THE HIGH COURT
CHANCERY

[2021] IEHC 251
[2019 No.88COS]

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

BETWEEN

THE REVENUE COMMISSIONERS

APPLICANTS

AND

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

RESPONDENTS

RULING of Mr. Justice David Keane delivered on the 1st April 2021

Introduction

1. On 19 February 2021, I gave judgment refusing the application of the Revenue Commissioners ('Revenue') for various directions and declarations as of right, pursuant to s. 438 of the Companies Act 2014 ('the 2014 Act'), against Aengus Burns and Paul McCann (together, 'the receivers'), as receivers and managers of the property of Begassa Limited ('the company').

2. This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2021] IEHC 110.

3. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to file concise written submissions, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.

4. Both Revenue and the receivers filed helpful and concise written submissions within the period allowed.

The costs of the application

i. applicable rules and principles

5. Order 99, rule 2(1) of the Rules of the Superior Courts ('RSC'), as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), confirms that , subject to the provisions of statute, the costs of and incidental to every proceeding in the Superior Courts shall be at the discretion of the court concerned.

6. Order 99, rule 3(1) of the RSC provides in material part:

> 'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

7. Section 168 of the Legal Services Regulation Act 2015 ('the 2015 Act') states in material part:

'(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings ...

(2) Without prejudice to *subsection* (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,
(b) costs from or until a specified date, including a date before the proceedings were commenced,
(c) costs relating to one or more particular steps in the proceedings,
(d) where a party is partially successful in the proceedings, costs relating to the successful elements of the proceedings, and
(e) interest on costs form or until a specified date, including a date before judgment.'

8. Section 169(1) of the 2015 Act states:

'A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases,
(d) whether a successful party exaggerated his or her claim,
(e) whether a party made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.'

9. In *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183, (Unreported, Court of Appeal, 8 July 2020) ('Chubb') (at para. 19), Murray J distilled from those provisions the following principles on the costs of concluded proceedings:

'(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0. 99, r.2(1)).

(b) In considering the awarding of costs of any action, the Court should '*have regard to'* the provisions of s.169(1) (0. 99, r.3(1)).

(c) In a case where the party seeking costs has been '*entirely successful in those proceedings'*, the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to '*order otherwise'* the court should have regard to the '*nature and circumstances of the case'* and '*the conduct of the proceedings by the parties*' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is '*partially successful'* in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been '*entirely successful'* the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (0. 99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).'

ii. submissions on costs

10. The receivers submit that they have been entirely successful in these proceedings, so that they are entitled to an award of costs against Revenue, as there is nothing in the particular nature and circumstances of the case, or in the conduct of the parties, that would warrant the exercise of the court's discretion to order otherwise.

11. Revenue submits that the receivers have not been successful on one issue – namely, the applicability of s. 617(4) of the 2014 Act to a receivership as opposed to a winding-up – and that, in consequence, it is entitled to either an order for a portion of its costs of the application or an order that each party should bear its own costs.

12. In advancing that submission, Revenue relies on the observation of Murray J in *Chubb* (at para. 20), that there are two potential difference between the former costs regime and that which now applies under the Act of 2015: first, that the discretion to depart from the principle that costs should follow the event where the successful party has not prevailed on all issues is no longer limited to complex cases; and second, that, in a case with more than one 'event', prevailing in the event and being entirely successful in the action may well not mean the same thing.

13. In developing its argument, Revenue suggests, in short, that the receivers may have won the event but were not entirely successful in the application because they failed to persuade the court that the repayment of the *receivership* loan attracted the statutory priority accorded to the reimbursement of funds used to discharge any costs, charges or expenses *in a winding up* under Part 11 of the 2014 Act.

14. Revenue relies on a number of decisions on costs in cases in which the losing party prevailed on an issue or issues and where, in consequence, the court concerned determined the percentage of the overall costs attributable to that part of the trial, before netting those costs off against the remaining percentage of the costs of the proceedings due to the winning party.

15. So, Revenue cites *McAleenan v AIG (Europe) Ltd* [2010] IEHC 279, (Unreported, High Court (Finlay Geoghegan J), 16 July 2010), a case in which a solicitor challenged an insurer's decision to avoid the professional indemnity policy for the solicitor's practice in which she worked, which decision had been taken on the grounds, among others: (1) that the plaintiff was a partner in the practice; (2) that the policy was a joint, and not a composite, one; (3) that the policy was vitiated by the alleged fraudulent non-disclosure of the principal in the practice; (4) that the insurer was entitled to rely on additional grounds of avoidance set out in a particular letter; (5) that the plaintiff misrepresented to the insurer that she was a partner in the practice; and (6) that the misrepresentation was a material one and was recklessly made entitling the insurer to avoid the policy.

16. The plaintiff succeeded in her challenge to the first three grounds invoked to support the avoidance of the policy but failed on the others with the result that she lost the action. However, Finlay Geoghegan J concluded (at para. 9) that the insurer had decided to pursue its defence of the first three ground to a determination, which 'added significantly to the evidence adduced; to the extent of the legal submissions; and to the length of time of the hearing of the case'. The hearing took nine days; six days of evidence and three days of submissions.

17. Finlay Geoghegan J concluded that, rather than attempt to separately assess the costs of each issue, it would be preferable instead to estimate the percentage of the costs attributable to the issues on which the plaintiff had succeeded and to offset that amount against the remaining percentage of the costs of the proceedings to which the insurer was entitled as the successful party. The resulting apportionment was one in the ratio of 40:60 and, subtracting the former portion of the costs from the latter, the insurer was thus entitled to an order for 20% of its costs of the proceedings.

18. Similarly, Revenue relies on the decision of the Court of Appeal in *Sony Music Entertainment (Ireland) Ltd & Ors v UPC Communications Ireland Ltd* [2017] IECA 96, (Unreported, Court of Appeal (Finlay Geoghegan, Hogan and Faherty JJ) ('*Sony Music*'). That was an appeal concerning the costs of a copyright infringement injunction application. In considering the costs of the application, the High Court had applied the principles identified by Clarke J in *Veolia Water UK plc v Fingal County Council (No. 2)* [2007] 2 IR 81 ('*Veolia*') on the costs of complex cases where the winning party has not

succeeded on all of the issues and had, in consequence, awarded the successful plaintiffs 60% of their costs. In upholding that determination, the Court of Appeal (*per* Finlay Geoghegan J) endorsed the approach that had been adopted in McAleenan, before concluding:

> '24. It follows from the decision of the trial judge in these proceedings that he must have formed the view that the issues on which UPC was successful contributed only as to 20% of the overall costs of the proceedings. Such a decision leads to the plaintiffs being entitled to an order for 80% of their costs and the defendants to a cross order for 20% leaving, as the trial judge determined, a net order in favour of the plaintiffs for 60% of their costs.
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> 25. No objection was taken to the trial judge adopting an approach of awarding a percentage of the overall costs as distinct from making an order confined to a limited number of total hearing days. Where the losing party has won on a number of issues this appears appropriate where the issues on which it has won includes legal issues and will have contributed to many of the preparatory costs relating to pleadings and submissions. There may be other cases where a winning party has lost on what is primarily an evidential issue or some other issue makes it appropriate to simply reduce the hearing days for which costs are allowed.'

19. Most particularly, Revenue cites the recent judgment on costs of Sanfey J in *Re Latzur Ltd (in receivership)* [2021] IEHC 97, (Unreported, High Court, 11 February 2021) ('*Latzur*'). Like the present case, that one concerned an application for directions pursuant to s. 438 of the 2014 Act. The applicant was the receiver and manager of the assets of a company named *Latzur Ltd ('Latzur'*), appointed under a debenture made between it and another company named Chelsey Investissements SA ('Chelsey'). The receiver sought directions concerning whether, in the events that had occurred, the floating charge created by the debenture had converted to a fixed charge. The resolution of that question would determine, in effect, whether the funds available for distribution were to go to Chelsey, as holder of that fixed charge, or to Latzur's preferential creditors, of which Revenue was the largest. Thus, the contest at the hearing – in which the receiver took no active part – was one between Chelsey and the Revenue.

20. The question posed by the receiver, in seeking directions, was whether the delivery of a notice of conversion by Chelsey to Latzur, while the latter was in examinership, had operated to expressly crystallise the floating charge. The written submissions delivered on behalf of Revenue shortly before the originally scheduled hearing date revealed that it would be relying on the asserted failure of Chelsey to prove delivery of that notice. Shortly afterwards, Chelsey addressed that issue in two affidavits. The Covid-19 pandemic then intervened, forcing the hearing to be rescheduled. At the commencement of the rescheduled hearing, Chelsey applied for leave to file the two new affidavits in court. Revenue opposed that application. Sanfey J acceded to it on the basis that there was no evidence that to do so would cause any prejudice to Revenue, which had by then been in possession of copies of the affidavits for a number of months. In the course of the

hearing, Chelsey advanced the separate argument, flagged for the first time in its written submissions, that, prior to the delivery of the notice of conversion, the floating charge had already automatically crystallised under the terms of the debenture either when the examinership petition was presented or when the sole director of the company resolved to petition for examinership, or both.

21. In his judgment on that directions application, given under the citation [2020] IEHC 592, (Unreported, High Court, 20 November 2020), Sanfey J concluded as follows (at para. 145): (1) The presentation of the examinership petition had effected the automatic crystallisation of the floating charge; (2) the sole director's decision to petition for examinership had not; (3) even if the presentation of the petition had not crystallised the floating charge, the subsequent delivery of the notice of conversion had done so; (4) thus, the receiver was appointed under a fixed charge; and (5) in consequence, Chelsey was entitled to the funds.

22. Returning to the judgment on costs, Sanfey J cited the passages already referred to in the judgment of Murray J in *Chubb* before observing that, while it might be said that Chelsey had 'won the day' and was therefore entitled to its costs, the case demonstrated a number of factors relevant to the statutory discretion to order otherwise. Those factors were, in summary (at para. 7):

> '(1) The originating notice of motion issued by the receiver did not address the issue on which Chelsey ultimately prevailed, i.e. the automatic crystallisation of the charge. As regards crystallisation of the charge, the only issue raised by the receiver was that of whether a notice of crystallisation of 23rd November, 2013 served by Chelsey was sufficient to convert the floating charge into a fixed charge;
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> (2) the issue of automatic crystallisation arose for the first time after service of the affidavits in the written submissions delivered by Chelsey on 9th March 2020, just over two months prior to the assigned hearing date;
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> (3) affidavits in relation to service of the notice of crystallisation were sworn on 14th and 17th April 2020, only after the written submissions of Revenue delivered on 6th April 2020 made it clear that Revenue would contend at the hearing that Chelsey had not proved service of the notice of crystallisation;
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> (4) Chelsey was required to make application to this Court on the new hearing date of the application – 17th September 2020 – for liberty to file the affidavits relating to service in court. This application was opposed unsuccessfully by Revenue, and the affidavits were an essential element in establishing the service of the notice of crystallisation;
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> (5) four grounds for establishing that the receiver was appointed on foot of a fixed charge were advanced by Chelsey. On two of these issues – the contentions that the floating charge automatically crystallised into a fixed charge on the presentation of the petition to appoint an examiner, and that the service of the notice of

crystallisation, in the absence of automatic crystallisation, served to convert the floating charge into a fixed charge – Chelsey was successful. On the other two issues – whether automatic crystallisation occurred automatically on the appointment of the receiver, and whether the passing of a resolution by the company had the effect of crystallising the floating charge – Revenue was successful.'

23. Sanfey J then made several further observations about the circumstances of the application that I would summarise in the following way:

(a) Chelsey had been unsuccessful on a number of issues and had primarily succeeded on the issue of whether the floating charge had automatically crystallised, an issue only raised for the first time in its written submissions (para. 8).

(b) Although, Chelsey also prevailed on the express crystallisation issue, it could not have done so without proving delivery of the notice of conversion, which was only possible because the court acceded to its application to file two affidavits in court to that end, an application that would have been more contentious and less likely to succeed if the hearing had proceeded when originally scheduled (para. 9).

(c) In considering whether it was reasonable for Revenue to raise, pursue or contest the issues in the proceedings, it was material to note: first, that Revenue had succeeded on two of the four issues Chelsey raised in support of the contention that the floating charge had crystallised into a fixed charge and had only failed on another because the court acceded to Chelsey's application for permission to file additional affidavits; and second, that the issue of the validity of an automatic crystallisation clause was a novel and complicated one. Thus, it was reasonable for Revenue to contest all of the issues in the application, even though the result went against it (paras. 10-12).

(d) In addition, it was of some small significance that the application had been brought by the receiver, rather than either of the antagonists in the event, so that it was not a true *lis inter partes* as such (para. 13).

24. Against that background, having determined that it was appropriate to follow the approach outlined by the Court of Appeal in *Sony Music*, Sanfey J adopted the view that, on a rough estimate, the issues on which Chelsey succeeded accounted for 70% of the costs of the proceedings, and the issues on which Revenue did 30%. However, having regard to Chelsey's conduct of the proceedings, in raising one of the issues on which it succeeded for the first time in its written submissions and in requiring leave to file affidavits in court to succeed in another, Sanfey J concluded that, although Chelsey had done anything deliberately improper, it was nonetheless appropriate, in marking disapproval of the disruptive effect of that approach, to reduce the percentage of its costs to which Chelsey was entitled from 70% to 50%. Thus, netting off the 30% of its costs to which Revenue was entitled, Sanfey J awarded Chelsey 20% of its costs of the application against Revenue.

iii. decision on costs

25. While spread out over two separate dates, the hearing of the application took less than one full day of court time.

26. In substance, the application raised just two issues. The first was whether the claim for repayment of the receivership loan was a 'claim for principal or interest in respect of the debenture', within the meaning of that term under s. 440(1) of the 2014 Act, and thus subject to the priority that section gives to preferential payments under Part 11 of that Act. The second was whether the court should grant the directions sought at paragraphs 3 and 4 of Revenue's originating notice of motion.

27. The receivers succeeded, and Revenue failed, on both of those issues.

28. Revenue correctly points out that the receivers failed to persuade me that the 'costs, charges and expenses properly incurred in the winding up of a company' identified in s. 617 in Part 11 of the 2014 fall within the description in s. 440(1) of 'debts, which in every winding up are, under the provisions of Part 11 relating to preferential payments, to be paid in priority to all other debts'.

29. However, I do not accept Revenue's contention that the point should be viewed as a discrete issue in the application. The relevant issue or controversy was whether the claim for repayment of the receivership loan was a claim for principal or interest under the debenture. Revenue's position – the fundamental basis upon which it brought its application – was that it was. Although I rejected the receivers' argument that the claim for repayment of the receivership loan was entitled to an antecedent priority under Part 11 of the 2014 Act, I concluded that it was nonetheless entitled to an equivalent antecedent priority under the common law, as articulated by the UK House of Lords in *Buchler v Talbot* [2004] 2 WLR 582, which priority was not displaced by statute because the claim for repayment of the receivership loan was not a 'claim for principal or interest in respect of the debenture' as that term is used in s. 440(1) of the 2014 Act.

30. While, as Murray J pointed out in *Chubb, prevailing* in the event and being entirely successful in the proceedings are not the same thing, I would also say that failing on a particular point and failing on an issue are not the same thing either. In other words, a legal point is not necessarily the same thing as a legal issue. In this case, the receivers failed on the point but won on the issue to which the point was material. Conversely, Revenue succeeded on the specific point (that the repayment of the receivership loan had no priority under Part 11 of the 2014 Act) but failed on the relevant issue (whether the claim for repayment of the receivership loan was a claim for principal or interest in respect of the debenture, over which the repayment of preferential creditors had priority).

31. Thus, in contrast to the position in *Latzur*, the receivers succeeded on each of the two issues in the application and Revenue failed on each.

32. There are two other differences between the circumstances of the present case and those of *Latzur*. First, I can find nothing to deprecate in the receivers' conduct of the application. Revenue ventures the criticism that the receivers did not provide it with a copy of the receivership loan letter before exhibiting it to an affidavit sworn on their behalf in the application. However, I am not aware if Revenue had ever previously sought to be provided with a copy of that letter. Moreover, there is no suggestion that it was not provided to Revenue in good time prior to the hearing of the application. Further, it is not clear to me whether and, if so, how Revenue contends that the earlier receipt by it of a copy of that letter would have materially affected the position it adopted, the application it brought, or the outcome of that application.

33. The second difference is that this was Revenue's application. It seems to me that it was, in that sense, a true *lis inter partes*.

34. Being satisfied that the receivers were entirely successful in the proceedings and that there is nothing, having regard to the particular nature and circumstances of the case, or the conduct of the parties, that warrants the exercise of the discretion under s. 169(1) of the 2015 Act to order otherwise, I will make an order awarding the receivers their costs of the application against Revenue.

A stay pending appeal

35. Revenue seeks a stay on any order to be made in the application, including any order on the costs of the application, pending appeal, although it does not identify the applicable legal test for the grant of that relief.

36. As a matter of logic and law, I do not think that I can stay the order that I propose to make refusing Revenue the reliefs that it seeks in its originating notice of motion. A stay on the refusal of a declaration is not the grant of a declaration; a stay on the refusal of an order directing a payment to be made is not an order directing that payment to be made; and the refusal of an order determining the sum of money to be paid is not an order determining that sum. Accordingly, the grant of any such stay would be sterile of effect and would serve no useful purpose.

37. If I am wrong about that, then it seems to me the test I must apply on an application for a stay is that confirmed by the Supreme Court in *C.C. v. Minister for Justice* [2016] 2 IR 680, applying the principles earlier identified by that court in *Okunade v Minister for Justice* [2012] 3 IR 152. In simple terms, I must first determine whether the Revenue has established an arguable case and, if so, must then consider whether the least risk of injustice lies in granting, or refusing, a stay.

38. The case that Revenue wishes to make on appeal is that the construction given in the judgment to s. 440(1) of the 2014 Act: (1) sanctions the practice of using floating charge assets to discharge the costs of realising fixed charge assets; (2) sets aside the statutory benefit otherwise accorded to preferential creditors under that section; and (3) breaches the principle that an office-holder should not be remunerated out of the assets otherwise

available for the benefit of preferential creditors for work done for the sole financial benefit of secured creditors.

39. I cannot see how any of those propositions can be said to flow from the judgment. To briefly recapitulate the material findings that it contains:

    (a) The debenture created fixed and floating charges over the company's assets in favour of the bank.

    (b) The receivers were appointed over the assets secured by the debenture.

    (c) The receivers secured a loan facility from the bank to assist in the conduct of the fixed and floating charge receiverships.

    (d) In December 2015, the receivers informed Revenue that they then estimated an 80% dividend would be available to preferential creditors, with the result that Revenue anticipated a preferential payment of €87,317.60.

    (e) Two and a half years later, in June 2018, the receivers wrote again to Revenue stating that their earlier confirmation of an anticipated dividend had issued in error and that no dividend would be available.

    (f) The receivership loan funds drawn down on various dates between March 2012 and April 2014 in the aggregate amount of €234,589.33 were applied for the purposes of both the fixed and floating charge receiverships and were allocated between those receiverships in the ratio 72:28. The partial repayment of that loan in the sum of €208,570 was debited against each of those receiverships in the same ratio, so that €150,664,33 was repaid from the fixed charge receivership and €57,905.67 from the floating charge one.

40. I fail to see how I could have been satisfied on those undisputed or uncontroverted facts that floating charge assets were used to discharge the costs of realising fixed charge assets or that the receivers had been remunerated out of floating charge assets for work done for the sole financial benefit of secured creditors, much less how the judgment can be construed as sanctioning the conduct of a receivership in that way.

41. In so far as I can understand it, Revenue's argument seems to involve a fundamental confusion between purpose and effect. The unfortunate fact that only the secured creditor obtained any benefit from the receivership does not mean that the receivership was conducted solely for the benefit of that creditor.

42. In support of its contemplated appeal, Revenue relies heavily on the decision of Finlay Geoghegan J in the High Court case of Re *DR Developments (Youghal) Ltd* [2012] 1 ILRM 374 ('*DR Developments*') as authority for the uncontroversial proposition that, as a general rule, an officeholder should be remunerated by the creditor or class of creditors for whose benefit the relevant work was done. For the reasons I have already given, I can find nothing in what seems to me the proper construction of s. 440(1) of the 2014 Act

that is inconsistent with the application of that general rule. A brief comparison between the facts of that case and those of the present one serves to reinforce that view.

43. In *DR Developments*, an official liquidator had been appointed to wind up a property development and construction company. All the assets of the company were subject to fixed and floating charges in favour of the company's bank. The company was indebted to the bank in an amount that far exceeded the value of those assets, which comprised a partly developed site and an undeveloped site in East Cork. While not explicitly stated in the judgment, it seems reasonable to assume that those assets were each the subject of a fixed charge in favour of the bank. In any event, it was accepted on all sides that there were no other potential assets available to discharge the liquidator's costs and expenses, much less to make a distribution of any kind to the company's unsecured creditors, preferential or ordinary. Thus, it was accepted from the outset that any work the liquidator might do to realise the company's assets he would be doing for the exclusive financial benefit of the bank (as fixed charge holder) and not for the financial benefit of the company or any of its other creditors.

44. It was in that specific context that Finlay Geoghegan J stated (at 379):

> '19. In such circumstances where an official liquidator is doing significant work for the *exclusive* financial benefit of a charge holder such as [the bank], it would not appear appropriate that he be remunerated for such work out of assets coming into the liquidation which might otherwise be available for distribution to the preferential and general unsecured creditors. Hence, it would appear to follow that where an official liquidator agrees to do work *exclusively* for the benefit of a secured creditor (including selling for the benefit of the holder of a fixed charge) that he should not include the work done as work for which he would claim remuneration in the winding-up. In so far as he reaches agreement with the secured creditor for the discharge of remuneration to him, this requires sanction of the court for the reasons next set out. The position becomes more complex where an official liquidator does work which is in part for the benefit of a secured creditor and in part for the winding-up but similar principles apply. This is unlikely to arise on the facts herein.'
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> (emphasis supplied)

45. The receivers in this case were not in the position of official liquidators, subject to the requirement under s. 228(d) of the Companies Act 1963 to have their remuneration fixed by the court. The work they did was for the benefit of both the fixed and floating charge receiverships, rather than solely for the benefit of the fixed charge receivership (even if, in the event, only the fixed charge holder obtained a benefit from that work). The monies they obtained from the fixed charge holder comprised loan funding for the receivership, rather than remuneration for that work. The application of that loan funding was apportioned between the fixed and floating charge receiverships, as was the partial repayment of it. Thus, there was no question of the receivers being remunerated for

work done in the fixed charge receivership out of assets that were the subject of the floating charge.

46. There is no doubt that difficulties can arise where work in a receivership is done in part for the benefit of a secured creditor and in part for the benefit of other creditors. Indeed, as Revenue points out in its submission in support of a stay, Lynch-Fannon and Murphy, *Corporate Insolvency and Rescue*, (2nd edn, Bloomsbury Professional, 2012) makes precisely that point (at 286), citing the Statement of Insolvency Practice, S14B, *'A Receiver's Responsibility to Preferential Creditors'*, (Institute of Chartered Accountants, 2005) (paras. 17-25) in the relevant footnote. The paragraphs cited deal with best practice on the assessment of preferential creditors' claims. Contrary to the submission made by Revenue, I do not accept that the need to deal with such difficulties when they arise modifies in any way the law on the priorities in a distribution under a receivership.

47. Finally, in submitting that it has an arguable appeal, Revenue suggests that there is something fundamentally inimical to the proper conduct of a receivership if the terms of a privately negotiated debenture or a privately negotiated loan agreement are permitted to determine the priorities in a receivership distribution. Once again, I fail to see how the judgment states or implies any such thing. Rather, it holds that the priorities in a receivership distribution are those recognised by common law, as modified by statute (specifically, s. 440(1) of the 2014 Act). To which I would add that, in enacting sub-ss. (3) and (4) of s. 617 of the 2014 Act, the Oireachtas plainly saw nothing inimical to the proper conduct of a winding-up in conferring a statutory entitlement to reimbursement upon a person who privately agrees to provide funds to discharge any costs, charges or expenses incurred in it, which entitlement has the same priority over all other claims as that given to the discharge of those costs, charges or expenses.

48. For those reasons, I am not satisfied that Revenue has established an arguable ground of appeal on the basis it asserts. Nonetheless, I would be slow to conclude that the very broad construction of the term 'any claim for principal or interest' in s. 440(1) of the 2014 Act for which Revenue contends is an unarguable one. On that basis I would be prepared to hold that there is an arguable appeal.

49. However, I cannot see how the grant of a stay on the order refusing Revenue's application for the declarations and directions it seeks would represent the least risk of injustice in this case pending appeal, not least because it is not clear what purpose such a stay would serve in principle or in practice. For that reason, I must refuse to grant a stay on that order.

50. On the other hand, I will grant a stay on the execution of the order for costs.

Conclusion

51. 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 Revenue to pay the receivers 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 granting a stay on the execution of that costs order pending the expiration of the time permitted for lodging an appeal and, should an appeal be lodged in time, pending its determination.

Order accordingly.