is not, it does not address the fundamental frailties identified by McDonald J. in his decision of 26th June, 2019.

32. Because the motion heard by McDonald J. was an interlocutory application, I was not convinced by Mr. Beatty's argument that Mr. Coyle should be precluded by the application of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 from bringing it again, but he did not address the shortcomings identified by McDonald J. in his previous application.

33. For the reasons which I gave in an *ex tempore* judgment on 15th October, 2019 and which I have shortly reprised, I refused Mr. Coyle's application in relation to the discovery in the plenary action.

Motion to set aside the winding up order or annul the liquidation

34. I next dealt with Mr. Coyle's motion, issued on 8th May, 2019, to set aside the winding up order made by Keane J. on 24th July, 2017.

35. At the time that motion was issued, Mr. and Mrs. Coyle's appeal was listed before the Court of Appeal for 31st May, 2019. On 12th April, 2019 the Court of Appeal had refused an application by Mr. Coyle for an adjournment of the appeal pending the determination of the first two motions motions which were then listed for hearing before the High Court on 2nd July, 2019.

36. On the face of the motion I could not see what jurisdiction I could conceivably have to set aside a final order of the High Court, still less after it had been - as it had been on 15th July, 2019, for the reasons given in the judgment of Costello J. on 25th June, 2019 - affirmed by the Court of Appeal: but I listened carefully.

37. On 15th April, 2019 Mr. Coyle wrote to the petitioning creditor's solicitors, Paul N. Beausang & Co., asserting that after an extensive review of the status of the petitioner, he had concluded that the petitioner did not have locus standi to have presented the petition to wind up Decobake Limited, or to continue what he said was the pursuit, but what he meant was the defence, of the appeal then pending before the Court of Appeal. Mr. Beausang, in a short reply, dismissed the suggestion and the letter as "*nonsense*" and "*drivel*".

38. On 29th April, 2019 Mr. Moffat wrote what he called an "*addendum to submissions dated 6th February, 2019*" in which, over eleven pages, he set out various provisions of the Grand Jury (Ireland) Act, 1836, the Poor Relief (Ireland) Act, 1838, the District Court Rules, the Companies Act, 2014, the Courts of Justice Act, 1924 and the Local Government Act, 1941, and offered the view that the District Court warrants obtained by Mr. McHugh for collection of the rates were invalid, and that neither Mr. McHugh nor Dublin City Council was entitled to have presented a winding up petition.

39. The judgment of Costello J. shows, at para. 65, that the validity of the District Court warrants and the vires of the petitioner were among the issues which, although not argued before Keane J. or referred to in the grounds of appeal, Mr. and Mrs. Coyle sought to canvass before the Court of Appeal. Costello J. said at paras. 66 and 67:-

> *"66. These are all entirely new matters which were not raised in the High Court and which may not be raised now on appeal. They are points which, if they had any merit, it was open to the company and appellants to raise on any number of occasions in the District Court, and twice at least in the High Court (30th June, 2017 and 24th July, 2017). Furthermore, under the principles in Henderson v. Henderson (1843) 3 Hare 100, in view of the many occasions when the matter was listed in the District Court, at no point was the jurisdiction of the District Court ever raised and it is not now open to the appellants, belatedly, to raise any point on the alleged want of jurisdiction of the District Court. Finally, given that the point raised is one which goes to the jurisdiction of the District Court, the appropriate course for the company would have been either to have sought a case stated or to have brought a judicial review.*
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> *67. More fundamentally, these points all go to the issue of whether the petitioner is a creditor of the company. The appellant accepted on affidavit and in submissions to the High Court that he is and admitted that the debt is due and owning. It follows that these arguments are nihil ad rem. That being so, I see no want of vires in a rates collector collecting rates due and admitted to be due, by all lawful means, which include petitioning for the winding up of a company who has failed to pay rates since 2012."*

40. Mr. Coyle, having served the motion on Paul N. Beausang & Co., as solicitors for the petitioning creditor, sought to contest the entitlement of counsel instructed by Mr. Beausang to be heard. Besides the legislation which had been transcribed into Mr. Moffat's "*addendum*", Mr. Coyle sought to make much of the fact that Mr. McHugh had since retired. Mr. Coyle relied on the decision of the United Kingdom Supreme Court in *Takhar v. Gracefield Developments Limited* [2019] UKSC 13., seizing on the principle, as if it was a charm, that fraud unravels all, but without being able to say what the fraud allegedly was; and ignoring, if he understood it, the requirement that any application to a court of coordinate jurisdiction to set aside a final judgment must be by a new action and not a motion.

41. In the end, Mr. Coyle said that he intended to make an application to the Supreme Court for leave to appeal against the judgment of the Court of Appeal.

42. For the reasons which I gave in an ex tempore judgment on 17th October, 2019 I found that Mr. Coyle's application by notice of motion in the High Court to set aside a final order of the High Court which had been the subject of an unsuccessful appeal to the Court of Appeal was misconceived and devoid of merit, and I refused it.

Motion in relation to the composition of the committee of inspection

Motion for the removal of the liquidator

43. Following his appointment as liquidator, Mr. De Lacy took possession of as much of the company's property as he could, and he sought to carry on the trade. Taking the view that the Coyles were interfering with the company's business and with the liquidation, Mr. De Lacy issued the plenary proceedings to which I have already referred and on 8th August, 2017 applied to the High Court for, and obtained, a series of interim injunctions. Shortly thereafter Mr. Coyle issued cross proceedings against Mr. De Lacy and the company.

44. While Mr. De Lacy's application for interlocutory orders was pending, he summoned a creditors' meeting for 6th October, 2017 at which, pursuant to s. 666(2), a committee of inspection was appointed, consisting of five persons appointed by the creditors. The members of the committee of inspection appointed by the creditors were Malcolm O'Mahony, nominated by Lee and Barry O'Mahony; Catherine Kennedy, nominated by Eugene Sheehan & Company accountants; David Kiernan, nominated by Targeted Investment Opportunities ICAV; Susan Woods, nominated by the Revenue Commissioners; and Deirdre Murphy, nominated by Dublin City Council.

45. At a general meeting of the company convened for 9th October, 2017 three further members were appointed, pursuant to s. 666(3): Mr. Coyle, Mrs. Coyle, and Mr. Moffat.

46. At least with the benefit of hindsight, a great deal of aggravation and court time might have been saved if, pursuant to s. 666(4) of the Act of 2014 the creditors had then resolved that the persons appointed by the general meeting ought not to be members of the committee of inspection.

47. Notice of the appointments to the committee of inspection was duly given to the registrar of companies.

48. A meeting of the committee of inspection was convened for 7th November, 2017. The meeting ran on for nearly three hours but, in Mr. De Lacy's view, could not proceed to any business as the members' representatives sought to argue every issue at length. Mr. De Lacy then wished to brief the committee on the pending litigation against Mr. and Mrs. Coyle and the cross-action by Mr. Coyle against the company, and the conduct of the company's business but he took the view that the members' nominees were conflicted in relation to those matters and asked them to withdraw. They refused.

49. On 23rd May, 2018 Mr. Coyle convened, or attempted to convene, a meeting of the committee of inspection for 30th May, 2018 at the Westgrove Hotel, Clane, Co. Meath. He did not give notice to the creditors' nominees directly but circulated an e-mail to such of the creditors who had appointed them as he had addresses for, as well as Mr. De Lacy, who he requested to circulate formal notice of the meeting.

50. Mr. De Lacy had holidays planned for 30th May, 2018. He discussed the proposed meeting with the creditors' nominees: who said that if Mr. De Lacy could not be in attendance, neither would they attend. Mr. De Lacy's and the creditors' nominees'

position was that unless they attended the proposed meeting it would be inquorate and could do nothing: and Mr. Coyle was advised accordingly.

51. On 28th May, 2018 Mr. Coyle circulated a proposed agenda for the proposed meeting. Again this was not sent to the creditors' nominees but to such e-mail addresses as Mr. Coyle had. The agenda contemplated that the committee of inspection would *inter alia* consider the validity of all claims of debt; the disposal of the remaining assets of the company; the merits of any ongoing litigation; and proposals from the liquidator as to the basis of his remuneration.

52. On 30th May, 2018, Mr. Coyle sent to Mr. De Lacy and Mr. Moffat notice of a suggested third meeting of the committee of inspection which it was said would take place at the Westgrove Hotel, Clane, Co. Kildare on 6th June, 2018. The same agenda was attached. By e-mail dated 1st June, 2018 Mr. Coyle asked the liquidator to circulate formal notice to all committee members and to arrange access on the day of the meeting for all committee members to the company's premises and all books and records.

53. There was an issue as to whether the e-mail of 30th May, 2018 was sent to anyone other than Mr. De Lacy and Mr. Moffat. On its face, they were the only recipients, but it later emerged that the e-mail had been blind copied to the addresses to which the previous e-mails had been sent. It was not explained why this was done but it was calculated – in one or other or both senses of the word – to add to the confusion.

54. Mr. De Lacy was on holidays on 30th May, 2018 and was due to return late in the evening of 5th June, 2018. He again discussed Mr. Coyle's proposal with the creditors' nominees and they decided that they would not attend the proposed meeting.

55. On 1st June, 2018 Mr. De Lacy wrote to all the members of the committee of inspection. He anticipated – quite correctly as it turned out – that Mr. Coyle was attempting to lay the ground for an argument that if the creditors' nominees did not attend the proposed meeting on 6th June, 2018 they would have absented themselves from two consecutive meetings and so, in accordance with s. 668(4)(b) of the Act of 2014 would have vacated their offices. To forestall that argument (and without prejudice to his position that neither meeting had been validly convened) Mr. De Lacy suggested that each of the creditor members might give a leave of absence to all of the others. Each of the five creditor nominees indicated that they would not attend the proposed meeting on 6th June, 2018; four of them gave leave of absence to all the others; and Mr. Coyle was advised accordingly.

56. In an e-mail of 6th June, 2018 Mr. De Lacy notified Mr. Coyle of his intention to arrange a meeting of the committee of inspection in the near future at a date convenient for all members.

57. On 8th June, 2018 Mrs. Coyle, purportedly acting on behalf of the committee of inspection made up of Mr. Coyle, herself and Mr. Moffat, wrote to the creditors' nominees asserting

that they had vacated their office. There was an exchange of e-mails over June and July, 2018 but neither side would budge.

58. On 14th August, 2018 Mr. De Lacy gave notice to all who had been appointed to the committee of inspection in November, 2017 of a meeting of the committee of inspection to be held on 21st August, 2017. Mr. Coyle challenged each of the *"former members*" to acknowledge that they had vacated their office and threatened an application to the High Court if they did not. Mr. Moffat issued a similar threat to Mr. De Lacy. One of the creditors' nominees, Ms. Susan Woods, had enough and on 16th August, 2018 she resigned as a member of the committee of inspection. Mr. De Lacy decided to defer the meeting of the committee of inspection and on 28th August, 2018 issued the first application now before the court.

59. This first application is made pursuant to s. 631(1) of the Act of 2014 which allows *inter alia* the liquidator to apply to the court to determine any question arising in the winding up of a company.

60. Mr. De Lacy gave notice of his application to all who had been appointed to the committee of inspection. Three of those who had been appointed by the creditors Mr. O'Mahony, Ms. Murphy and Mr. Kiernan, by their solicitors, wrote to Mr. De Lacy's solicitors indicating that they supported his position.

61. Mr. Coyle and Mr. Moffat came out fighting. Not only did they stand over the position they had taken in correspondence but Mr. Coyle, with the support of Mr. Moffat, moved to have Mr. De Lacy removed as liquidator and/or to annul the order for winding up and/or for orders for the summoning of a creditors' meeting or an extraordinary general meeting of the company. For good measure, an order was sought requiring Mr. De Lacy to "*remedy any default in his management of Decobake Limited (in liquidation) and an order for him to pay all costs personally of and incidental to the application*."

62. It appears from the affidavit of Andrew Moffat that one of the creditors' nominees, Ms. Deirdre Murphy, did not attend the committee of inspection meeting of 7th November, 2017. That non-attendance, as well as her non-attendance at the meeting of 30th May, 2018 was relied upon in support of his argument that Ms. Murphy vacated her office on 30th May, 2018.

63. Mr. Moffat challenged the *bona fides* of Mr. De Lacy's e-mails of 1st June, 2018 to the creditor appointed members, suggesting that it was a premeditated manipulation of those members not to attend the meeting proposed for 6th June.

64. Mr. Moffat challenged the validity of the leave of absences for the meeting of 6th June, 2018 on the grounds *inter alia* that it was required to be unanimously given by all of the members of the committee of inspection.

65. Mr. Moffat, at p. 23 of his affidavit, set out six "*particulars of cause shown*" which are said to warrant Mr. De Lacy's removal, as follows:-

"(a) That Mr. De Lacy set out, with premeditation, to manipulate the composition of the committee of inspection and conspired with creditors at the creditors' meeting held on 6th October, 2017 to ensure that his preselected nominees were elected to the exclusion of all other nominees;

(b) That he knowingly allowed Malcolm O'Mahony, proxy for Lee and Barry O'Mahony, to vote in the knowledge that the said O'Mahonys were not creditors;

(c) That he knowingly allowed David Kiernan, proxy for Targeted Investment Opportunities ICAV, to vote in the knowledge that the said Targeted Investments was not a bona fide creditor;

(d) That when challenged post the voting by [Mr. Moffat] that [Mr. De Lacy] did not disallow both Malcom O'Mahony and David Kiernan to be elected to the committee of inspection;

(e) That he set out systematically not to engage in a proper manner with the committee of inspection and that he refused or neglected to provide proper sets of accounts by which the committee could have oversight of the progress of the winding up, and he neglected to bring powers used by the liquidator to the attention of the committee;

(f) That he unnecessarily committed creditors' funds to bring court cases before the court in respect of directors and family members of the directors that were of no financial benefit to the creditors and he failed to allow the matter to be discussed on the agenda of the committee of inspection;

In respect of the above and other matters disclosed in this averment, Mr. De Lacy has not acted in good faith, has wasted large amounts of creditors' funds and a number of his acts may have criminal consequences. I respectfully submit that he should be removed by the court from his position as liquidator."

66. Much of Mr. Moffat's criticism of Mr. De Lacy is directed to the status of Lee O'Mahony and Barry O'Mahony, and Targeted Investment Opportunities ICAV. Mr. Moffat's contention is that the Messrs. O'Mahony and Targeted Investment Opportunities were not creditors of the company and should not have been allowed to vote. This contention had not previously been made in correspondence and was not directed to the composition of the committee of inspection but was advanced as a ground on which Mr. De Lacy should be removed.

67. I will deal with this contention as briefly as I can.

68. Lee O'Mahony and Barry O'Mahony were the landlords of premises occupied by the company at Clane, Co. Kildare. On 15th February, 2016 the Messrs. O'Mahony entered the premises in Clane in purported reliance on a proviso for forfeiture on the ground that the rent was allegedly in arrears. Mr. Coyle re-took possession later that day and the company issued High Court proceedings against the Messrs. O'Mahony claiming an

injunction restraining any further entry on the property. The central issue in dispute between the O'Mahonys and the company was whether a reduction in the rent reserved by the lease of the Clane property had been temporary or was permanent. An interlocutory *modus vivendi* was found upon terms that the company would pay the rent which it acknowledged was payable and would lodge a sum of €31,941.55 in court, which it duly did.

69. The Messrs. O'Mahonys' position in the action against them by the company is that on 15th February, 2016 they effected a re-entry of the Clane premises and that the lease was thereby forfeit. Mr. Moffat's contention is that the effect of the re-entry was "*the termination of the contractual right to any historic rent default claims*".

70. At the time of the liquidation, the Messrs. O'Mahony claimed to be owed a sum in excess of €152,768 for rent and insurance.

71. As a matter of law, the forfeiture of a lease changes the status of the occupier of premises from a tenant, who is entitled to be in possession and is liable to pay the agreed rent as it falls due, to a trespasser who is liable to pay damages for trespass, called mesne rates, at such rate as may be assessed in due course by a court. Mr. Moffat clearly knows about this rule, but he equally clearly does not understand it. The effect of forfeiture is to change the nature of the occupier's liability thereafter, but it has no effect on his accrued liability to pay the rent which was fallen due before forfeiture. The legal effect of the forfeiture of a lease was carefully and clearly explained by Laffoy J. in *Moffat v. Frisby* [2007] 4 I.R. 572, [2007] IEHC 140, a case which Mr. Moffat won. No less to the point, Mr. Moffat's contention is based on the Messrs. O'Mahonys' contention that the company's lease was forfeited by re-entry and ignores the company's contention that the lease was not validly forfeited. If the company is correct, it had at the date of the winding up an ongoing liability to pay the rent.

72. In fact, what happened at the creditors' meeting was that following Mr. Moffat's intervention, Mr. De Lacy discussed with Mr. Malcolm O'Mahony, the Messrs. O'Mahonys' proxy, the amount of their claim and it was reduced to €30,000 which was more or less the amount which had been lodged in court and more or less so much of the claim as was in respect of rent strictly so called at the date of the disputed forfeiture.

73. Mr. Moffat's contention in relation to the status of Targeted Investment Opportunities ICAV is, as he says, similar. At the creditors' meeting Mr. David Kiernan, as proxy of Targeted Investment Opportunities was allowed to vote on a proof for €63,446.37. Targeted Investment Opportunities is or was the landlord of premises occupied by the company at Bachelors Walk, Dublin. By Ejectment Civil Bill on Title issued on 30th November, 2016 Targeted Investment Opportunities claimed an order for possession against Mr. Coyle, Decobake Limited, and all persons concerned. Targeted Investment Opportunities' claim for possession and mesne rates is based on an alleged termination of a tenancy but Mr. Moffat, if he knows it, does not say what the company's position is in relation to the tenancy in the Bachelors Walk property. Moreover, by contrast with the O'Mahony claim, Mr. Moffat did not at the creditors' meeting challenge Mr. Kiernan's

entitlement to vote by reference to the nature of the company's liability to Targeted Investment Opportunities.

74. Mr. Moffat, on the one hand, expressly acknowledges in his affidavit that the court cannot on this application (not least in the absence of the claimants) decide the validity of the claims of the Messrs. O'Mahony and Targeted Investment Opportunities, but on the other suggests that Mr. De Lacy was guilty of misleading the court by setting out in his provisional liquidator's report the amount of those claims.

75. I am quite satisfied that the case that Mr. De Lacy should be removed by reason of the way in which he dealt with the claims of the Messrs O'Mahony or Targeted Investment Opportunities, whether in his provisional liquidator's report or at the creditors' meeting of 7th November, 2017 is entirely baseless. Not only is the argument as to the entitlement of the Messrs. O'Mahony and Targeted Investment Opportunities based on a misunderstanding of the law, it is inconsistent with the argument that Malcolm O'Mahony and David Kiernan vacated their office by their non-attendance at meetings of the committee of inspection.

76. The first meeting of the committee of inspection was, as I have said, convened by Mr. De Lacy by notice dated 24th October, 2017 for 7th November, 2017. On 1st November, 2017 Mr. Moffat sent to the liquidator what he describes as a detailed list of documents and accounts which he wished to have prior to that meeting. Mr. Moffat's list was, as he described it, a comprehensive and detailed list. He sought all documents in relation to the claims of the Messrs. O'Mahony and Targeted Investment Opportunities; all pending litigation; monthly trading accounts for the business carried on in Clane, Bachelors Walk and a web based business.

77. Shortly after, Mr. Moffat sent to the liquidator (and, he says, to such other unidentified members of the committee of inspection for whom he had e-mail addresses) a draft agenda for the meeting: which he proposed would start with a discussion of the legal status of the committee of inspection by reference *inter alia* to three Court of Appeal decisions, and move on to a consideration of the need for the liquidator to provide an indemnity to each of the members of the committee of inspection. The agenda proposed that from there the discussion would move to the appointment of "*independent legal counsel to advise the committee as a body corporate*", and then back to a reassessment of the proxies and proofs used at the creditors' meeting on 6th October. The draft agenda proposed a detailed review of all pending litigation, including an assessment of the likely cost and prospects of success of the action which had been brought against Mr. and Mrs. Coyle.

78. It seems to me that Mr. Moffat's draft agenda is entirely consistent with Mr. De Lacy's account of a meeting which went on for hours without making any progress. It is quite clear from the draft agenda that Mr. Moffat's proposal was that the committee of inspection would entirely usurp the role of the official liquidator; that he and Mr. and Mrs. Coyle would be provided with detailed financial information as to the day to day management and operation of the company's business, with which they were by then in

competition; and that he and Mr. and Mrs. Coyle would seek to influence the progress of the litigation in which Mr. and Mrs. Coyle and their daughters were defendants and counterclaimants.

79. Mr. De Lacy relies on a document produced by Chartered Accountants Ireland called Technical Release TR 05/2016 and entitled "*Guidance for members of the Committee of Inspection in Court and Creditors' Voluntary Liquidations*". This suggests, correctly, that the liquidator need not comply with a request for information where *inter alia* the information sought is commercially sensitive, or where the enquiring committee member may have a conflict of interest, or where legal proceedings are either being contemplated or have been issued in relation to the affairs of the company. The guidance document goes on to suggest, again correctly, that where a committee member may have a conflict of interest, the liquidator may exclude such a member from the relevant meeting of the committee. It would not make sense that the position would be otherwise.

80. Mr. and Mrs. Coyle were creditors of the company, but they were involved in litigation against it and they were in business in competition with it. They, and Mr. Moffat as their nominee, were hopelessly conflicted. Their object in demanding the information sought and in seeking to participate in the discussion was to promote their own interests and not the progress of the liquidation.

81. Mr. Coyle, in his first affidavit, disclaimed all confidence in Mr. De Lacy, charging that Mr. De Lacy had failed to act in good faith, had sought to influence the creditor members of the committee of inspection to his own agenda, and had failed and been negligent in the discharge of his duties as liquidator.

82. Mr. Coyle alleges that Mr. De Lacy misled the court in a number of respects in his provisional liquidator's report of 24th July, 2017.

83. Mr. Coyle points in particular to the inclusion in a list of verified creditors annexed to the provisional liquidator's report of Barry O'Mahony and Lee O'Mahony, shown to have been owed €95,572 when Mr. Coyle says it was owed nothing; AIB Bank, shown to have been owed €42,883 when Mr. Coyle says it was in fact owed €36,000; Targeted Investment Opportunities shown to have been owed €35,979 when it was not a creditor; Real Estate Holdings, shown to have been owed €21,296, when it was owed €5,333; and Three Ireland, shown to have been owed €1,953, when it was not a creditor of the company.

84. Mr. Coyle rehearses, at some length, his position in the dispute between the company and the O'Mahonys and points to an averment in an affidavit of the O'Mahonys' solicitor sworn in the company's action against them to ground an application to have the money lodged in court paid out to his clients, as evidence that the rent in respect of the Clane premises had been paid by the lodgement of the monies in court. This is nonsense. The money was paid into court – where it still is - and not to the O'Mahonys. As far as the €95,572 is concerned, if the lease had been validly forfeited (as the O'Mahonys claimed, but the company contested) the company's liability to pay the rent would technically have ceased but it would have accrued a significant liability for mesne rates. The rent reserved by the

lease would have been a good measure of the value of the use and occupation of the land, and so of the company's liability. The question of the extent of the company's liability to the O'Mahonys is quite separate to the technical legal nature of the liability: whether it was for rent or mesne rates or a combination of the two. As the Court of Appeal explained in Re: Eden *Further Education Ltd*. [2015] IECA 70, creditors of a company include those with unliquidated claims, even though under the Companies Acts, 1963 to 2012 there was no mechanism to put a value on such claims so as to allow those creditors to vote. In my firm view it would have been misleading and wrong to have recorded the company's liability to the O'Mahonys at a substantially smaller sum, or at nil.

85. Whether the company's liability to the O'Mahonys was technically a debt which would have allowed them to vote at the creditors' meeting was an entirely separate issue. Under the previous regime, O. 74, r. 68 of the Rules of the Superior Courts provided that no creditor should vote in respect of any unliquidated or contingent debt. That was the rule which the Court of Appeal considered in Re: *Eden Further Education Ltd*. Section 698(5) of the Act of 2014 now provides that the chairperson of a creditors' meeting may put on an unliquidated or contingent debt, or upon any debt the value of which is not ascertained, an estimated minimum value for the purpose of entitlement to vote and admit the creditor's proof for that purpose. That was more or less what was done in this case with the O'Mahonys' proof and there was no challenge to it.

86. Mr. Coyle alleged that counsel for the petitioning creditor mislead the court by asserting that the O'Mahonys were owed €100,000. This was entirely unjustified. The transcript of the DAR (on which Mr. Coyle relies) shows that what counsel said was that the landlord *"says that there is over €100,000 in rental arrears on that premises*." What counsel was doing was correctly relaying to the court the amount of the O'Mahonys' claim and not asserting what the company's liability was: whether as to the amount or the nature of the liability.

87. I find no warrant for the allegation that Mr. De Lacy did not act as an independent officer of the court or that he acted to advance his own interests.

88. The time sheets submitted by Mr. De Lacy and his solicitor, Mr. Kevin Barry, showed that they both spent some time trying to understand and unravel Mr. Coyle's disputes with the company's landlords. Mr. Coyle's argument, in effect, is that Mr. De Lacy and Mr. Barry were bound to have come around to his unshakable and entirely unsustainable point of view that because the Clane lease had been forfeited (which the company contested) and the Bachelors Walk tenancy had been terminated (which the company did not admit) the landlords were owed nothing. Mr. Coyle's (as well as Mr. Moffat's) point of view is based on a misunderstanding of the law and is manifestly wrong. There is no justification for seeking to characterise Mr. De Lacy's assessment of the company's liability as a fraud on the creditors.

89. Mr. Coyle offers a detailed and rather jaundiced account of the creditors' meeting of the 6th October, 2017, which he acknowledges he did not attend. The challenge, again, is not directed to the validity of the meeting or the effectiveness of the business done but to

Mr. De Lacy's conduct as liquidator. Any challenge to the validity of the appointment of the committee of inspection would be inconsistent with the position that the members of the committee of inspection later vacated their office by failing to attend two consecutive meetings.

90. Mr. Coyle's affidavit is littered with allegations of fraud for which there is absolutely no basis. The winding up petition - by a judgment creditor, acknowledged to be owed the debt - is said to have been fraudulent. The support of the petition by the O'Mahonys and by Targeted Investment Opportunities who were unquestionably owed money (if not for rent, then for mesne rates) is characterised as fraudulent. That is at best nonsense.

91. From Mr. Coyle's point of view, the object of the winding up petition was to forestall an action by the company against Mr. McHugh (apparently for damages arising out of Mr. McHugh's unsuccessful attempts to recover the rates which were admittedly due by the company to Dublin City Council and for which he had obtained District Court warrants) and to secure for the O'Mahonys and Targeted Investment Opportunities the return of their properties. He ignores altogether the fact that the petition was precipitated by the company's steadfast refusal to pay its bills. It is clear from the judgment of Costello J. that Mr. Coyle's case that there was an ulterior motive on the part of Dublin City Council in presenting the winding up petition, or on the part of the O'Mahonys in supporting it, has been heard and rejected by Keane J. and the Court of Appeal as bare assertion without any supporting evidence and unsustainable.

92. Part of the allegation of misconduct and negligence against Mr. De Lacy is directed to his conduct of the litigation against Mr. and Mrs. Coyle. It is said that he refused to agree to compromise one aspect of the litigation against Mr. Coyle on terms proposed by Mr. Coyle. It is said that there was delay in the delivery of the statement of claim in the plenary proceedings. It is said that Mr. De Lacy refused to agree to Mr. Coyle's request for voluntary discovery.

93. It does appear that Mr. De Lacy was late in delivering his statement of claim; and that Mr. De Lacy lost the one issue in relation to the interlocutory injunction which was eventually fought; and that McDonald J. made a significant discovery order after a three-day hearing: but none of these matters, individually or collectively, could properly ground Mr. Coyle's allegation of misconduct. To a degree, Mr De Lacy engaged with the criticism levelled at him and sought to justify his conduct of the plenary proceedings but it seems to me that it is wrong in principle that the court should be asked to review the conduct of pending litigation. What Mr. Coyle in truth asks the court to do is to say that the action against him and his wife and daughters is so obviously bound to fail that Mr. De Lacy should be removed as liquidator for having brought it. That is something which the court could not possibly do. The costs occasioned by any delay in pleading or by any interlocutory application fought and lost by Mr. De Lacy (if any, and Mr. De Lacy says that the plenary proceedings could not have been managed otherwise than they have been) will have been dealt with by the judge who heard those applications.

94. What Mr. Coyle says about the committee of inspection meetings which he tried to convene is largely argumentative, but he does acknowledge that he did not have the contact details for the creditor nominated members and sent his e-mail in relation to the proposed meeting of 30th May, 2018 to the creditors, rather than the members of the committee.

95. In the hope of justifying the sending of notice of the proposed meetings to the creditors, rather than to the members of the committee of inspection, Mr. Coyle relies on s. 691 of the Act of 2014. But s. 691 is directed to the entitlement of creditors to attend and vote at creditors' meetings, not committee of inspection meetings. If anything, s, 691 underlines the importance of ensuring that notice of meetings is given directly to those who are entitled to attend and vote.

96. Mr. Coyle expresses alarm that Mr. De Lacy wrote to the creditor nominated members on 1st June, 2018 advising them that he believed that Mr. Coyle was seeking to engineer a situation in which they might be removed from their positions. In my view, Mr. Coyle was in fact setting out to do what Mr. De Lacy thought he was setting out to do and Mr. De Lacy was simply seeking to forestall that. Mr. Coyle correctly observes that he had no control over whether the creditor members would or would not attend the meetings, but he plainly sought to convene the meeting for 6th June on the very day on which no one had attended the meeting he had sought to convene for 30th May. Whatever Mr. Coyle's object may have been in seeking to convene the first meeting, I am satisfied that his object in seeking to convene the second was to engineer vacancies.

97. Mr. Coyle, at para. 45 of his first affidavit, sets out in eleven lettered sub-paragraphs "*particulars of cause shown".* These do not precisely match Mr. Moffat's particulars, but they are essentially the same.

98. Mr. Coyle, also, asked for permission to invoice the company for his "*professional fees".*

99. Mr. De Lacy in his second affidavit sworn on 12th November, 2018 usefully identifies the issues on each of his and Mr. Coyle's motions.

100. The first issue on the application for directions as to the composition of the committee of inspection is whether the meetings or purported meetings on 30th May, 2018 and 6th June, 2018 were validly called.

101. Section 668(1) of the Act of 2014 permits any member of the committee of inspection to call a meeting as and when he or she thinks fit. This must be done on notice to each member of the committee. The calling of such a meeting will frequently be facilitated by the liquidator but I accept Mr. Beatty's submission that he is not obliged to do so and that no member of a committee of inspection is entitled to require the liquidator to convene a meeting or to relay to the other members a request for a meeting.

102. The time and venue of the proposed meetings were decided upon by Mr. and Mrs. Coyle and Mr. Moffat without consultation with the liquidator or the creditor members. I am

satisfied that Mr. Coyle well knew that Mr. De Lacy would be on leave on 30th May, 2018 because a claim by one of his daughters against the company, with which Mr. Coyle was intimately involved, and which had been due to be heard by the Workplace Relations Commission on 29th May, 2018 had been postponed for that reason. Mr. Coyle did not have the contact details for the creditor members of the committee of inspection and so could not give them notice. He was not entitled to give notice, instead, to the creditors who nominated the members of the committee of inspection. Neither was the fact that the creditor appointed members were made aware by the liquidator of Mr. Coyle's proposal to call a meeting any substitute for the notice to which they were entitled.

103. In *Portuguese Consolidated Copper Mines, Limited* (1890) 42 Ch. D. 160 the English Court of Appeal dealt with a similar issue. Two of four directors who had been appointed by the subscribers of the company on 22nd October, 1888 met on 24th October. One of the absent directors had authorised, or purportedly authorised, one of those in attendance to act on his behalf. The other absent director was said to have been told of the intention of the others to meet and to have said *"I cannot be there*", but no proper notice was given. North J. held that an allotment of shares purportedly made at the meeting was, on a number of grounds, "*as bad as it well could be*" but the English Court of Appeal was content to focus exclusively on the validity of the meeting. No notice of the meeting had been given and it was on that ground alone found to have been invalid.

104. I find that the purported meetings were not properly called. There was consequently no obligation on the part of the members of the committee of inspection to attend them, and no consequences of non-attendance.

105. The purported meeting of 30th May, 2018 not having been properly convened, there was no obligation on the part of the creditor members to attend it, so it did not count as a second meeting missed by Ms. Deirdre Murphy.

106. The date and venue proposed for each of Mr. Coyle's proposed meetings was inconvenient for the liquidator and in my view, he is not to be criticised for failing to co-operate. Mr. De Lacy correctly divined Mr. Coyle's object in convening the second meeting and he was, in my view, perfectly entitled to relay his apprehension to the creditor appointed members and to relay his suggestion as to how what was perceived to be Mr. Coyle's plan might be foiled.

107. The second issue on the application for directions is whether leave of absence was validly given.

108. If the proposed meeting for 6th June, 2018 was not properly called, which it was not, the issue of the validity of the leave of absence does not arise: but I will nevertheless express my view on it.

109. Mr. Coyle would argue, on the one hand, that leave of absence must be given unanimously by all of the members of the committee of inspection, and, on the other, that he has never argued that he could unilaterally veto any request for leave of absence.

Logically, any action requiring the concurrence of all can be blocked by the objection of any one.

110. Section 668(4)(b) contemplates "*the leave of those persons who, together with himself or herself, were appointed as members of the committee by the creditors or, as the case may be, members of the company*." This provision could not be clearer. The creditor appointed members were appointed, together, by the creditors on 6th October, 2017. The members of the committee appointed by the members of the company were, together, appointed by the members of the company on 9th October, 2017. By s. 668(5), members of a committee of inspection are subject to removal by what Dr. Courtney refers to as the constituencies by whom they were appointed, and by s. 668(6) vacancies are to be filled by the constituency in which the vacancy has occurred.

111. Neither Mr. Coyle nor Mrs. Coyle nor Mr. Moffat had any role in deciding whether the creditors' members would have leave of absence. In my view, any issue as to whether an absent creditors' member (or, for that matter, a members' nominee) had leave is a matter between him and her and those other members with whom he or she was appointed, so that it is not open to the members' appointees to challenge the non-attendance of a creditors' appointee. If I am wrong in that, I do not see in the legislation any requirement that the leave of absence must be unanimous. In this case, each of the creditors appointed members, other than Ms. Woods, had the express permission of all but one of the others to be absent, and Ms. Woods had the permission of all of the others.

112. Mr. Moffat characterises the action of the majority of the creditors' nominees to give leave of absence to the others as a "*leave of absence conspiracy*". Mr. De Lacy says that this characterisation is misguided and untrue. However it may be characterised, the leave of absence was given by each of the creditors' nominees to all of the others on a proposal of Mr. De Lacy to forestall an apprehended move by Mr. Coyle and, possibly, to forestall a meeting at which the liquidator would not be in attendance but at which, if only two of the creditors' nominees attended, Mr. and Mrs. Coyle and Mr. Moffat would be in the majority. I see nothing wrong with that.

113. I would reject the submission that leave of absence must be granted by the entire committee of inspection, or that it must be granted unanimously by the class or constituency to which the absent member belongs.

114. The third issue identified by Mr. De Lacy on his application for directions is whether the members of the committee of inspection vacated their office by their non-attendance, without leave, at two consecutive meetings.

115. Again, this issue would only arise if the meetings had been validly called (which they were not) and if the creditor appointed members did not have leave of absence (which they did): but I will express my view.

116. If the meeting of 30th May, 2018 had been validly called, it would have been inquorate. Section 697(3) of the Act of 2014 provides that if within 30 minutes from the time appointed for a meeting to which that provision applies a quorum of creditors, contributories or members, as the case may be, is not present or represented, the meeting shall be adjourned to the same day of the following week at the same time and place, or to such other day or time or place as the chairman may appoint, not less than seven nor more than 21 days later. By s. 690, s. 697 applies in relation to a meeting of creditors, contributories or members held or to be held under Part 11 of the Act of 2014.

117. Mr. Beatty submits that s. 697(3) does not apply to meetings of the committee of inspection but that if it did, the meeting of 30th May, 2018 ought to have been adjourned, so that any non-attendance at the adjourned meeting would only count as non-attendance at one meeting.

118. Mr. Coyle seeks to rely on s. 697(3), but the fact of the matter is that the inquorate meeting of 30th May was not purportedly adjourned but a new meeting was purportedly convened for 6th June.

119. Mr. Coyle seeks to make much of the fact that the creditor appointed members of the committee of inspection – who were on notice of the liquidator's motion and his cross motion – did not appear or participate in the hearing. As I have said, Ms. Woods resigned and three of the other four, by their solicitors, notified the liquidator's solicitors of their support for the position he had taken. Mr. Brian Conroy was instructed on behalf of Ms. Deirdre Murphy and supported the position of the liquidator. It was perfectly proper that Messrs. O'Mahony and Kiernan should have conveyed their support to the liquidator's solicitors.

120. I agree that s. 697(3) does not apply to meetings of a committee of inspection. Since it does not, it is in my view unhelpful to contemplate what the position might be if it did. Section 668 contemplates the appointment by the creditors of not more than five persons to the committee of inspection and the appointment of not more than three by the company. There is no provision for a quorum for a meeting of a committee of inspection by number, but s. 668(2), which provides that a committee of inspection may act by a majority of members present at a meeting, spells out that it shall not act unless a majority of the committee is present. In my view, if the meeting of 30th May, 2018 had been validly called and was inquorate, it could not have acted for any purpose, specifically to adjourn, and that would have been that. That was the conclusion of the Ontario Court of Chancery in a case of *McLaren v. Fiskin* [1881] O.J. No. 134. Mr. Coyle, or any other member, could have called a further meeting which would have been a separate meeting and any member who failed to attend both would have fallen within section 668(4).

121. Mr. De Lacy addresses *seriatim* Mr. Coyle's complaints in relation to the figures in the list of creditors appended to the provisional liquidator's report, pointing out that several of those had been addressed and explained in the body of the report.

122. From Mr. De Lacy's explanation, it is evident that there is an issue between the company and the O'Mahonys as to whether the rent payable for the Clane property was permanently reduced. This dispute accounts for a gap of something like €170,000 or €180,000 between the landlords' claim and the company's acknowledged liability. If the issue between the company and the O'Mahonys is not academic at this stage, or cannot be agreed, the claim will have to be adjudicated upon: by Mr. De Lacy in the first instance.

123. As to the €42,883 shown it to be owing to AIB Bank, the affidavits show that Mr. Coyle's figure of €36,000 is more or less the amount of a judgment obtained by AIB Bank against him and Mrs. Coyle on foot of a guarantee of the company's liabilities. The company's liability on one of two accounts with AIB Bank is €42,890.28. Mr. Coyle's proposition that the company's liability to the bank is capped at the amount of the unpaid judgment which the bank recovered against the guarantors is ridiculous. So too is Mr. Coyle's proposition that the effect of the unsatisfied judgment is that he has become a creditor of the company in the amount of the unpaid judgment.

124. Mr. De Lacy's assessment of the claim of Targeted Investment Opportunities was based on a combination of the arrears of rent claimed and an estate agent's report as to the value of the use and occupation of the Bachelors Walk premises. Mr. Coyle's position is founded on his heretical belief that the forfeiture of a lease absolved the lessee from all liability to the lessor.

125. The figure of €21,296 shown to be owing to Real Estate Holdings, which Mr. Coyle says is only €5,333, is supported by an invoice and statement of account and the liability was admitted by Mrs. Coyle in the statement of affairs for the company which she swore on 17th October, 2017.

126. The claim of Three Ireland for €1,953 was the subject of a solicitor's letter and threatened District Court proceedings.

127. It is the duty of a provisional liquidator to make an assessment of the company's liabilities. Mr. De Lacy's assessment was abundantly justified.

128. Mr. De Lacy refutes in detail the proposition that he allowed the O'Mahonys and Targeted to vote at the creditors' meeting when he knew that they were not entitled to vote but for the reasons already given, that proposition was unsustainable on its face. And even if Mr. De Lacy had made a technical mistake in allowing the O'Mahonys to vote their unliquidated claim for mesne rates as well as their liquidated claim for rent, it could not possibly have justified an application for his removal.

129. Mr. De Lacy also refutes the other allegations said to amount to "*particulars of cause shown"* but again, for the reasons I have given, those complaints were unsustainable in the first place.

130. As to the complaint that Mr. De Lacy refused to facilitate oversight of the liquidation, Mr. De Lacy points out, correctly, that the demands for trading figures and accounts never came from the committee of inspection as such, but from Mr. Coyle and Mr. Moffat. Mr. Moffat's list of documents and information and his draft agenda were obviously based on a fundamental misunderstanding of the role of the committee of inspection. Mr. De Lacy correctly believed that Mr. Moffat's requests presaged an attempt to usurp the role of the liquidator and I find that he was entirely justified in refusing Mr. Moffat's request.

131. As to Mr. De Lacy's request that Mr. and Mrs. Coyle and Mr. Moffat should absent themselves from the meeting of the committee of inspection while he updated the other members on the trading position of the company and on the litigation against Mr. and Mrs. Coyle, the fact is that Mr. and Mrs. Coyle had established themselves in business in direct competition with the company and were defendants and counterclaimants in the plenary proceedings. I find that Mr. and Mrs. Coyle, and Mr. Moffat as their nominee, were clearly conflicted and it was entirely appropriate that Mr. De Lacy should have briefed the committee of inspection in relation to the trade and litigation in their absence.

132. One of Mr. Coyle's and Mr. Moffat's complaints against Mr. De Lacy is that he has caused unnecessary cost through litigation against the directors. In Mr. De Lacy's view, the plenary proceedings were necessary to preserve the value of the business and to stop Mr. and Mrs. Coyle and their daughters from impeding, frustrating and obstructing the liquidation. Those proceedings, in which Mr. and Mrs. Coyle and the Misses Coyle submitted to a variety of interlocutory orders, are well advanced but have not been decided. Mr. Coyle and Mr. Moffat now argue that Mr. De Lacy's action is devoid of merit. Mr. De Lacy counters that the proceedings are entirely meritorious. In effect, the court is now asked by both sides to either summarily adjudicate on the merits of the plenary proceedings or to attempt to make some provisional assessment of the likely outcome. That is something that the court could not possibly do.

133. It is at least implicit in Mr. Coyle's and Mr. Moffat's case that whatever the outcome of the plenary proceedings may be, there is no hope of recovering against any of the Coyles on foot of any award of damages or costs. The assessment of the likely true value of whatever orders Mr. De Lacy hopes to win is a matter for him, in consultation with the creditor members of the committee of inspection. Moreover, since the Coyles are counterclaimants as well as defendants, the only way in which Mr. De Lacy could bring the plenary proceedings to an end would be to abandon the claim and submit to the counterclaim, or to settle upon such terms as the Coyles might be willing to agree. It is wholly unrealistic to contemplate that Mr. De Lacy would share his legal advice or discuss the prospects of success of the claim or counterclaim with his opponents: still less that he might be removed as liquidator for failing to abandon his claim and capitulate to the counterclaim.

134. On 30th November, 2018 Mr. Moffat filed a second long affidavit, repeating his proposition that the effect of the contested forfeiture of the Clane lease and the contested termination of the Bachelors Walk tenancy meant that "*there was no indebtedness due to*

the lessors at the time of the liquidation", and advancing a number of confused arguments based on the "*corporate status of the committee of inspection*". The affidavit was largely a repetition of what Mr. Moffat had previously said. At great length, Mr. Moffat disagreed with all that Mr. De Lacy had said and agreed with all that Mr. Coyle had said.

135. On 10th December, 2018 Mr. Coyle filed a further affidavit described as a replying and supplemental affidavit. In great detail, Mr. Coyle sought to demonstrate that the creditor appointed members of the committee of inspection must have been, or were likely to have been, aware from the e-mail he sent to some of the creditors and to Mr. De Lacy on 23rd May, 2018 of his wish to have a meeting of the committee of inspection on 30th May, 2018.

136. Mr. Coyle also dealt with his attempt to call a meeting for 6th June, 2018. It will be recalled that Mr. De Lacy in his first affidavit referred to an e-mail sent to him and Mr. Moffat on 30th May, 2018. It emerged from Mr. Coyle's second affidavit that this e-mail had been blind copied to those to whom the e-mail of 23rd May, 2018 had been sent. But as the earlier e-mail was not notice to the members of the committee of inspection of the meeting proposed for 30th May, neither was the e-mail of 30th May notice of the meeting proposed for 6th June, 2018.

137. Otherwise, the second affidavit of Mr. Coyle is argumentative, setting out as averments of fact what should have been offered as submissions of law.

138. At para. 39 of his second affidavit, Mr. Coyle introduced a new allegation that Mr. De Lacy, as provisional liquidator and thereafter, had incurred unnecessary expense in hiring a security firm to protect the company's premises. If what Mr. Coyle said about the engagement of a security firm required a response at all, it would have been sufficient for Mr. De Lacy to have said, as he did say, that it is standard practice for a provisional liquidator to engage security personnel and locksmiths and so forth to assist with taking control of a company's premises and assets, and that the security he engaged was what he believed to have been warranted in the circumstances.

139. Mr. De Lacy, however, went on to set out in detail why he took the measures he did and opened a whole new labyrinth of dead ends, none of which was material to any of the issues before the court. It is not necessary or appropriate for the court to embark upon the consideration of the rights or wrongs of the reports of which Mr. De Lacy based his judgment as to the extent of the security he would require to allow him to perform his functions; or who might have reported the attempt by the Dublin City Sheriff on 14th December, 2016 to execute a District Court warrant for payment of rates to the Gardaí at Store Street as an armed raid.

140. At para. 47 of his second affidavit, Mr. Coyle suggested that by making the staff redundant, Mr. De Lacy had increased the liabilities of the company by €138,917.26. But it is well established that the redundancy of the staff was the consequence of the winding up order, the effect of which in the ordinary case is a discharge of the company's

employees. *See Donnelly v. Gleeson* (Unreported, High Court, 11th July, 1978, Hamilton J.).

141. At para. 48 Mr. Coyle expressed concern at the fact that Mr. De Lacy's professional indemnity insurance was in the name of his firm and that his "*underwriters*" had allowed a charge over all of their assets which would effectively place them beyond the reach of their creditors. The adequacy of Mr. De Lacy's professional indemnity insurance is a matter between him and the court and had been adjudicated upon by the court. Moreover, I am not satisfied that Mr. Coyle has any genuine concern as to the insurance, but his challenge is part of a campaign to harry Mr. De Lacy. It was also asserted – without a shred of evidence – that Mr. De Lacy was responsible for an article in the *Sunday Business Post* which Mr. Coyle thought was derogatory and defamatory of him.

142. I mention, for completeness, that in the course of argument Mr. Coyle sought to raise an issue in relation to Eugene Sheehan & Co., accountants. Mr. Sheehan, he said, as his personal accountant as well as the accountant to the company. Mr. De Lacy, he said, had paid Mr. Sheehan €21,000 for work done for the purposes of the liquidation. Mr. Coyle referred to the decision of the House of Lords in *Bolkiah v. KPMG* (A firm) [1999] 2 A.C. 222 and suggested that there was no evidence that Mr. Sheehan had not disclosed his confidential information to Mr. De Lacy. I did not understand where Mr. Coyle thought this might go. There was no evidence that Mr. Sheehan had not disclosed Mr. Coyle's personal information to Mr. De Lacy, but there was not even an assertion, never mind any evidence that he had.

143. I mention, also, that although Mr. Coyle sought the removal of Mr. De Lacy as liquidator, he did not propose any alternative liquidator.

144. Mr. Coyle's last word was an unashamed admission that his object in seeking to have Mr. De Lacy removed or the winding up order annulled was to regain control over the company.

145. A third affidavit of Mr. Moffat sworn on 9th January, 2019 had not a word of evidence in it but comprised a commentary on the evidence of Mr. De Lacy and Mr. Coyle in relation to events in which Mr. Moffat had no involvement.

146. Mr. Moffat's second last word was that the squandering of creditors' money on court proceedings is obscene. His last word was that he should be reimbursed by way of costs for the outlays, travel and personal time spent on Decobake business as a member of the committee of inspection at the rate at which the time of partners is charged out by firms of solicitors.

147. In the written submissions filed on behalf of the liquidator the idea was floated that the court might wish to consider whether it should dispense with the need for the committee in inspection entirely so that the liquidator might report to the creditors at a creditors' meeting. This was not sought by the notice of motion and it is not evident that the views of either the creditors' nominees to the committee of inspection or the creditors were

canvassed. Nor was there any submission that the court should in fact dispense with the committee of inspection, or why.

148. The primary relief sought by the liquidator's motion for directions issued on 28th August, 2018 was an order determining the constitution of the committee of inspection. That motion also sought an order pursuant to s. 668(7) dispensing with the need to fill the vacancy on the committee of inspection which arose on the resignation of Ms. Susan Woods on 16th August, 2018.

149. Section 668(7) provides that if the liquidator, having regard to the position in the winding up, is of the opinion that it is unnecessary for a vacancy occurring in the committee to be filled, he or she may apply to the court and the court may make an order that the vacancy shall not be filled, or shall not be filled except in such circumstances as may be specified.

150. Mr. De Lacy asks for an order that the vacancy should not be filled but he does not depose that it is his opinion that it is unnecessary to fill the vacancy, still less explain why it should not be filled. It seems to me that the ground has not been laid for this application.

151. I find that Mr. De Lacy has made out the case he makes as to the constitution of the committee of inspection.

152. I find that Mr. Coyle has not made out his case that Mr. De Lacy should be removed as liquidator.

Mr. De Lacy's motion for an extension of time within which to comply with the requirements of section 681

Mr. Coyle's motion for an order directing compliance by the liquidator with his obligation under s. 681

153. Section 681 of the Companies Act, 2014 requires that where a winding up has not been concluded within twelve months of the date of its commencement, the liquidator should send to the registrar of companies, at the specified intervals, a statement in the prescribed form containing the prescribed particulars about the proceedings in, and the position of, the winding up. The prescribed form is Form E4.

154. The particulars include the amounts in which the company is indebted to secured creditors and the form requires a declaration that the liquidator conscientiously believes the same to be true.

155. Mr. De Lacy struggled with the statutory forms. At the time of his appointment, the books and records of the company had not been written up to date. Mrs. Coyle eventually swore what she described as a provisional statement of affairs, which she qualified by an assertion that she had been denied access to books and records and prevented from contacting creditors to verify facts. The figures in this document are variously relied upon by Mr. Coyle as irrefutable evidence of the company's indebtedness

to him and Mrs. Coyle, but not of the indebtedness of the company to various of its trade creditors.

156. On 2nd November, 2016 Mr. and Mrs. Coyle and their daughters filed a notice in the companies registration office of the creation of a charge in their favour over the assets of the company. From the time of Mr. De Lacy's appointment, Mr. and Mrs. Coyle have taken inconsistent positions as to the effect and effectiveness of this charge. The document relied upon appears to have been shown by Mr. Coyle to Mr. De Lacy on 30th June, 2017 when Mr. De Lacy came to take possession of the company's property, in support of a contention that the charge had crystallised so that all the property on the premises belonged to Mr. Coyle and his family, and not the company. Later, it was suggested that the charge was, variously, a fixed and floating charge, or a floating charge, and that it might have been void in certain unspecified respects. Mr. and Mrs. Coyle were inconsistent in the amounts which they claimed to be owed to them by the company and whether those amounts were or were not claimed to be secured. As has been seen, Mr. Coyle took various positions on the claims of various creditors of the company and the amounts of their claims. Mr. Coyle failed to deal with Mr. De Lacy's correspondence which was directed to establishing what the company's liabilities were.

157. By e-mail of 9th May, 2019 Mr. Coyle wrote to Mr. De Lacy that he had failed to lodge accounts in accordance with law and threatened a court application. Mr. De Lacy replied, by his solicitors, on 13th May, 2019 protesting that Mr. Coyle's claims has vacillated wildly and arguing that the filing of accounts would be an entirely futile and meaningless exercise where the financial status of the company was grossly uncertain.

158. Eventually, on 21st May, 2019 Mr. De Lacy filed E4 forms for the twelve months ending 23rd July, 2018 and the six months ending 23rd January, 2019. Mr. De Lacy qualified his declaration on these returns by saying that he was not satisfied regarding the accuracy of the amounts which had been extracted from the statement of affairs prepared by the directors which statement of affairs had been qualified by them as to its accuracy.

159. The forms were rejected by the companies registration office because the effective periods were incorrect. The correct starting date – it was said, quite correctly - should have been the date of presentation of the petition and not the date of the winding up order. When the forms were resubmitted by Mr. De Lacy on 18th July, 2019 they were again rejected: this time because they were required by the registrar to be in the standard format, without any adjustments to the template text.

160. In the meantime, Mr. Coyle had issued his motion on 4th June, 2019 and on 16th September, 2019 Mr. De Lacy countered with a motion for relief under section 681(4).

161. In support of his motion, Mr. Coyle swore a short affidavit exhibiting his correspondence with Mr. De Lacy and asserting that the accounts were required for his pending motion to remove Mr. De Lacy, alternatively for the creditors to understand the position of the company.

162. In support of his motion, Mr. De Lacy swore a relatively short affidavit in which he outlined the difficulties he had had in completing the forms and asserting that Mr. Coyle had wholly obstructed the liquidation.

163. Mr. Moffat, although not a party to either motion, weighed in with a "*fourth affidavit of Andrew Moffat*" suggesting that Mr. De Lacy's motion (but not Mr. Coyle's) was interlinked with the first two motions. In anticipation that there might be objection to Mr. Moffat seeking to intervene in these motions, all that he had to say was copied and pasted into a further affidavit of Mr. Coyle. Mr. Moffat contended that the rejection by the registrar of the resubmitted forms was brought about by his intervention.

164. The primary relief sought by Mr. De Lacy by his motion of 16th September, 2019 is an order extending the time for compliance with the requirements of section 681. Alternatively, he asks for an order pursuant to s. 681(4) disapplying, exempting or dispensing with the requirement that he comply with the provisions of s. 681(2) and/or 681(3).

165. If not for any of the reasons offered by Mr. Coyle or Mr. Moffat, I am nevertheless satisfied that Mr. De Lacy's motion is misconceived.

166. I am prepared to assume for present purposes – but I have not heard argument and am not to be thought to have decided – that s. 681(4) invests the court with power to extend the time for compliance with the requirements of sub-s. (2) after the intervals prescribed by sub-s. (3) have passed.

167. The premise of any application to extend time for compliance with the statutory requirements can only be that what the Act requires to be done can be done, but not just yet. It seems to me that difficulty in complying with the statutory requirement cannot, by itself, amount to a good reason why the requirement should be dispensed with.

168. It is self-evident that liquidations which continue for twelve months and beyond are likely to involve a variety of difficult issues.

169. It seems to me that the position taken by the registrar is correct. In a complicated or convoluted liquidation, the liquidator may not at the prescribed intervals be able to make an affirmative conscientious declaration as to the company's liabilities, but the issues in relation to contested liabilities can be summarised in the body of the form. I believe that it was not appropriate that Mr. De Lacy should have sought to make returns setting out figures which he declared he did not believe to be accurate.

170. It is undoubtedly the case that Mr. Coyle has set out to avoid, frustrate, hinder, impede and delay the liquidation of Decobake Limited at every turn. The books and records of the company are incomplete. The information in the company's records is variously challenged and verified by the directors. The position taken by Mr. Coyle from time to time has, as Mr. De Lacy's solicitors asserted in their letter of 13th May, 2019, vacillated wildly in respect of different claims which are wholly inconsistent. It does not follow,

however, that the financial status of the company is grossly uncertain or, even if it was, that the submission of any account would be an entirely futile and meaningless exercise.

171. As I have observed, the premise of any application to extend the time must be that what needs to be done can be done but there is no indication as to what remains to be done, or when it is thought likely that whatever needs to be done can be done. As far as the liabilities of the company are concerned, there is no suggestion that any information or document is required from anyone other than Mr. and Mrs. Coyle. It seems to me that the only certainty in this case is that Mr. De Lacy cannot reasonably expect any co-operation from the directors and so must either compel the production of whatever information and documents he is confident that the directors have, or make his decisions by reference to the material which he has. As far as the assets are concerned, the continuing intention appears to be that a buyer can be found for the business. While Mr. De Lacy does not in terms say so, I think that the inference is irresistible that the value of the business, if not the prospects of finding a buyer at any price, are dependant on the outcome of the ongoing litigation. I can readily imagine that it may be difficult, but it is not said that it is impossible, to estimate the value of the outstanding assets or the period within which the winding up may probably be completed. It is not said that the publication of any of the information required to be included in the E4 would be detrimental to the liquidation.

172. In the affidavit of Mr. De Lacy grounding his application, reference is made to the motions for directions as to the composition of the committee of inspection and for the removal of the liquidator. I do not see how the outcome of those motions might assist in the determination of the question of whether Mr. Coyle and his family are secured creditors, or what the liabilities to them might be.

173. For these reasons, I am not satisfied that Mr. De Lacy has made out a case either for an extension of time within which to comply with the requirements of s. 681(2), or a direction that the obligation under s. 681(2) should not apply.

174. Mr. Coyle's declared object in pursuing all of these motions is to unseat the liquidator and recover control of the company's business. His declared primary object in seeking the order directing compliance with the requirements of s. 681 and various other orders for the inspection of the company's books and delivery of accounts is to gather information which he hoped would assist him in having Mr. De Lacy removed. I do not believe his alternative assertion that the application was pursued for the benefit of the creditors generally.

175. By his motion issued on 5th October, 2018, Mr. Coyle sought, in the alternative to an order removing Mr. De Lacy or annulling the winding up, orders pursuant to s. 179 convening a general meeting of the company and pursuant to s. 689 convening a creditors' meeting. Technically the reliance on s. 689 was misplaced but I attach no importance to that. Mr. Coyle has not articulated why he might need an order convening any meeting, or what specific business he proposes might be conducted at any such

meeting, but I am confident that his hope is to draw the court into the further pursuit of his vendetta against Mr. De Lacy. The court will not be so drawn.

Orders

176. On Mr. De Lacy's motion issued on 29th August, 2018 there will be:-

(a) An order pursuant to s. 631(2) of the Companied Act, 2014 determining that the members of the committee of inspection are Malcolm O'Mahony, Catherine Kennedy, David Kiernan, Deirdre Murphy, Paul Coyle, Margaret Coyle and Andrew Moffat.

(b) An order refusing the application pursuant to s. 668(7) dispensing with the need to fill the vacancy on the committee of inspection which arose on the resignation of Ms. Susan Woods on 16th August, 2018.

177. Mr. Coyle's motion issued on 5th October, 2018 will be refused.

178. Mr. Coyle's motion issued on 4th June, 2019 will be refused.

179. Mr. De Lacy's motion issued on 16th September, 2019 will be refused.

180. There will be an order for the payment by Mr. Coyle of the costs of Mr. De Lacy's motion issued on 29th August, 2018 and of Mr. Coyle's motion issued on 5th October, 2018, which, in any event, will be ordered to be costs in the liquidation.

181. There will be no order as to the costs either of Mr. Coyle's motion issued on 4th June, 2019 or of Mr. De Lacy's motion issued on 16th September, 2019.

182. I will hear counsel as to what, if any, order should be made as to Ms. Murphy's costs.