THE HIGH COURT

[2022] IEHC 587

Record No. 2005/309 COS

IN THE MATTER OF CERISE GLEN LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2003

Between

GEORGE MALONEY, LIQUIDATOR OF CERISE GLEN LIMITED (IN LIQUIDATION)

Applicant

-and-

JOSEPH CASEY AND SHARON CASEY

Respondents

JUDGMENT of Ms. Justice Stack delivered on the 25th day of October, 2022.

Introduction

1. This application is brought by the Liquidator of Cerise Glen Ltd (in liquidation) ("the Company"), and relates to the property known as Number 8, Farrin Carrig, Duncannon,

County Wexford ("the Property"), and which the Liquidator says is registered in Folio 1224F of the Register, County of Wexford.

2. In these proceedings, the Liquidator claims the following orders:-

(a) An order pursuant to s. 596(2) of the Companies Act 2014 ("the 2014 Act"), s. 608(2) of the Companies Act 2014 and/or the inherent jurisdiction of the High Court requiring all parties having notice of the order immediately surrender possession and control of the Property to the Liquidator;

(b) A declaration pursuant to s. 602(2) the 2014 Act, s. 615(1) of the Companies Act 2014 and/or the inherent jurisdiction of the High Court that all leases, licenses and other arrangements providing for occupation, possession and/or control of the Property by any party other than the Liquidator are void and of no effect;

(c) An order pursuant to s. 596(2) of the 2014 Act, s. 608(2) of the 2014 Act and/or the inherent jurisdiction of the High Court requiring all parties having notice of the said order immediately to deliver up to the Liquidator all keys, alarm codes and/or other security and access devices in respect of the Property;

(d) An order pursuant to s. 596(2) of the 2014 Act, s. 671(4) of the 2014 Act and/or the inherent jurisdiction of the High Court requiring all parties having notice of the said order immediately to provide details to the Liquidator, including all relevant documentation, of all purported leases, licences or other arrangements providing for occupation of any portion of the Property;

(e) An order pursuant to s. 596(2) of the 2014 Act, s. 671(4) of 2014 Act and/or the inherent jurisdiction of the High Court requiring all parties having notice of the said order immediately to provide details to the Liquidator, including all

relevant documentation, of all payments received or receivable in respect of any portion of the Property in the period since 7 November 2005;

(f) An order pursuant to s. 596(2) of the 2014 Act, s. 608(2) of the Companies Act 2014 and/or the inherent jurisdiction of the High Court requiring all parties having notice of the order immediately to transfer to the plaintiff all payments received in respect of any portion of the Property in the period since 7 November 2005.

3. The Liquidator at present does not seek the other orders sought in the notice of motion which issued on 23 December 2019, namely:

- orders restraining trespass, and prohibiting any interference or obstruction of the Liquidator, his servants and/or agents in their efforts to take possession of, secure, sell or rent the Property,
- orders prohibiting all parties having notice of the making of the order from holding themselves out as having any entitlement to sell, rent, or otherwise grant any entitlement of possession of any portion of the Property
- an order prohibiting all persons having notice of its making from making contact with any current or prospective occupant or purchaser of any portion of the Property without the prior written consent of the Liquidator.

The Liquidator's application is to adjourn that portion of the motion.

4. Furthermore, notwithstanding the various references to s. 596(2) of the 2014 Act in the notice of motion, the Liquidator in his oral submissions invited the court to make its order under s. 673 of the 2014 Act, in light of the judgment of this Court (Keane J.) in *Kirby v. Google Ireland* [2020] IEHC 196, which was delivered after the notice of motion was issued.

5. In *Kirby v. Google Ireland*, Keane J. found (at para. 37) that the purpose of ss. 596(1) and (2) was not to provide for a summary mode of recovery by a liquidator of possession of company property but was intended to protect a liquidator from: -

> *"any claim for loss or damage where the liquidator has taken, or retained, custody of property, which appears to be that of the company but is later found not to be"*.

6. Keane J. held that the power of a liquidator to recover company property on a summary basis was contained in s. 673 of the 2014 Act which provides, in material part:

> *"(1) In a winding up of a company, on notice in writing being given by the liquidator requiring him or her to do so, any:*
>
> *(a) contributory for the time being on the list of contributories;*
>
> *(b) trustee;*
>
> *(c) receiver;*
>
> *(d) banker; or*
>
> *(e) agent or officer;*
>
> *of the company shall, within such period as is specified in the notice, pay, deliver, convey, surrender or transfer to or into the hands of the liquidator any money, property, books or papers which happen to be in his or her hands for the time being and to which the company is* prima facie *entitled"*
>
> *(2) The court may exercise the following power:*
>
> *(a) of its own motion; or*
>
> *(b) on the application of the liquidator;*
>
> *at any time after the appointment of a provisional liquidator, the making of a winding-up order or the passing of a resolution to wind up a company voluntarily.*
>
> *(3) That power of the court is to require a person referred to in any of paragraph (a) to (e) of subsection (1) to pay, deliver, convey, surrender or transfer forthwith, or*

within such period as the court directs, to the liquidator any money, property or books and papers in his or her hands to which the company concerned is prima facie *entitled."*

7. As noted by Keane J., the power of the court can only be exercised as against certain categories of person and only in respect of any money, property or books and papers in the hands of such a person *"to which the company concerned is prima facie entitled"*. He also pointed to the relatively high threshold for application of the section (*prima facie* entitled) and held that s. 673 confers a discretionary power, the exercise of which is conditioned by the need to consider whether it was in the interests of justice to so order.

8. In light of the judgment of Keane J., the Liquidator now seeks an order pursuant to s. 673, rather than s. 596, and I am satisfied that he can proceed in this way given that s. 673 (2) confers on the court the power to make an order of its own motion. It is clear from the notice of motion what is being sought and, even though the respondents are litigants in person, I do not see that there is any prejudice to the respondents in considering the matter by reference to s. 673.

9. Before turning to the power conferred by s. 673, it should be noted that I did not understand the Liquidator to rely on the inherent jurisdiction of this court as a basis for the order sought. Again, I think this was appropriate in light of *Kirby v. Google Ireland*, where Keane J. held (at para. 54) that there was no inherent jurisdiction to summarily order the delivery up of property to a liquidator, citing the statement of Murray J. (as he then was) at para. 27 of his judgment in *G. McG. v. D, W. (No. 2)* (*Joinder of the Attorney General*) [2001] 4 IR 1: -

". . . *the normative value of the law and the imperative of certainty concerning the scope of the judicial function exclude the exercise of an inherent jurisdiction where the court's jurisdiction has been expressly and completely delineated by statute".*

10. Keane J. applied that *dictum* in *Kirby v. Google Ireland*, stating: -

"*. . . s. 673 of the Act of 2014 expressly and completely delineates the summary jurisdiction of the court to order the delivery up of property to a liquidator in the context of the winding-up of a company*".

11. It therefore seems clear that the power to make the requested order is exercisable only by reference to the terms of s. 673 itself.

Preliminary objection: applicability of the 2014 Act

12. Before turning to the facts of this case and deciding whether it is appropriate to make an order pursuant to s. 673, a technical objection raised by the respondents must be considered. That is to the effect that the Liquidator cannot rely on the provisions of the 2014 Act which he invokes in this application as well as a further objection, as I understand it, to the continuing validity of his appointment.

13. The Liquidator was appointed by order of this Court (Laffoy J.) on 7 November 2005, on foot of a petition presented on behalf of the Collector General, pursuant to the relevant provisions of the Companies Acts 1963 – 2003, which have since been repealed and replaced by the 2014 Act.

14. Significantly, s. 5(4) of the 2014 Act provides that any person appointed to any office under or by virtue of any former enactment relating to companies, who is in office immediately before the commencement of the provision concerned of this Act, shall be deemed to have been appointed to that office under or by virtue of the provision concerned of the 2014 Act. The Liquidator is therefore deemed to have been appointed under the relevant provisions of the 2014 Act and to enjoy the powers conferred on liquidators by the 2014 Act,

and his appointment is not affected by the repeal of the prior legislation. Furthermore, he may rely on s. 673 for the orders he seeks.

15. In addition, by virtue of s. 5 (3) of the 2014 Act, the reference in the title of these proceedings to the Companies Acts 1963 to 2003, must now be read as a reference to the Companies Act, 2014, albeit that perhaps a formal amendment to reflect this would be appropriate in due course.

16. The Respondents' preliminary objection is therefore, not well-founded.

Factual Background and Agreements

17. The within application is brought, in effect, to enforce a series of related Agreements which have been approved by this Court (Finlay Geoghegan J.) as long ago as 2009. The three Agreements comprise:

(1) a Settlement Agreement made 31 July 2008, between the Company of the first part, the Liquidator of the second part, the first respondent of the third part and the second respondent of the fourth part,

(2) a Settlement Agreement made 4 September 2009, between the Company of the first part, the Liquidator of the second part, and Mrs. Sheila Casey, deceased, ("the Deceased"), who was the mother of the first respondent, of the third part, and

(3) a Supplemental Agreement made 3 January 2009, between the Company of the first part, the Liquidator of the second part, and the Deceased of the third part.

The first two of these Agreements expressly provide that they are each *"co-dependent"* on the other in that they each state that, if one is not implemented in full, the other is automatically rescinded.

18. The three Agreements provide for the sale of the Property, which is situated in a residential development constructed on lands of which the Deceased was at all material times registered as full owner. Their essential effect is to provide that the Property is to be sold by the Liquidator and to provide for how the proceeds of sale are to be divided as between the Company, the respondents, and the Deceased.

19. It appears that what occurred is that the Company, of which the Respondents were and still are the Directors, proceeded to develop the Deceased's lands (of which the Property forms one unit) by way of the construction of a residential housing estate with common areas to be owned by a management company, Cerise Glen Property Management Ltd. ("the Management Company").

20. It is common case that, prior to her death, the Deceased granted to the Company a licence to occupy the lands for the purpose of development, together with an option to purchase the lands. However, that option was never exercised and lapsed in April 2005. It is accepted that the Deceased was, at the date of her death, the full owner of the lands, and I think it is clear that, by that time, the licence had expired and the option had lapsed.

21. The result is that the Property is now in the ownership of the first respondent, in his capacity as sole executor and beneficiary of the Estate of the Deceased. I have not seen a copy of the Folio on which the Property is registered nor has there been any evidence of any steps taken by the first respondent to become registered as full owner of the Property, but it seems that he is the person entitled to be registered as full owner of the Property.

22. The background to the execution of the Agreements is that, although the other units in the development have been sold to third parties, the Property was not sold. One of the key

motivations on the part of the Liquidator for securing the Agreements relates to a contract made 21 December 2004, whereby the Company, notwithstanding that it was not the registered owner of the Property, purported to contract to sell the Property to the first respondent for the sum of €305,000.00. This presumably was executed by the Company with the intention of exercising the option to purchase the Property, which at that time it still enjoyed.

23. In addition, it appears from the letter from the respondents' former solicitors to the Liquidator's solicitors dated 16 February 2007, that the Deceased, in consideration of granting the licence and option, was to receive a sum of €400,000. It also appears to have been claimed by the second respondent in the Statement of Affairs sworn by her in December 2005, that €200,000 of the sum of €400,000 was applied in reduction of Mrs. Casey's director's loan accounts, and the remaining sum of €200,000 was said to remain due to her in her capacity as a creditor of the Company. The purpose of the Agreements therefore appears to have been to recover the Property for the benefit of the liquidation by reaching a settlement with the respondents in relation to the contract for sale and with the Deceased in relation to the alleged monies allegedly owing to her, as well as dealing with the difficulties arising out of the lapse of the option originally enjoyed by the Company and the consequence of that, which was that the Property was in the ownership of the Deceased.

24. The Liquidator disputes the *bona fides* of the contract to sell to the first respondent and says it was a sale at an undervalue. He points to, *inter alia*, a letter from AIB of 5 July 2004, to the Company's solicitors, which indicated that the Property should sell for a figure of over €375,000. He also relies on the fact that the Property had also been previously sale agreed to a third party in August 2001, at the price of IR£250,000, which equates to over €317,000 and that a valuation in January 2007 had indicated that the Property should realise in the region of €400,000 to €425,000.

25. I do not believe I have to resolve the dispute between the parties as to whether or not the contract between the Company and the first respondent was *bona fide* and/or at an undervalue, as it is common case that the Company, the Liquidator and the Respondents all entered into the Settlement Agreement dated 31 July 2008, in which both the Company and the first respondent agreed to rescind the contract relating to the Property. It was further agreed that the Property would be sold (with the Liquidator having exclusive authority in relation to the sale) and the proceeds divided in accordance with the provisions of the Agreement.

26. It seems that the principal focus of the Agreement was to ensure that the Property was sold and to provide for how the proceeds of sale were to be divided. Clause 4 records that all parties believed the Property was worth at least €305,000, inclusive of VAT. It was agreed that, if the Property was sold for that price, various deductions would be made commencing with a payment of €55,000, as secured creditor, but also including a payment to the Deceased of €30,000 and a payment to the first respondent of €65,000. The latter sum was to be paid to the first respondent *"in full and final settlement"* of his payment of a deposit of €100,000 in the contract for the purchase of the Property. The balance remaining after those deductions was to be retained by the Company.

27. However, if the Property sold for less than €305,000, then the deduction to ACC bank would be made, but the deductions to the Respondents *"shall reduce rateably relative to the price achieved"*. An example of how that would operate in practice was set out at Schedule 1 to the Agreement.

28. Further provision was made in circumstances where the price achieved was greater than €305,000. The same deductions would be made and the balance up to €305,000 would be distributed to the Company. After that, costs of sale in the sum of €15,000 would be deducted, followed by a sum of €10,000 in respect of repairs to the Property. These sums

were said to be intended *"as a provision and may be subject to amendment at the discretion of the… liquidator"*.

29. Thereafter, any remaining balance would be divided 50/50 between the Company, on the one hand. and the respondents jointly, on the other hand. An example of how this would work in practice was contained in Schedule 2 which assumed that the Property was sold for €500,000. In that event, the respondents jointly would receive an additional sum of €73,403.

30. Clause 7 preserved a claim which the respondents had apparently asserted against the Company, but this was specifically said not to include a claim to the deposit of €100,000 paid by the first respondent in respect of the purchase of the Property.

31. The Settlement Agreement with the Deceased was in somewhat similar terms, again agreeing that the Property would be sold and that the Liquidator would have exclusive authority in relation to the sale, as well as providing for the payment to the Deceased of the sum of €30,000. That sum was to be *"in full and final settlement of all claims of [the Deceased]"*, which presumably related to the debt of €200,000 which the respondents claim was owed by the Company to the Deceased.

32. By way of the Supplemental Agreement dated 30 January 2009, the Deceased agreed that she would take such steps as were necessary (to include the execution of all required documentation) to ensure that the purchaser of the Property would obtain good marketable title to the Property.

33. All three of these Agreements were approved by this Court (Finlay Geoghegan J.) by order made in these proceedings on 3 February 2009.

34. Before turning to the appropriateness of the orders now sought by the Liquidator, which will require consideration of the nature of the rights of the Company acquired and/or acknowledged by those three Agreements, it is necessary to refer to a letter dated 11 October 2011, from the Liquidator to Mr. Conor Blackwell of Grant Thornton who was, at that time,

acting for the respondents. This letter records that the Agreements were varied so as to pay the sum of €7,000 to first respondent in respect of maintenance work carried out to the Property. However, this sum was said to be payable in full *"on the basis that the sale closes for the current price of €155,000 by 31st December 2011"*. The letter went on:-

> *"In the event of the sale of the property closes for a reduced price, then the €7,000 payable to [the first respondent] will be reduced in proportion with the payment to the company."*

35. The key purpose of this 2011 Agreement seems to have been to ensure that the sums payable to the respondents under the terms of the 2008 Settlement Agreement would instead be paid to the Company *"in full and final settlement of the costs awarded under the section 150, 160 and 236 applications"*. The Agreement went on:-

> *"As such no payments other than the €7,000 (or reduction thereof) will be payable to [the respondents]. The Liquidator will not seek recovery of any further costs from the [respondents] in respect of previous High Court applications.*
>
> *Finally, [the respondents] and the legal representatives of [the Deceased] will provide all legal confirmations previously requested, and any additional information or confirmations required to facilitate the sale of the property for sale."*

The document is exhibited with redaction of the identities of the various parties but I think it is clear that the parties in question are those set out in square brackets above.

36. It seems clear that this Agreement did not set aside the earlier Agreements but instead sought to set off costs orders which had been made against the Respondents in previous applications brought by the Liquidator, from the sums payable to them under the Settlement Agreement. Instead, only the sum of €7,000 in respect of maintenance of the Property by the first respondent was potentially payable.

37. This 2011 Agreement does not appear to have provided for what would occur if the sale did not close, which it did not, and if the Property subsequently appreciated significantly in value, which I think must inevitably have occurred since 2011.

38. As I understood it, the respondents claimed that the 2011 Agreement completely replaced the earlier Agreements, it would seem for the purpose of submitting that none of the Agreements are enforceable.

39. The Liquidator's position appears to be that this 2011 Agreement was conditional on the contemplated sale going through and, when it did not, the 2011 Agreement fell away so that the respective position of the parties was governed by the three Agreements executed in 2008 and 2009. However, at the same time, the Liquidator nevertheless sought to rely on the 2011 Agreement as a basis for continuing to write off the costs of various applications brought against the respondents in the course of the litigation against the monies due to them under the 2008 Settlement Agreement. Notwithstanding this latter argument, the Liquidator has apparently sought to tax those costs, which would not appear to be consistent with the continued enforceability of, at the very least, the provisions in it providing for the recovery of those costs from the sums payable to the respondents on foot of the 2008 Settlement Agreement.

40. However, given my conclusions on the application as a whole, I do not have to come to a concluded view on the effect of the 2011 Agreement.

The Liquidator's application

41. The Liquidator seeks the delivery up of vacant possession of the Property on foot of the Agreements. By letter dated 23 November 2018, addressed to the *"occupier"* of the Property, he demanded possession of the Property and referred to the Company being the

"beneficial owner" of the Property, but this position was (I think correctly) not pursued at hearing, where it was said that the entitlement to a share in the proceeds of sale constituted either an interest in lands or a chose in action which was *"property"* of the Company within the meaning of s. 673 of the 2014 Act. The nature of the interest in land claimed by the Liquidator has not been articulated in either written or oral submissions and, indeed, his written submissions assert that it is not necessary to do so.

42. However, insofar as it is now conceded by the Liquidator that the Company was not the beneficial owner of the lands, I think such a concession is correctly made, given that the Agreements do not purport to give the Liquidator any estate or interest in the lands but rather a share of the proceeds of sale. It also gives the Liquidator authority to arrange for and conduct the sale. However, it does not acknowledge or confer any legal or beneficial ownership in the lands. Indeed, the 2009 Agreement concluded with the Deceased seems to have been required so as to ensure that the Deceased would transfer the Property to the purchaser with whom the Liquidator negotiated a sale. It seems that the transfer of the ownership of the Property was something of an afterthought and had not been dealt with in the earlier Settlement Agreements with the respondents and with the Deceased.

43. The key purpose of this application is to permit the Liquidator to take possession of the Property for the purposes of selling it in accordance with the Agreements. One of the bases upon which the respondents object to the Orders is that there is no explicit reference in the Agreements to a right of possession for the Liquidator or to sale with vacant possession. In response, the Liquidator relied on the well-known tests for implying terms into a contract, namely the business efficacy test and the officious bystander test, either of which he said would justify the interpretation of the Agreements as including a right for him to take possession of the Property.

44. I have no difficulty whatsoever in accepting that it is necessarily implied in the Agreements that the purchaser of the Property will obtain vacant possession of it on completion of the sale. However, in terms of organising the sale, all that the Agreements provide is: -

> "*The Official Liquidator will have exclusive authority relating to the sale of [the Property]".*

45. The question is therefore whether the contractual right to arrange the sale carries with it, as a necessary incident, the right to enter into possession for the purpose of arranging for the sale of the Property. As Laffoy J. stated in *Kavanagh v. Lynch* [2011] IEHC 348 - a case where a receiver appointed in accordance with certain mortgage conditions which empowered him to terminate tenancies, recover possession and re-let the property - these conditions reflected what was necessary to be a receiver of the income, rents and profits of the mortgaged property, and, without being entitled to take possession, he could not do his job.

46. The question, therefore, is whether the Liquidator could meaningfully exercise his authority in relation to the sale of the Property without going into possession. I think it is probable that he could not, and that his contractual right to arrange for the sale of the Property probably entitles him to enter into possession of it in order to prepare it for sale. Indeed, where property is sold with vacant possession, the vendor usually takes steps prior to offering the Property for sale, to achieve vacant possession.

47. However, it is not necessary to decide that because the right claimed is, at best, a contractual right to possession under the Agreements and therefore ownership of the Property remains in the estate of the Deceased. This begs the question as to whether such a right is *"property"* for the purpose of s. 673 of the 2014 Act.

Whether the rights of the Company and/or Liquidator pursuant to the Agreements constitute "property" within the meaning of section 673 of the 2014 Act

48. The determination of this issue requires consideration of a number of discrete points.

i. The meaning of "property" in s. 673 of the 2014 Act

49. First, there is the question of the definition of *"property"* for the purposes of s. 673. Section 673 is contained in Part 11 of the 2014 Act and s. 559 of the 2014 Act defines *"property"* for the purposes of Part 11 as meaning *"all real and personal property, and includes any right of action by the company or liquidator under the provisions of this Act or any other enactment"*.

50. However, counsel for the Liquidator relied on the definition of *"property*" in the Bankruptcy Act 1988, s.3, as substituted by reg. 3 (a)(ii) of the European Communities (Insolvency) Regulations (S.I. No. 334 of 2002), which provides that "*property*"-

> "*(a) includes money, goods, things in action, land and every description of property, whether real or personal,*
>
> *(b) includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property,*
>
> *(c) in relation to proceedings opened in the State under Article 3(1) of the Insolvency Regulation includes properties situated outside the State, and*
>
> *(d) in relation to proceedings so opened under Article 3(2) of the Regulation, does not include properties so situated."*

The Liquidator submits that s. 619 of the 2014 Act has the effect of incorporating that definition in s. 673 of the 2014 Act.

51. I'm afraid that, for two reasons, I cannot accept this submission. First, the specific provision of a definition of *"property"* in s. 559, in my view, rules out any attempt to import, by implication, a different definition from another statute (and from a different, albeit related, statutory code). Section 619 of the Companies Act 2014 provides that where a company is being wound up, the court may, on the application of the Liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the Liquidator by his or her official name. Subsection (2) provides that such an order will operate to vest the property in the Liquidator and that the Liquidator may come after them in such indemnity, if any, as the court may direct, bring or defend in his or her officially in any action or other legal proceeding which relates to that property or which is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property. I simply do not see how that provision can operate to introduce into the 2014 Act a different - and much wider - definition of "*property*" from the 1988 Act than that specifically provided for in the relevant Part of the 2014 Act itself.

52. Secondly, a similar submission has previously been rejected by this Court (Carroll J.) in *Re Irish ISPAT Limited* [2004] IEHC 143. That case concerned an attempt by a liquidator to disclaim very onerous obligations imposed as conditions attached to an integrated pollution control licence. The Liquidator in that case relied on s. 290 of the Companies Act, 1963, arguing that, by reason of s. 284 of the 1963 Act, which provided that the bankruptcy rules should prevail and be observed relating to the respective rights of secured and unsecured creditors, the debts, and the valuation of annuities and further and contingent liabilities, the definition of "*property*" in s. 3 of the 1988 Act applied to companies in liquidation. The purpose of that submission was to rely on para. (b) of s. 3 in support of a contention that the onerous conditions attached to the licence constituted *"property"* which could be disclaimed under s. 290.

53. However, Carroll J. (at p. 45) applied *Re Irish Attested Sales Ltd*. [1962] IR 70, in which Kenny J. held that s. 207 of the Companies Consolidation Act, 1908, the precursor of s. 284 of the 1963 Act did not import all the rules of bankruptcy into the law relating to the winding up of companies, but only those specified in the section. Carroll J. similarly found that the bankruptcy rules were confined to the matters specified in s. 284, which is in similar terms to s. 619, and she therefore appears to have rejected any suggestion that more general provisions in the Bankruptcy Act, 1988, such as the definition of "*property*" in s. 3, had been imported into s. 290 by s. 284 of the 1963 Act.

54. As s. 619 of the 2014 Act is in similar terms to s. 284 of the 1963 Act, *Re Irish ISPAT Ltd*. is therefore authority for the proposition that the definition of *"property"* in s. 3 of the 1988 Act cannot be imported into Part 11 of the 2014 Act.

55. For both of those reasons, I am therefore satisfied that s. 3 of the 1988 Act is not relevant to this application.

56. I am not sure that much turns on this point, however, as the definition of *"property"* in s. 559 is, in my view, sufficiently broad to capture the type of rights conferred by the Agreements, which were categorised by the Liquidator as either a thing in action or – somewhat more tentatively - a right to a share in the proceeds of sale and therefore an interest in land. I do not agree that the right of the Liquidator could be classed as an interest in land but is a right of action, founded on contract. A cause of action of this kind would usually be regarded as personal property and therefore falls within the definition of *"property"* in s. 559 of the 2014 Act.

57. Perhaps the desire of the Liquidator to import the wider definition of *"property"* in s. 3 of the 1988 Act, which undoubtedly includes all kinds of things in action, was provoked by the express reference in the definition of *"property"* in s. 559, to rights enjoyed under statute and the absence of any reference to contractual or other rights recognised at common law.

58. However, s. 559 is in the nature of an *"enlarging definition"*, in the sensed used by the authors of *Bennion on Statutory Interpretation*, 6th ed., (London: LexisNexis, 2013) who describe this (at p. 526) as one *"designed to make clear that the term includes a matter that otherwise would or might be taken as outside it."* See also *Craies on Legislation*, 12th ed., (London: Thomson Reuters, 2020) at para. 24.1.3. The effect of s. 559, therefore, is to confirm that rights conferred by statute are included, rather than to exclude rights deriving from contract and therefore recognised by the common law.

59. Indeed, contractual obligations have been treated as property rights protected by the Constitution: see Kelly, *The Irish Constitution*, 4th ed, 2018 at para. 7.8.11, and the authorities cited therein.

60. The usual meaning of *"personal property"* would include both chattels and choses or things in action, and I think it is clear that, as a general proposition, all things in action held by the Company, including any right it enjoys under the Agreements, constitute *"personal property"* within the meaning of s. 559. It is less clear, however, that s. 673 is intended to apply to things in action.

ii. Whether, notwithstanding the definition of "property", s. 673 applies to things in action

61. Notwithstanding the applicability of the definition in s. 559 to s. 673, however, it is difficult to see how a court can order the delivery up of a thing in action.

62. The language of s. 673 (and of its precursors, s. 164 of the 1908 Act and s. 236 of the 1963 Act) suggests that it is directed to the physical custody of chattels rather than the enforcement of things in action.

63. In the United Kingdom, it has been held that s. 234(3) and (4) of the 1986 Act, which provide for immunities for, *inter alia*, liquidators who exercise their right to seize property which appears to belong to the company but turns out to apply to third parties, apply *"only ... to tangible property and not to choses in action"*: see Dillon LJ (with whom Ralph Gibson LJ agreed) in *Welsh Development Agency v. Export Finance Co. Ltd.* [1992] BCLC 148 at 170 (h-j). However, s. 234(2) equates to the power of the court under s. 673(3) and Dillon LJ also stated: *"that again appears at least primarily to be dealing with tangible property only."* Staughton LJ was of a similar view stating (at p. 190) that s. 234 applied only to choses in possession, not choses in action.

64. In addition, MacCann and Courtney in their note on s. 236 of the 1963 Act, seem to assume that s. 236, like s. 229 of the 1963 Act to which they also refer, relates to physical custody of items: see *Companies Acts, 1963-2012*, (Bloomsbury Professional, 2013), at p. 501.

65. I do not think this position is altered by the fact that the legislation under consideration in *Welsh Development Agency v. Export Finance Co. Ltd.* expressly provided that the very wide definition of *"property"* in s. 436 of the 1986 Act – which is in terms similar to s. 3 of our Bankruptcy Act 1988, set out above – applied *"except in so far as the context otherwise requires"*, a gloss which does not appears in s. 559 of the 2014 Act. It appears from caselaw in the neighbouring jurisdiction, at least, that the presence or absence of this type of provision does not carry too much weight as it is merely *"a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in this text"*: *per* Sedley LJ in *M v. Secretary of State for Work and Pensions* [2004] EWCA Civ 1343; [2006] QB 380 at para. 84. The rationale for this approach is that the legislature is always free to disapply a definition, whether expressly or by implication: see *Bennion on Statutory Interpretation*, 6th ed., (London: Thomson Reuters, 2020) at p. 523.

66. It would therefore seem that the absence of any such gloss on the definition of *"property"* in s. 559 does not prevent an interpretation of s. 673 to the effect that it is intended to apply only to chattels, given that this is at the least strongly suggested by the natural and ordinary meaning of much of the language in s. 673. For example, subs. (1) speaks about delivering, conveying, surrendering or transferring the Property *"into the hands of the liquidator"*, though it must of course be noted that s. 673 contains no equivalent to the language in, for example, s. 675(1)(ii) which refers to an order for seizure of a person's *"books … papers and movable personal property".* On the other hand, a power of seizure in s. 672 (2)(c) refers to the seizure of *"any money, property or books and papers of the company found on the premises"*, without clarifying that these relate only to movable personal property. Part 11, therefore, appears not to be consistent in its attention to the question of whether intangible property can be seized or delivered up.

67. Notwithstanding the breadth of the definition of *"property"* in s. 559, therefore, I think there is some uncertainty as to whether the power in s. 673 is applicable to intangible property. If that is so, then a question would arise as to whether the power conferred by the section could nevertheless be exercised in this case, as the thing in action is a contractual right to enter into possession of land, and land is obviously something capable of physical possession. I do not have to decide this issue, however, as I think there are other difficulties with the application to which I now turn.

iii. Whether the issues raised by the respondents can be resolved in this application

68. In her affidavits and in the course of her submissions, the second respondent raised, on behalf of both respondents, a variety of objections to the enforceability of the Agreements,

including laches and s. 9(2) of the Civil Liability Act, 1961, which bars certain causes of action against the estate of a deceased person.

69. However, it does not seem to me that a summary application pursuant to s. 673 is an appropriate procedure in which to resolve these issues. In *Kirby v. Google Ireland*, Keane J. approved the analysis in Lynch, Fannon and Murphy, *Corporate Insolvency and Rescue* (2nd ed., 2012) at para. 5.54, where they stated, in relation to s. 236 of the 1963 Act (the precursor of s. 673 of the 2014 Act): -

> *"Where there is a dispute as to ownership, we suggest that it is open to the court to resolve this dispute in such a manner as to decide whether or not to accede to an application under s 236 to deliver up property to the control of the liquidator. It may be necessary to determine the issue of ownership or entitlement to the property by way of plenary proceedings, but, that need not preclude the court from exercising its jurisdiction under s 236 and ordering the property be delivered to the control of the liquidator at least pending the outcome of proceedings regarding the question of ownership of the property."*

70. Keane J. approved that analysis, albeit stating that it was *"not directly on point"* as no application had been made to him pursuant to s. 673.

71. Similarly, MacCann and Courtney, state (at p. 501):

> *"The provisions of s 236 cannot be availed of by the liquidator in circumstances where the ownership of the property in question is disputed. Instead, whilst the liquidator might be in a position to obtain physical custody of the items under CA 1963, s 229 pending a determination of the dispute as to ownership, the actual question of ownership will have to be determined by ordinary plenary proceedings brought by the liquidator in the name of the company, having first obtained the leave of the court to do so under CA 1963, s 231(1)(a)."*

72. These statements of the law are based on *Re Palace Restaurants Ltd.* [1914] 1 Ch. 492, at 500, where Buckley LJ held that a court could not, in exercising its power under s. 164 of the Companies (Consolidation) Act, 1908, determine a dispute as to ownership.

73. Section 164 of the 1908 Act (which was replaced by s. 236 of the 1963 Act and, ultimately, by s. 673 of the 2014 Act) provided:

> *"The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to the liquidator any money, property, or books and papers in his hands to which the company is prima facie entitled."*

74. That case concerned company money but, applying the principle by analogy to a thing in action, it seems to me that a power to order delivery up of property on a summary basis does not, when that property is in the nature of a thing in action, extend to the power to finally determine whether or not there is a defence to the action.

75. In *Re London Iron and Steel Co.* [1990] BCLC 372, Warner J., contrasting s. 234 of the Insolvency Act, 1986 with the previous enactments ending in s. 551 of the Companies Act, 1985, pointed (at p. 374 a-c) to the significant differences between s. 234 of the 1986 Act and the earlier statutory provisions, which are in substantially the same terms as s. 673. He held that the legislature had intended to alter the nature of the power from that enjoyed previously and to allow the exercise of the power even where there might be a third party with a good claim to the property. He also noted that the applicable rules of court provided all the safeguards of a plenary hearing.

76. Section 673, however, is in the same terms as the earlier legislation in the United Kingdom, which, right up to the repeal by the Insolvency Act 1986 of s. 551 of the

Companies Act 1985, provided for a power to require delivery of property on a summary basis on the same terms as s. 164 of the 1908 Act already cited above. It therefore seems that it is *Re Palace Restaurants Ltd.* which is the persuasive authority relevant to s. 673 of the 2014 Act, and that is to the effect that these disputes cannot be finally resolved in an application of this kind.

77. In *Re London Iron and Steel Co.*, Warner J. (at p. 374 g – i) cited *Gore-Browne on Companies* (44th ed., 1986) vol. 2. para. 34.5.2. which explained the effect of the earlier legislative provisions in the UK in the following terms:

> *"But the power must not be stretched beyond its natural and intended limitations, so as, for example, to attack ordinary debtors of the company or third parties who have indirectly obtained company moneys; nor may the court or liquidator enforce payment or delivery where the obligation, and therefore the liquidator's right, is in dispute. Although such disputes are often determined, with the third party's consent, on a summons in the winding up, there is no power to compel submission to this procedure. The liquidator's proper course is to take action in the ordinary way, and for this purpose he exercises his power to bring an action or the proceedings in the company's name and on its behalf. This he may do without sanction in a voluntary winding up, but only with the sanction of the court or the liquidation committee in a winding up by the court."* [Emphasis added.]

78. Unlike *Kirby v. Google Ireland*, the issue arises squarely in this application. The Liquidator asserts a right to possession on foot of a contract or agreement, but the respondents put forward various grounds upon which they say the Agreements are no longer enforceable. It seems that, even if the rights of the Liquidator to sue on foot of the Agreements constitute "*property*" for the purposes of Part 11 of the 2014 Act, though not necessarily for s. 673 itself, in circumstances where various issues are raised by the

respondents as to the enforceability of those Agreements, the best that the Liquidator could obtain under s. 673 in any event, is an order directing the delivery of possession pending resolution of those disputes in plenary proceedings. Given that his right to possession is enjoyed as an incident to his authority to sell the lands, which could not occur pending resolution of the dispute, an interim solution of this kind would be pointless in this particular case.

79. For example, the respondents claim that the Agreements are no longer enforceable due to laches and while the Liquidator correctly points out that mere lapse of time alone is insufficient to maintain a defences of laches, the respondents have raised various issues arising from the delay including, in particular, the expense incurred by the first respondent – said to amount to €40,000 – in taking it upon himself to maintain the Property after he purported to repudiate the Agreements in 2016. The respondents also rely on s. 9(2) of the Civil Liability Act, 1961 for the proposition that the Agreements are no longer enforceable against the estate of the Deceased and, all three Agreements being co-dependent, the 2008 Settlement Agreement to which they are a party is no longer enforceable either.

80. Whether any of these would afford a good defence is another matter, but it certainly appears that these issues are not capable of resolution in a summary manner as contemplated by section 673.

81. Given that s. 673 is in terms fundamentally unchanged since at least s. 164 of the 1908 Act, it therefore seems that the issues between the parties as to the interpretation and enforceability of the Agreements should be canvassed in plenary proceedings.

82. If I am wrong in that, however, there is in any event a further obstacle to the application of s. 673 in this case, which I must now consider.

iv. Respondents not in possession qua directors and not in possession of Company property

83. It is quite clear that s. 673 is directed only to particular categories of person and the Liquidator relies on it on the basis that the first respondent is a director and shareholder of the Company. However, it is accepted that the first respondent is currently in possession of the Property in his capacity as sole executor and sole beneficiary of the Deceased. The second respondent derives any right to entry and possession of the Property in effect by way of a licence or series of licences from her husband. As a result, they are both claiming, in effect, under the title of the Deceased. However, the Deceased was not a person to whom s. 673(1) applies. She was, in effect, a third party property owner whose estate appears to still be the registered owner of the Property.

84. Section 673(1) is quite clear in excluding from its ambit the property of third parties. The whole purpose of the section is to secure custody of the property of the company in liquidation, and it seems to have been for this reason that it applies only to certain categories of persons, each of whom might have good reasons, in the ordinary course of their respective roles, for having company property *"in their hands"*.

85. Here it is common case that the Property was, immediately prior to her death, the property of the Deceased and that the first respondent is in possession of it in his capacity as sole executor and sole beneficiary of the estate of the Deceased. He does not enjoy possession of the Property *qua* officer or agent of the Company.

86. In my view, the court's power of summary recovery of possession cannot be exercised against the first respondent, purely on the basis that he also happens to be a director and shareholder of the Company. The Company is not *"prima facie entitled"* to the Property. On the contrary, the Liquidator has, at best, an implied contractual right to enter into possession

so as to arrange a sale. Even though the Company is also a party to the Agreements, it is the Liquidator who has authority in relation to the sale. The Liquidator is not, in this case, seeking to recover possession or custody of the property of the Company, but to enforce a contractual right which he says he enjoys on foot of a contract with, *inter alia*, the respondents.

87. The purpose of s. 673 is to enable a liquidator to gather in the assets of a company for the purposes of administering them, and not to enforce a contractual right of possession which is said to be enforceable against a third party (in this case, the Deceased) or their successor-in-title (the first respondent), enjoyed on foot of an agreement of the type in issue here.

88. As I think it is clear that the s. 673 can only apply to property to which the Company is *prima facie* entitled and could not be used to recover possession of property held by a director of the Company in his capacity as executor of his mother's estate, I must refuse the application on the basis that s. 673 is not available to the Liquidator in this case for the purpose of recovering possession of this Property. The appropriate course is to institute plenary proceedings to recover possession, in which all issued raised by the parties can be canvassed.

Application pursuant to s. 602 of the 2014 Act

89. Although that is sufficient to dispose of the application, and it is therefore not necessary to decide or refer to other arguments made by the respondents in defence of it, I think it is appropriate to say something about those reliefs which relate to the occupancy of the Property by Mr. Thomas Keogh, the father of the second respondent. Apparently, this elderly gentleman, who is not in very good health, has been in occupation of the Property for

some time under licence, presumably from the first respondent. The Liquidator submits that as the entitlement of the Company to the proceeds of sale of the property constitutes "*property*" within the meaning of the Companies Act 2014, the creation of a licence without his consent is a disposition of that property which is void pursuant to s. 602 of the 2014 Act. I do not think this follows. The Property itself is not the *"property"* of the Company.

90. It seems to me that any "*disposition*" involved in granting a licence, which would appear to be entirely informal, to Mr. Keogh, was one granted by the Estate of the Deceased and not by the Company. It would, therefore, appear that s. 602 of the 2014 Act does not apply.

91. Having said that, it is of course the case that any licence of the kind which appears to have been granted to Mr. Keogh is not binding on third parties such as the Company or the Liquidator.

92. Similarly, I do not see any basis for the relief which would require the respondents to deliver up all details of purported leases and licences granted in relation to the property, or to account for payments received (if any). As neither the Liquidator nor the Company can assert ownership of the Property pending sale, I do not see how there could have been any entitlement to these reliefs, or how ss. 596, 671 or 673 could apply where the only rights asserted are those under the Agreements.

93. I would also add that I do not think the reliance on Mr. Keogh's advanced age and alleged state of health would have any effect on the rights of the Company or the Liquidator, had the application otherwise been in order. The evidence is that Mr. Keogh is the owner of Unit 10 in the development and was in occupation of those premises at the time the Agreements were executed. It is also entirely unclear to me why Mr. Keogh, if he is in fact dependent on the second respondent and her sister for his day-to-day needs, is living on his own in a Property - the subject of litigation - when he owns a neighbouring property and

when the respondents own a property on adjacent lands. Perhaps this will be clarified in any future proceedings that the Liquidator may bring.

Conclusion

94. In any event, the Property is not one to which the Company is *"prima facie entitled"* and is held by one of the directors in another capacity. While his precise capacity was not proven in the course of the application, it is clear that the first respondent holds the Property either as executor of the Deceased's estate or as the sole beneficiary who is either registered as full owner or entitled to be registered as such. There is also a doubt as to whether the section can apply to choses or things in action enjoyed by a company in liquidation and as to whether this summary procedure can be used to resolve the type of dispute which exists here.

95. As a result, the respondents cannot be compelled to deliver up possession of the Property pursuant to s. 673 of the 2014 Act and I refuse all of the relief sought.