[2020] IEHC_208

**THE HIGH COURT**

**[No. 2018/279 COS]**

**IN THE MATTER OF DOMINAR GROUP LIMITED**
**(IN VOLUNTARY LIQUIDATION)**
**AND IN THE MATTER OF SECTION 638 OF THE COMPANIES ACT 2014**

**BETWEEN**

**PRINT & DISPLAY LIMITED**

**APPLICANT**

**AND**

**LIAM DOWDALL**

**RESPONDENT**

**AND**

**MICHAEL CURNEEN**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on the 8th day of May 2020**

**Introduction**

1. The application before me is for an order pursuant to s.638(1)(b) of the Companies Act 2014 for the removal of the respondent as liquidator of Dominar Group Limited (in voluntary liquidation), hereafter referred to as 'the company'. The applicant owns 50% of the shares in the company; the other shareholder is Mr. Michael Curneen, the notice party, who also owns 50% of the company. The notice of motion also seeks the appointment pursuant to s.638(1)(b) of a named alternative liquidator.

2. The respondent was appointed as liquidator of the company on 9th April, 2008. The directors swore a declaration of solvency on that date, and also made a declaration that the company would be in a position to pay its debts in full within 12 months of the commencement of the winding up. The company passed a special resolution that the company was to be wound up voluntarily as a members' voluntary winding up. The company embarked on this course of action after a serious deterioration in the relationship between the shareholders, which involved the issue of proceedings under s.205 of the Companies Act 1963 by the applicant against Mr. Curneen. Ultimately, these proceedings were compromised, and as part of this compromise the parties agreed to the appointment of a liquidator.

3. The originating notice of motion before me issued on 16th July, 2018. By order of 12th April, 2019, this Court directed the service of written submissions according to a prescribed timetable. The applicant also applied to this Court for leave to examine the respondent for the purposes of the application. It was accepted by the applicant that, should the order for examination be made, Mr. Jim Conway, a director of the applicant, would make himself available for examination on his affidavits. The extent to which examination should be allowed was the subject of argument before O'Connor J., who delivered an *ex tempore* judgment setting out the basis of the orders made by him, which were as follows:

> "(1) Liberty to the Applicant to cross-examine the liquidator in respect of whether he failed to preserve and safeguard the assets of the company

(2) Liberty to the Applicant to cross-examine the liquidator regarding the financing for the removal of waste from the Osmanska 7 site subject to the approval of the trial judge

(3) Liberty to Counsel representing the liquidator to cross-examine Mr Jim Conway on such facts as the Judge hearing the application to remove the liquidator may approve…".

4. Ultimately, the matter came before me for hearing on 22nd January, 2020. The hearing took four days, during the course of which the respondent was examined by counsel for the applicant. The parties agreed that the examination of Mr. Conway would not be necessary. Both parties made very detailed written submissions, and I have also had the benefit of transcripts of the hearing.

5. It will be apparent that the conduct of the liquidation has been far more protracted than one would normally expect of a member's voluntary liquidation. As the applicant seeks the removal of the respondent as liquidator, it will be necessary to examine both the context in which the liquidator was appointed, and his conduct of the liquidation, in some detail.

**Background**

6. The facts of the matter are set out and debated at considerable length in the affidavits sworn by the parties. While all of such matters have been assimilated by the court and taken into account in this judgment, what follows is a non-exhaustive synopsis of matters with the intention solely of setting out the context in which the current application takes place.

7. The applicant and the notice party ('Mr. Curneen') each hold 50% of the shares in the company. The company is a holding company which owns a subsidiary called Print & Display (Polska) Sp.Zo.o ('P&D Polska'). This company was involved in the printing industry in the Polish and European markets. Mr. Curneen, with the agreement of the applicant, had control of the day to day management of this business.

8. Unhappy differences arose between the shareholders, and the applicant presented a petition on 12th December, 2007 pursuant to s.205 of the Companies Act 1963 seeking relief against Mr. Curneen on the grounds that the affairs of the company were being conducted by Mr. Curneen in a manner oppressive to the applicant in its capacity as a member of the company, or that the affairs of the company were being conducted in disregard of the applicant's interests as a member of the company.

9. The applicant alleged in the s.205 proceedings that it had become aware in October 2007 that land located at Osmanska 7, Warsaw, ("Osmanska 7") the property of P&D Polska, had been transferred without the applicant's knowledge to another Polish company Grosbeak Sp.Zo.o ('Grosbeak'), controlled by Mr. Curneen. Mr. Conway averred in the grounding affidavit in the present application that the applicant obtained injunctive relief following the institution of the s.205 proceedings restraining Mr. Curneen from giving

effect to certain resolutions of the company – at a time when the board of the company was controlled by Mr. Curneen - sanctioning large salary and pension increases to Mr. Curneen, together with certain retrospective and other payments. Mr. Conway further averred that the applicant had, subsequent to the aforesaid settlement, instituted contempt proceedings in this Court in respect of what the applicant considered to be contempt of the court's order of 12th December, 2007 granting injunctive relief.

10. I should say at this point that Mr. Curneen, although a notice party, did not participate in the present proceedings other than by submitting an affidavit in support of the retention of the respondent as liquidator. At para. 4 of that affidavit, Mr. Curneen recorded that he did "not agree with Mr. Conway's account [in the grounding affidavit to this application]… of the background to the settlement in 2008…which led to the appointment of Mr Dowdall, and nor is Mr. Conway's account complete". However, Mr. Curneen declined to address the detail of such matters in his affidavit, on the basis that they were "not relevant to the current application".

11. What is not in dispute, and what is clear from the evidence both documentary and on affidavit, is that there was what Mr. Conway describes as a "catastrophic deterioration in the relationship between the Company's shareholders, leading to an irreconcilable impasse in corporate management…" of the company. This led to a settlement by agreement of the parties on 3rd March, 2008. The terms of this settlement are of some importance, and are set out below:

> "The parties to these proceedings agree to the following terms in full and final settlement of the proceedings:
>
> (1) The petitioner and the respondent agree to the appointment of a voluntary liquidator of Dominar Group Limited for the purpose of realising the assets of that company.
> (2) The liquidation will proceed as a members' voluntary winding up of Dominar Group Limited.
> (3) The injunction granted by the High Court on the 12th of December, 2007, shall continue until the appointment of the voluntary liquidator.
> (4) The parties, by consent, will pass a resolution to put Dominar Group Limited into members' voluntary liquidation. The meeting of the members for this purpose shall be held by close of business on Friday the 7th of March, 2008.
> (5) On the appointment of the liquidator the proceedings shall be struck out with no order.
> (6) For the avoidance of doubt, the liquidator shall realise the assets of [P&D Polska], Studio Dom. Sp.Zo.o and [Grosbeak] as soon as possible.
> (7) An insolvency partner of BDO Simpson Xavier shall be appointed voluntary liquidator.
> (8) The directors of Dominar Group Limited shall each swear a Declaration of Solvency in relation to that company".

12. A declaration of solvency was duly sworn by the directors of the company on 9th April, 2008. This showed that the company, in addition to approximately €35,000 in cash and debtors, had investments of €3,820,988. After deduction of liabilities, including contingent liabilities for warranties on the sale of a subsidiary, a foreign exchange loss and a claim for salary increase and back-pay, the estimated surplus according to the declaration of solvency was €631,316. On the basis of these figures, the directors were satisfied that the applicant was solvent. The respondent has averred in these proceedings that he agrees that the company was solvent at the date of his appointment, and believes that it remains solvent in that its assets exceed its liabilities.

13. As of the date of the liquidator's appointment, the company had three particularly significant assets: the P&D Polska business, the Osmanska 7 property held by Grosbeak, and a court case being taken in Poland by P&D Polska/Grosbeak against Polskie Pracownie Konservacji Zabytkow S.a.("PPKZ"), the public authority for the city of Warsaw. This claim related to the failure of PPKZ to disclose, prior to the sale to P&D Polska/Grosbeak, the existence of restitution claims affecting the property under Polish law by ex-owners or their heirs. Effectively, this case appears to have been a claim for compensation or damages arising out of an alleged misrepresentation by the vendor prior to sale. According to an email in December 2011 from a colleague of the respondent enclosing a memorandum from the company's Polish legal advisors, the claim against PPKZ was for approximately €1.067m "plus statutory interest from 10 March 2009 until the date of actual payment".

14. The respondent's position regarding the sale of P&D Polska and Osmanska 7 was expressed at para.11(c) and (d) of his replying affidavit of 2nd November, 2018 as follows:

> "(c) P&D Polska was included in the DOS [Declaration of Solvency] at a value of €1,895,908. It yielded a dividend in 2008 of €1,588,453 and was sold in 2011 for €1,950,000 realising a total of €3,538,000. From this, a total sum of €1,649,226.60 was distributed to the applicant.
>
> (d) Grosbeak was included in the DOS at a value of €1,166,450. Grosbeak is a special purpose vehicle which holds property in Poland. Having awaited the resolution of a series of claims on the property, I believe that the property can be sold for a gross sum of approx. €4,700,000. Certain costs will have to be deducted from this sale price, including the costs of clearing the lands for sale which is likely to be in the region of €1.1m. This is addressed further below. In addition Grosbeak has net current liabilities of approximately €1.7 million. Ultimately I expect that Grosbeak will realise a net sum significantly in excess of the value placed on it in the DOS."

15. The criticisms of the respondent by the applicant, and the basis for its plea for removal of the respondent as liquidator of the company, focus on the conduct by the respondent of the liquidation in relation to the preservation and sale of the assets of P&D Polska and Grosbeak, and the attempts to resolve the compensation claim. As the terms of settlement made clear, the realisation of, *inter alia,* the Grosbeak and P&D Polska assets

was to be carried out "as soon as possible". Accordingly, it is appropriate to examine in some detail what has happened in relation to each of these assets.

**Sale of shareholding in P&D Polska**

16. In his grounding affidavit of 16th July, 2018, Mr. Conway refers to the sale by the respondent of the shareholding of the company in P&D Polska to Mr. Curneen, and expresses his belief that "the disposal of the P&D Polska shareholding to Mr Curneen was on terms that did not reflect the true value of that business and notwithstanding that the Applicant had offered to purchase the shareholding at a higher value with an earlier payment of deferred consideration and a lower credit risk than Mr Curneen's offer". Proceedings were issued by the applicant against the respondent for damages arising out of the respondent's conduct of the sale of those shares. It appears that those proceedings remain extant but have not been advanced by the applicant.

17. Notwithstanding that the applicant's position was that the claims in the foregoing proceedings were "distinct from those in these originating proceedings", Mr. Conway swore a second affidavit exhibiting an "expert liquidator's report on the conduct of the liquidator of Dominar Group Limited, Liam Dowdall" by Mr. Aidan Garcia Diaz of Collins Garcia. Mr. Garcia Diaz is, *inter alia*, a licensed corporate insolvency practitioner and an experienced liquidator. His report was given as an expert, with all the duties to this Court that such a role implies, and his report comprised a critique of Mr. Dowdall's conduct of the liquidation. Among the sections of his report was one dealing with the respondent's alleged failure to achieve the best price possible for assets owned by the company, and P&D Polska in particular. Mr. Garcia Diaz, having reviewed the facts and correspondence, concluded that "…in respect of the disposal of P&D Polska, the maximum realisation available was not achieved by Mr. Dowdall. This is evidenced by the fact that the Company was not placed on the open market, and a superior offer from the other 50% shareholder was ultimately overlooked".

18. At paras. 13-18 of his first affidavit sworn on 2nd November, 2018, the respondent defended his conduct of the sale of the shares. He set out the steps he had taken before concluding that finding a third party purchaser was not feasible, and his justification of the sale of the company to Mr. Curneen, contending that "…Mr Curneen's offer was lower, at €975,000, but was without similar conditions and was accompanied by protections, including a personal guarantee from Mr Curneen and an anti-embarrassment provision, which were absent from the Applicant's offer". In the course of his explanation of the circumstances surrounding the sale, he commented that, during the course of negotiations, "…it became clear that the existing management team at P&D Polska was not prepared to work with Jim Conway or his son, Ronan Conway…four key members of the management team indicated that they would resign if the business was purchased by the Applicant".

19. Apart from the question of whether the respondent's conduct of the sale of P&D Polska was appropriate – which Mr. Conway avers is the subject of separate proceedings, notwithstanding the view of Mr. Garcia Diaz that it is a matter of substantial concern in the present context – it is clear that Mr. Conway and the directors of the applicant were

aggrieved by the decision to sell to Mr. Curneen and, given the poor relations between the directors of the applicant on the one hand and Mr. Curneen on the other, this led to a perception on the part of the applicant, exacerbated by later events, that the respondent was not dealing with assets appropriately and in his own right, but was rather delegating the realisation of assets such as Osmanska 7 and the compensation claims to Mr. Curneen and failing to control the process so as to ensure effective disposition of those assets.

20. In order to decide whether this perception was accurate, it is necessary to examine in some detail the respondent's dealings with the company's assets, and also his dealings with the applicant and its directors. These dealings are set out comprehensively in Mr. Jim Conway's grounding affidavit, which also sets out extensively the applicant's reasons for issuing the present application.

**The Progress of the Liquidation**

21. The applicant appears to have commenced a proactive examination of the conduct of the liquidation in December 2013, seeking a report from the liquidator "outlining the steps and progress made in relation to addressing all issues concerning the Osmanska 7 property in order to proceed with its disposal". This request was made "some 5½ years into the liquidation and in circumstances where the applicant was receiving very limited and sporadic information from the Respondent with regard to the *PPKZ* case and the status of the Property's restitution claims, which claims we had been advised was [sic] preventing the Property's disposal." [Paragraph 19, affidavit of Jim Conway sworn 16th July, 2018].

22. The respondent wrote on 6th February, 2014 responding to the applicant's request. The report enclosed with that letter was expressed to be "based on inputs from the Grosbeak management team, legal advices and economic property reports at this time". The report set out matters concerning infrastructural changes regarding road access and the local area plan, and concluded that "…there is sense in waiting until at [sic] 2015 or preferably 2016 to sell Osmanska". A discussion of the property market set out the basis for this conclusion.

23. The report contained a synopsis of the position regarding restitution claims, emphasising two claims which it deemed to be "significant" and enclosing a report from Grosbeak's Polish legal advisor setting out the position in relation to each of the claims. The respondent summarised the position as follows:

> "Despite the huge number of Warsaw plots tainted by restitution claims professional valuers will not give an opinion as to value. Restitution claims are a massive inconvenience for any developer as claimants can be the cause of significant delay and cost. Legally they have no direct claim over the land and so the land can be sold or developed. However, in practice the claimants can cause havoc by objecting to every move at every stage and cause significant delay. Because of these difficulties banks will not take 'restitution claim' sites as loan security. This makes these tainted sites ideal picking for vulture speculators who will only buy at heavily discounted rates".

24. Osmanska 7 had two tenants who used the site to store sand, gravel and building rubble, connected with nearby building projects. As the respondent put it, "… they are both a nightmare to deal with and are consistently behind in their payments…We are aggressively pursuing payment every month and have started down the legal debt recovery route with one tenant…the legal route is very slow and builder types ignore such threats and see a legal case as an opportunity to further delay payments".

25. In relation to the case against PPKZ, the liquidator commented that "We have always expected to win the case but could never predict what a win means in terms of compensation". The legal advisor's report comprised a detailed summary of the progress of the proceedings to date, but did not give any firm indication of when the proceedings might be resolved.

26. The respondent's report referred to the "perpetual usufruct" fee payable by Grosbeak to the city of Warsaw, the amount of which was the subject of an appeal by Grosbeak. Cash flow was also examined, the respondent concluding that "…as we currently see it Grosbeak has sufficient funding to weather 2014 but depending on events in 2014 may not have sufficient funds going into 2015". The report included November 2013 and December 2013 management accounts for Grosbeak, and asserted that the unaudited January to December 2013 financial statements would be available "by the end of March 2014". A report by property consultants Jones Lang Lasalle on "The Land Investment Market in Poland" was also included.

27. The AGM of the company was held on 11th July, 2014 at the respondent's office. In advance of this meeting, Mr. Jim Conway wrote on the applicant's behalf by letter of 7th July, 2014 to the respondent setting out a list of issues and queries which he wished to have addressed at the meeting. The respondent replied by letter of 9th July, 2014 indicating that the purpose of the meeting would be to approve the "liquidator's account of his/her dealings and of the conduct of the winding up" (i.e. the form E3 required to be submitted by a liquidator), but that, once the meeting was concluded, the respondent would revert to the applicant in respect of the matters set out in the correspondence.

28. The meeting duly took place on 11th July, 2014. The respondent subsequently replied by letter of 6th August, 2014 to the queries raised in Mr. Conway's letter of 7th July, 2014. Mr. Tom Casey, the applicant's solicitor, who had attended the AGM as the applicant's proxy, then wrote by letter of 11th August, 2014 to the respondent setting out his response to the respondent's letter of 9th July, 2014, and his account of the exchanges which took place at the meeting, at which Mr. Curneen and the respondent were present.

29. It is clear from Mr. Casey's account of the meeting that much of the discussion concerned the issue of whether or not a representative of the applicant would be appointed to the board of Grosbeak. According to Mr. Casey, the respondent said that he had not discussed this issue with Mr. Curneen or the other P&D Polska board member, Ms. Katarzyna Frejlichowska, and Mr. Curneen indicated that neither he nor Ms. Frejlichowska would be prepared to sit on the same board as Mr. Jim Conway or any representative of the applicant.

30. In his letter of 11th August, 2014, Mr. Casey stated, in referring to the termination of the meeting:

> "9. At this point Mr Casey indicated that it appeared clear that there was no point in continuing the meeting; that for reasons which our client could not understand you appeared to [sic] openly hostile towards it and its position and that it further appeared that any decision relating to Grosbeak and its assets and their realisation or otherwise appeared to be left entirely to Mr Curneen, Mr Curneen having proceeded to commence outlining how he intended to continue deal [sic] with the Grosbeak assets" [emphasis in original].

31. Mr. Casey went on in the letter to state as follows:

> "It is our client's view that the manner in which the meeting was chaired and specifically your conduct at the meeting went far beyond unprofessional. In circumstances where our client's nominee was attending at your offices for the meeting, you were accompanied at the meeting by an assistant/colleague and, fundamentally, you were expressly made aware well in advance of the meeting, both orally and subsequently in writing, as regards the specific issues and matters which were of concern to our client and which they wished you would assist them with and/or provide an account to them and you were given every opportunity to prepare to deal with these matters, there is in our client's view no justification for the clear loss of control and temper demonstrated by you at the meeting and directed towards our client.
>
> It is further our client's view that your behaviour at the meeting demonstrated what can only be described as unconcealed hostility towards our client and its position and a lack of any desire whatsoever to engage with our client in addressing its concerns and enquiries, or as it transpired to even continue to maintain a pretence that you were or would seek to do so."

32. The position of the applicant was summarised in the said letter as follows:

> "Our client agreeing to your appointment was subject to and in the expectation that you would be efficient, vigorous and unbiased in your conduct of the liquidation and in compliance with your duties to the Company's members and in the realisation and distribution of the Company's assets. In our client's view you have not fulfilled your role in an efficient, vigorous and unbiased manner and/or complied with your duties. You have further shown no desire to provide any assurance or comfort to our client that you will not continue to do so in the future. The manner in which the Company's reconvened AGM was chaired and conducted by you is in our client's view further demonstrative of these facts…
>
> Having regard to the purpose for which you were appointed, the fact that our client, a 50% shareholder in the Company, has on reasonable grounds understandably lost confidence in your professional ability to perform your role as liquidator in a

vigorous, unbiased manner and in compliance with your duties in our client's view as set out in the foregoing paragraphs, in our client's view the best interests of the liquidation are served by your removal as liquidator. From our client's perspective, and entirely irrespective of its view that it is clearly not appropriate you continue as liquidator, the costs which have been incurred to date in the liquidation relative to the financial reward achieved for our client as 50% shareholder and the unexplained delay in addressing the restitution claims since your appointment in 2008 lead our client to the view that any additional cost and delay caused by a new appointment is justified".

33. As noted above, the respondent's letter of 6th August, 2014 responded to Mr. Conway's letter of 7th July, 2014. This letter addressed the management of Grosbeak as follows:

> **"2. Osmanska 7**
>
> Grosbeak's Management team and Board members comprise Michael Curneen and Katarzyna Frejlickswoska [sic]. Both are actively involved with managing Grosbeak and in my view carried out their duties in a diligent and efficient manner.
>
> Grosbeak's directors were originally involved in the purchase of this site by Grosbeak and retained substantial accumulated knowledge of the site. Since the commencement of the liquidation, their management of the site has been validated on a periodic basis by information received from the appointed legal and property advisers. I am updated on an ongoing basis by the Directors and I believe that this structure is effective. The overall strategy that has been followed on this site is:
>
> - Deal with the restitution claims covering the site. In total 8 claims covered the site, of which 4 now remain. Dealing with these claims has been a lengthy and bureaucratic process. Nonetheless, the information received from all parties involved on this site (Directors/Legals/Colliers) is consistent and indicates that the strategy of *cleansing* the site of these claims is enhancing the value of the site.
> - Continue with the PPKZ case re damages in connection with the original purchase of the site.
> - Adopt a hold strategy in respect of the site, until the above matters are resolved. This approach is further supported by the view that commercial property prices in Warsaw have been deflated for the past number of years.
>
> This strategy was implemented with P&D's knowledge & consent and that they have received ongoing updates on progress." [Emphasis in original].

34. In that letter, the respondent set out his reasons why, in his view, it was not appropriate to put a nominee of the applicant on the board of Grosbeak, stating *inter alia* that:

> "(b) The Directors are fully aware of all matters relating to the Osmanska site. They have indicated that they will resign their positions if your request [to have a representative of the applicant appointed to the Grosbeak board] is acceded to by me. This would not be in the best interests of the liquidation.

(c) I am satisfied with the management structure in place and do not see any need to vary it at this point. Given the fact that we are hopefully looking at a two year exit from the Osmanska site, the resolution of the restitution claims and PPKZ court case in this period and that both members of the Grosbeak management team are committed to working with me to maximise shareholder value, it would be extremely unwise to jeopardise this outcome by changing the composition of the board/management team…".

35. By letter of 28th August, 2014, the respondent's solicitors responded to Mr. Casey's letter of 11th August, 2014. The letter referred to the matters set out in the respondent's letter to Mr. Conway of 6th August, 2014, and set out the respondent's position generally as follows:

> "…we categorically reject your assertion that the liquidator has acted unprofessionally or with hostility towards your client. The Liquidator has always carried out his duties in compliance with the Act in the best interests of the members of the Company, as envisaged by the Settlement Agreement which led to his appointment, which has at times proved to be challenging given the history of conflict between your client and Mr Curneen and indeed in circumstances where your client instituted proceedings against the liquidator in 2011.
>
> In conclusion, it is not the function of the Liquidator to act at your client's direction, nor indeed at Mr Curneen's direction. The liquidator has always acted in a manner which he believes to be appropriate and in accordance with his statutory obligations. The fact that the Liquidator's decisions may not suit your client's agenda is a matter for your client. The Liquidator must continue to act as he sees fit.
>
> Your client's claims and threat of an application to seek his removal amount to an unwarranted attack on the Liquidator's good name and professional reputation and the liquidator fully reserves all of his rights in this regard. In 2011, at a time when your client was alleging that the Liquidator had not properly marketed P&D Polska, your client sought to inspect the Liquidator's file on that matter and the Liquidator voluntarily made disclosure to LK Shields [the applicant's solicitor at the time]. Although your client failed to expressly acknowledge, following completion of the review conducted by LK Shields, that there was no merit to the allegation which had been made, the fact that three and a half years have since elapsed without any further step being taken by your client, of itself, demonstrates the total absence of credibility of that allegation and is reflective of your client's attitude to the liquidation and the Liquidator".

**Developments from 2015 to 2018**

36. It has been necessary to set out the background to the matter and the foregoing exchanges in detail, as they formed the basis of the differing positions and contentions between the parties up to the issue of the present motion. The parties continued to

correspond with each other in relation to the issues over the following three years as set out in Mr. Conway's affidavit and as summarised below.

37. On 23rd July, 2015, the day prior to the scheduled AGM for that year, the applicant was provided with a set of management accounts for Grosbeak together with a report from Grosbeak's Polish lawyers regarding the restitution proceedings. Mr. Casey once again attended the AGM on 24th July, 2015 as proxy for the applicant. By letter of 17th August, 2015, Mr. Casey wrote on behalf of the applicant to A&L Goodbody, solicitors for the respondent, setting out at length the applicant's concerns as to the conduct of the liquidation. Among these concerns was a complaint about the respondent's conduct of the recent AGM, in which it was alleged that the respondent had "abruptly stood up and walked out of the meeting after approximately 7 minutes". Mr. Casey also complained of the applicant having received, between the 2014 and 2015 AGMs, no communication whatsoever from the respondent.

38. Mr. Casey's letter stated that his firm was "…instructed to proceed with an Application to remove your client as liquidator of the Company, and to appoint an independent liquidator both for the purpose of conducting the liquidation in an efficient and unbiased manner and to a [sic] detailed and forensic review of your client's handling of the liquidation". There ensued correspondence in which A&L Goodbody took issue with the applicant's threat to apply to court for the removal of the liquidator in circumstances where the same threat had been made a year previously and the applicant had not acted upon it. This prompted a brief but scathing response from Mr. Casey of 21st August, 2015, in which he deprecated, inter alia, the failure of the respondent "to even pretend…to hide his expressed, but unexplained, contempt of our client…".

39. By letter of 28th August, 2015 – exactly one year after its previous letter substantively defending the respondent's stewardship of the liquidation – Messrs A&L Goodbody responded at length to Mr. Casey's letter of 17th August, 2015. Not surprisingly, the letter strongly defended the respondent's position. In relation to the situation regarding Osmanska and the restitution claims, it stated as follows:

> "Since the commencement of the Liquidation, the strategy which has consistently been adopted by the liquidator with regard to the Grosbeak asset has been a medium term strategy whereby the property will be 'cleansed' of the restitution claims before it is put on the market. This strategy was approved by both shareholders. Please clarify if your client now wishes for the property to be sold at a reduced price on account of the pending restitution claims."

40. By email of 17th September, 2015, the respondent furnished an "update report" dealing with a number of matters, but primarily that of the Osmanska 7 site. This report was furnished in advance of a previously proposed meeting to discuss how to move forward in relation to this issue. The author of the report was expressed to be Mr. Curneen. The report included a number of appendices, including a report from the Polish lawyers in relation to the restitution claims. The report made no reference to the PPKZ litigation.

41. The applicant had a major issue with Mr. Curneen's authorship of the report. As Mr. Jim Conway put it in the grounding affidavit for this application:

> "I say that it becomes readily apparent from a review of the document that Mr Curneen had purported to deal with issues such as land valuation, planning and the then legal status of restitution claims in the body of the report. It was unclear whether or not Mr Curneen was paid for the furnishing of the report but what is clear [is] that it was commissioned by and furnished to the Respondent when he could have been in no doubt as to manifest lack of expert qualification on the part of Mr Curneen and the context of distrust and rancour between the Applicant and Mr Curneen leading to the Respondent's appointment in the first instance."

42. The meeting, which had been proposed for September 2015, did not take place due to unavailability of the respondent's solicitors. However, by letter of 17th December 2015, the respondent wrote to the applicant including a report on the Osmanska 7 situation with appendices, and the accounts of Grosbeak to 31st October, 2015. The letter sought "a contribution of €100,000, €50,000 from each shareholder" in February 2016 to pay Grosbeak's ongoing costs.

43. The report, which appears to have been written by Mr. Curneen, included a section in relation to the PPKZ case. The report stated that the claims against PPKZ had been valued at Pln.5.5m, but that "on investigation it became clear that PPKZ could not pay such an award…". The report went on to say that:

> "…it became clear that a Grosbeak win would be very difficult if not impossible to monetise. As it happened the judge sided with PPKZ. She stated that PPKZ had no liability under the warranty and that the obligation to identify claims lay with Grosbeak. This was a ridiculous judgment which provided Grosbeak with numerous grounds for appeal. However, given PPKZ's deteriorating financial condition, the time and costs involved in an appeal (circa Pln 150K) and the risk of another impartial judge being appointed to the case it was decided not to proceed with an appeal".

No indication is given in the report as to when the Polish court's decision was given, or as to what legal advice Grosbeak received in coming to its decision not to proceed with an appeal.

44. The respondent wrote by letter of 7th March, 2016 enclosing a legal update from Ms. Joanna Wasik, Grosbeak's legal advisor in Poland, on the restitution claims, together with management accounts of Grosbeak for the month of January 2016. The letter reiterated the request for a contribution from each shareholder as set out in the letter of 17th December, 2015 to meet "the costs that have been incurred".

45. An AGM of Grosbeak was subsequently held at the respondent's offices on 25th April, 2016. The applicant's solicitor Mr. Tom Casey attended the AGM on behalf of the applicant, and the respondent also attended with his solicitor present. An attendance of

the meeting was prepared by a trainee from Mr. Casey's office, and this attendance is exhibited to Mr. Conway's grounding affidavit. No particular issue is taken with this memorandum in the affidavits of the respondent. The memorandum records that a discussion took place in relation to the circumstances in which Grosbeak had decided not to proceed with an appeal of the Polish Court's decision in the PPKZ case. The memorandum records as follows:

> "TC (Tom Casey) asked what the decision had been. MC (Michael Curneen) explained it on the basis that the purchaser had obtained a warranty on the Property's purchase that there were no restitution claims affecting the land. TC queried how this case could have been lost. MC explained it on the basis that the judge had determined that Grosbeak had two weeks to conduct due diligence and the judge had determined that the restitution claims should have come to the purchaser's attention. TC inquired who were the solicitors who had acted in the property's purchase. MC stated it was the solicitors currently advising the liquidator and engaged in the litigation. TC raised the issue of the lawyers' liability, asking if anybody had considered the failure to acquire good title when purchasing. MC and LD (the respondent) commented who would pay for this and MC also stated that before the solicitors could be pursued the judgment would have to be appealed. TC asked why P&D was not consulted about the question of an appeal. LD stated that he, as liquidator, formed a view that it shouldn't be appealed and also that PW Legal (the solicitor who acted originally in previous firm, and was currently acting in a new firm) was not at fault. TC asked on what basis LD had come to this view, LD did not reply. TC asks if the other parties present understand our concerns re lack of transparency, the fact that MC appears to be clearly controlling and dictating everything. MC stated he is not dictating matters, that he is a 50% shareholder and everything he does is to maximise returns for both shareholders. TC asks if LD took advice re the case against the solicitors. He responded that he did and that it would have cost a fixed fee of 25/30,000. TC asked if it was lack of money which influenced the decision but MC stated it was the lack of time, and a desire to not have another case pending with lands to be sold. TC asked how much the litigation had costs [sic] and MC replied that the solicitors had agreed and been paid a fixed fee of some €25,000."

46. The respondent's solicitors wrote to the applicant by letter of 12th May, 2016 enclosing, at the request of the applicant, minutes of the company's AGMs from 2009 to 2015, and a statement in respect of the respondent's fees. The respondent subsequently wrote to the applicant by letter of 15th August, 2016 enclosing inter alia an updated memo on the restitution claims, a Polish language valuation of the property with extracts of same translated into English, and what appeared to be an English language extract of another valuation. In the letter, the respondent calls for a meeting on 19th September, 2016 to discuss the strategy going forward for Grosbeak. Mr. Casey attended the meeting on behalf of the applicant, and it is evident from his memorandum of the meeting that it comprised a thorough review of the various matters affecting the Osmanska 7 site.

47. Towards the end of the meeting, it appears from this memorandum that the respondent:

> "…stated he was seeking €100k from each shareholder. I [Mr. Casey] asked what the money was being sought for. LD stated it would be used to pay the tax and pay ongoing costs. I enquired ongoing costs for what. MC indicated that the Polish solicitors had taken the [unsuccessful] case on a fixed fee and they had not raised a fee for some time. LD stated he would send RC and I details of the costings."

48. On 7th November, 2016, the respondent wrote to the applicant seeking a contribution of €45k from each shareholder in order to meet the ongoing costs of Grosbeak and liquidator's fees. The letter attached cash flows in respect of Grosbeak to December 2018.

49. At paragraph 44 of his grounding affidavit, Mr. Jim Conway avers that … "the Applicant declined to make the requested €45,000 contribution referenced in the letter; the Applicant's position in that regard having been made clear by Mr. Casey at the 19 September 2016 meeting". However, it is not apparent from Mr. Casey's memorandum of the meeting that the applicant's position was made clear in this regard. Immediately after the paragraph in the memorandum dealing with the respondent's request for funding, Mr. Casey states:

> "DB [David Baxter, the solicitor advising the respondent] then inquired of me as to what my client's position was. I responded that my client's position would be made known when I took instruction and reported to it on today's meeting, albeit I didn't believe my client's position re removing the liquidator would change.
>
> LD stated that if funding was not made available he would have to sell property with claims attaching."

50. It is the respondent's position that his various requests for funding of the ongoing costs of the liquidation which he made during the course of 2016 were simply not responded to by the applicant. In his affidavit of 26th November, 2018, Mr. Jim Conway on behalf of the applicant reiterated the applicant's assertion that its position had been made clear by Mr. Casey at the meeting of 19th September, 2016, i.e. that it was declining to make the suggested contribution.

51. Matters do not appear to have progressed much further in 2017. An AGM was held in May 2017. Mr. Curneen was unable to be in attendance, and accordingly little progress of a substantive nature was made at the meeting. Attempts to arrange a further meeting during that year appear to have come to nought. However, a meeting did take place on 31st January, 2018 between Mr. Jim Conway, Mr. Ronan Conway and Mr. Casey representing the applicant, and the respondent and a colleague. Mr. Jim Conway, in the grounding affidavit, complains of what he alleges was the "offhand manner of the Respondent's engagement, or more correctly, his failure to engage with us, at the meeting". Mr. Conway also complained of the alleged refusal or inability of the

respondent to provide answers to queries put to him at the meeting. These allegations are denied by the respondent.

52. There ensued correspondence in February and March 2018 between Mr. Casey and the respondent. In a letter of 15th February 2018, Mr. Casey confirmed that "…our Client does intend now to proceed with its application seeking your removal as liquidator for the reasons previously outlined in our communication to and with you and A&L Goodbody solicitors on your behalf. In this regard our Client's representatives gained no comfort that its stated concerns with regard to the manner in which the Company Liquidation has been conducted to date are being or would be addressed".

53. The letter went on to state, in relation to the question of the respondent's fees as liquidator:

> "… our client made its position clear both prior to and subsequent to its receipt of this letter that it was not prepared to contribute further funds *inter alia* towards liquidator fees. Indeed, our client's position and the advice it has received is that excessive fees have to date being [sic] taken in the Liquidation without shareholder approval; that such fees are continuing to be accrued without shareholder approval; and that, insofar as there are not sufficient funds to discharge the costs of the Liquidation, the Company is insolvent and the Liquidation should properly be converted into an insolvent liquidation".

54. The respondent responded substantively to this letter on 12th March, 2018. He refuted any allegations of non-engagement on his part, enclosing an appendix listing correspondence from him to the applicant and/or Mr. Casey in respect of which he alleged that he had received no response from the applicant. He stated that his remuneration had been "agreed and approved by the shareholders", and stated that Mr. Casey appeared not to be aware of the extent of work conducted by him in the liquidation to date. He contended that there was no basis on which to support the conversion of a member's voluntary liquidation to a creditor's voluntary liquidation as "Given the significant value of Grosbeak's property there is no solvency issue".

55. At an AGM held on 20th April, 2018, at which Mr. Jim Conway and Mr. Casey attended for the applicant, and a colleague attended with Mr. Curneen, a written "update" was provided by the respondent. The update provided the February 2018 management accounts for Grosbeak. It confirmed that the Osmanska 7 property was now finally free of restitution claims, and that the exercise of obtaining the appropriate legal confirmations was underway. It set out the position on the payment of the perpetual usufruct obligation. A copy of "the latest valuation report" on Osmanska was attached, and it was stated that Mr. Curneen would give a "verbal update" on the ongoing valuation and sales process. The position in relation to tenants and recovery of rent was summarised.

56. The update also stated that the "JMR Trans soil and rubble mountain" was still on the Osmanska site "and that the legal ownership and removal rights of the soil and rubble

have now been obtained". It was stated that Mr. Curneen would provide a "verbal update" in respect of this issue at the meeting, although the applicant alleges that no such update was in fact provided.

57. In the event, it appears that the meeting concluded with Mr. Casey advising that the applicant wished to consider the information and documentation provided and would revert to the respondent in due course.

58. The applicant then proceeded to engage the services of a firm of property consultants, Colliers International ('Colliers'), to advise it in relation to the Osmanska 7 property. Colliers viewed the property with Mr. Jim Conway and Mr. Casey, and produced a comprehensive valuation report on 1st June, 2018. The report noted that the site was not secured, and that the "historical fly-tipping" was likely to continue. The situation of dust and sand emanating from the mud-heaps was "dangerous and can result in a claim and/or criminal proceedings". In Colliers' view, a 20% discount was necessary "due to the potential difficulties in the sales process" arising from, inter alia, the cost of cleaning the property and the need to carry out a site survey to check whether the soil was contaminated. A preliminary budget for the cost of removing the spoil and waste material on the site was estimated at Pln. 7,019,232 (€1.62m), subject to certain assumptions.

59. Colliers valued the property at Pln. 20,190,000. The respondent's valuation appended to the respondent's update for the meeting on 20th April, 2018 valued the property at Pln. 20,700,000. While the valuations were therefore broadly in line with each other, the respondent's valuation did not reference the material deposited on the property as impacting on the value of the site, and did not discount the value by reason of the legal and physical issues affecting the site, as opposed to the view of Colliers that a 20% discount to reflect these factors was appropriate.

60. In his affidavit of 2nd November, 2018, the respondent noted that the value of the property was not in dispute, and asserted that "the only remaining step to be taken prior to sale is to remove the rubble…this can be done at a cost significantly lower than that estimated by Colliers".

**The Applicant's concerns**

61. By letter of 28th June, 2018, the applicant's solicitors wrote to the respondent in terms which set out comprehensively the applicants concerns prior to the issue of the present motion. The letter advised the respondent of the engagement of Colliers and summarised the advices received from that firm. The letter contended that the report presented to the meeting on 20th April, 2018 was "completely inaccurate and indeed misleading", and went on to state as follows:

> "The issues which have most recently come to light following our client having received the expert advices of Colliers International as to the veracity and accuracy of the information made available to it with regard to the sale, marketability and value of the Property are, in our client's view, further evidence that you have acted negligently in your conduct of the Company's liquidation and in particular you have

failed to take the required steps to value, protect and realise Company assets that would be expected of an experienced Insolvency Practitioner.

Further, your continued reliance, including it was clear from what occurred at, and per the agenda for, the 20 April 2018 meeting, on what is being communicated to you by Mr Curneen with regard to the Property, its maintenance, condition, marketability and value, for the purpose of your seeking to discharge your duties as Company liquidator, is a cause of deep concern to our Client and at this point no longer acceptable. Whilst this would in any event arise due to the fact that it was the breakdown in the relationship between our client and Mr Curneen that was the nexus for your appointment as liquidator, in light of the issues which have and are continuing to come to light with regard to the destruction in the value of the Company's assets left under the control of Grosbeak/Mr Curneen and arising from '*nightmare'* non-rent paying tenants being allowed, in circumstances and on terms which have never been disclosed to our Client, to take possession of the property and their using same as an unauthorised landfill".

62. The letter concluded in the following terms:

"1. Our client does not accept that you have made yourself available to meet with its representatives and deal with any queries it may have or have had with the liquidation. Further, insofar as your letter references and encloses a schedule of correspondence to our client which correspondence it is asserted our Client has not engaged with, this allegation is refuted by our Client and, it is noted, chooses to ignore previous communications to your solicitors and what occurred at the AGMs attended by our Client's representative/s at your offices.

2. Our Client's position, that it was not prepared to contribute further funds towards liquidator's fees, was communicated to you at the meeting at your offices on 19 September 2016, during which meeting *inter alia* you stated that '*we were heading toward the time of having to make calls'* and we either had to move on the, restitution, claims or negotiate with the claimants and that there was the second issue of getting the tenants off the site and that if funding was not available you would have to consider what to do and take a decision as regards selling the Property at an impairment value.

3. Your remuneration as liquidator has not been agreed and/or approved by our Client, the 50% shareholder in the company. Further, our Client is privy to all communications passing between you and your advisers and LK Shields Solicitors and our client and its advisors are satisfied that same does not substantiate your having incurred, as of 2016, liquidation, legal and professional fees of €669,924.11.

4. Insofar as your letter concludes by asserting that our Client has been agitating on various issues since 2011, it is correct that our Client has been in communication with you for several years expressing concerns with regard to the manner in which you have conducted yourself and acted as Company liquidator. Our Client

disagrees with your stated position that the issues raised by it have been addressed and/or that the liquidation has been conducted in an open and transparent matter at all times.

5. Previous communication from you and/or your advisors does not in fact deal, in considerable issue or otherwise, with our Client's concerns that and inquiries as to whether, the company is insolvent. Insofar as your letter states that there is no basis that you are aware of to support the conversation [sic] of the company's NVL to a CVL, and you rely in this regard on '*significant value of Grosbeak's* property' as matters stand, per our Client's experts views, there is no value whatsoever in the Grosbeak property and indeed, as a result of the failure to take basic steps to value, protect and realise Company assets, the property may well be a liability on the Company's balance sheet". [Emphasis in original]

**The Respondent's position**

63. The applicant duly issued the notice of motion grounding the present application on 16th July, 2018. The report of Mr. Garcia Diaz was exhibited to Mr. Jim Conway's second affidavit of 26th September, 2018, in which he noted that no substantive response had been received to the applicant's solicitor's letter of 28th June, 2018.

64. The respondent replied by way of an affidavit of 2nd November, 2018. The affidavit comprises a substantive defence of the respondent's position, and I have referred to some of the points made in it above. The respondent defended his conduct of the sale of P&D Polska. The respondent then went on to address his dealings with Osmanska 7.

65. The respondent set out the background to the restitution claims, with a note in relation to them from Ms. Joanne Wasik, "Grosbeak's attorney". He exhibited a letter of 17th of September, 2018 from Ms. Wasik which "confirmed that the Osmanska 7 property was finally free of restitution claims", and that Ms. Wasik had "received confirmation from the Polish state on 20th June 2018 that no further claims existed".

66. The respondent contended that he had "at all times kept the applicant apprised of the position concerning Grosbeak and the Osmanska 7 property", and that a valuation furnished with his letter of 15th August, 2016 illustrated that the market value of the lands was approximately €3.44m "assuming no claims to the property" but approximately €2.04m "taking into account the then outstanding restitution claims". The respondent expressed the belief that this valuation "demonstrates that it was appropriate for me to await the ultimate resolution of the restitution claims before selling the Osmanska 7 property, so as to maximise the return available to the company".

67. The respondent then dealt with the occupancy by tenants, and the number of proceedings which it was necessary for Grosbeak to initiate against them. The respondent averred that one tenant, "JMR Trans", had "dumped a large volume of rubble on the lands", and that Grosbeak had received advice from Ms. Wasik that it would not have been practicable to have sought to restrain dumping on the lands. The respondent referred to a letter from Ms. Wasik of 19th July, 2018, in which Ms. Wasik expressed the opinion that "there

was no possibility at any time to obtain an interim order stopping landfill". Ms. Wasik concluded her letter by stating:

> "Grosbeak decided to take over the ownership of waste during the enforcement proceedings as it was absolutely obvious that environmental proceedings instigated by Grosbeak forcing JMR to remove waste from Osmanska would take environmental authorities several years, quite possibly over a decade to enforce".

68. The respondent exhibited a report of tests conducted by a Polish geologist in "June 2018" which the respondent averred "confirm that the material is free from contamination and is of good quality and useful as infill material or for road construction". The respondent then averred that he had sought quotes for the removal of the material, the most competitive of which was for approximately €840,000 plus VAT. The respondent summarised his position as follows:

> "…it is common case that the Osmanska 7 property can be sold for approximately €4.7 million, subject to the removal of the rubble left by JMR. The up to date information set out above, which was evidently unavailable to Colliers, demonstrates that there are no concerns about contamination and that the cost of the removal will be significantly lower than Colliers' estimate. Assuming that the lands can be sold for the expected amount, then following deduction of the costs of clearing the lands and the current net liabilities of Grosbeak, a net return of approximately €1.8m can be expected. This is significantly in excess of the value placed on Grosbeak in the DOS, namely €1,166,450."

69. As regards the PPKZ proceedings, the respondent referred to a memorandum from Ms. Wasik "explaining the proceedings and the rationale for the decision not to appeal…". The memorandum was not dated, but it was clear that it was a retrospective report on the proceedings and the advice given, rather than contemporaneous advice on which Grosbeak relied in deciding not to appeal.

70. The respondent then addresses the specific matters set out in Mr. Conway's affidavit. By way of general comment, he begins by stating that:

> "Mr Conway's narrative is selective and tendentious. I say and believe that a proper analysis of my communications with the applicant will demonstrate that I acted at all times appropriately having regard to my duties as Liquidator. During the course of the liquidation, it is the Applicant (acting through Mr Conway, his son Ronan Conway and the Applicant's solicitors) which has been difficult and aggressive. It appears to me that the Applicant has sought, in effect, to continue to pursue its dispute with Mr Curneen through the medium of the liquidation."

71. In addressing the allegation that excessive reliance was placed by him on Mr. Curneen, the respondent refers to a memorandum of understanding ('MOU') of 8th May, 2008, concluded between BDO Simpson Xavier ('BDOSX') – the firm to which the respondent was at that time attached – on the one hand, and Mr. Curneen and Ms. Frejlichowska on

the other. This memorandum was "to agree the terms under which the activities of the Polish companies of Dominar will be reported to Liam Dowdall of BDOSX…". The memorandum set out reporting requirements which the Polish companies – Grosbeak, P&D Polska and another company – were required to observe, and there were restrictions n the type of transactions into which the Polish companies could enter without notification to and approval by BDOSX "in writing". "Polish management" was obliged under the memorandum to "notify to BDOSX at the earliest opportunity… all matters that management consider would/may have a material impact on the Polish company's trading performance or their valuation in current and future periods". The MOU was signed by the respondent, Mr. Curneen and Ms. Frejlichowska.

72. The respondent avers that the directors of Grosbeak complied with the terms of the MOU, and that Mr. Seán McNamara of the respondent's office "…paid regular visits to the administration office of Grosbeak for the purposes of delivering monthly accounts and ensuring that any concerns expressed by Mr. Conway were properly investigated. This involved monthly visits for a considerable period of time during the course of the liquidation".

73. The respondent in the course of his affidavit reviews the course of the liquidation, and in particular the correspondence and meetings to which Mr. Conway referred in his affidavit. He makes the point that the contribution of €45,000 sought by him in November 2016 from each of the shareholders was solicited in the context of the applicant having received distributions of over €1.6m from the liquidation and the respondent having received no fees in the liquidation since 2013. He avers that, while the applicant did not respond to any of his various requests for funding, Mr. Curneen provided funding of €82,629.

74. The respondent deals in some detail with the question of his remuneration at paras. 45-48 of his affidavit. A figure of €389,448.19 has been paid out to him in liquidator's fees, and while this is greater than his initial estimate of €250,000 as set out in his initial letter of engagement of 9th April, 2008, he avers that "The role and level of work undertaken since that letter was far in excess of what was anticipated at the time of my appointment and this has inevitably had an impact on the level of fees incurred. The Applicant has been kept apprised of the work undertaken throughout the course of the liquidation".

75. The respondent refutes the suggestion that the members' voluntary liquidation of the company should be converted to a creditors' voluntary liquidation. He asserts that all of the company's creditors have been dealt with "and all assets realised, save for the shareholding in Grosbeak, which will realise a significant surplus". As such, the respondent contends that the company is not insolvent, and that there is no basis for the conversion to a creditors' voluntary liquidation.

76. At paras. 51-62 of his affidavit, the respondent addresses the various matters in the report of Mr. Garcia Diaz. While I will address the respective experts' reports below, it is fair to say at this point that the respondent emphatically rejects the assertions of Mr. Garcia Diaz criticising his conduct of the liquidation. The respondent also relies on the expert report of Mr. Jim Luby in this regard.

77. The respondent concludes by rejecting Mr. Conway's criticisms, and asserting that the applicant "has engaged only sporadically and mostly negatively in the liquidation process". He also avers that he is advised and believes that this Court "will have regard to the potential impact of the reliefs sought on my professional standing and reputation…".

78. By a supplemental affidavit of 7th November, 2018, the respondent exhibited a report by Mr. Jim Luby of McStay Luby, Chartered Accountants. Mr. Luby has "over 30 years' experience in insolvency and restructuring, having acted as examiner, liquidator, receiver and administrator". This affidavit was supportive of the respondent's position.

79. Mr. Jim Conway swore an affidavit on 26th November, 2018 in response to the respondent's affidavit of 2nd November, 2018, and the respondent in turn replied to this affidavit in his own affidavit of 12th December, 2018. These affidavits, as is often the way in such matters, consist mainly of argument and rebuttal of the other side's contentions rather than setting out facts relevant to the matters at issue. Mr. Conway's affidavit alluded to a suggestion that the respondent "failed to obtain shareholder approval for the monies taken by him as remuneration", asserting that it was "noted" that the respondent did not dispute this, although in the course of submissions at the hearing some uncertainty was expressed by counsel for the applicant as to whether this was in fact the case.

80. In his affidavit of 12th of December 2018, the respondent acknowledged that there had been a delay in notifying the applicant that the PPKZ proceedings had been dismissed and that Grosbeak had decided not to appeal that decision. The respondent stated that this delay was "regretted", but that "Grosbeak was entitled to decide on the basis of the legal advice it received at the time not to appeal the decision".

**Events in 2019 and 2020**

81. By motion issued on 28th January, 2019, the applicant brought an application before the court for examination of the respondent. This application was determined by the judgment and order on 27th July, 2019 of O'Connor J. as set out above. During the course of this application, the applicant's solicitor Mr. Tom Casey swore an affidavit on 18th February, 2019 exhibiting an exchange of correspondence in relation to the steps to be taken regarding the Osmanska 7 site.

82. By letter of 10th January, 2019, the respondent wrote to provide an "update" in respect of the site. With regard to the sale of Osmanska 7, the letter indicated that the property advisory firm CBRE had been asked in Poland to advise on sales strategy, and a copy of that firm's proposal was enclosed. It was also indicated that Grosbeak was "currently engaging with a Polish financial institution to provide funding for the site clearance", and that "a draft term sheet for funding of PLN 4.2M" had been procured, but "… the shortfall of PLN 0.288M will have to be provided by funds from the shareholders". The letter concluded by stating that the respondent was "proposing to move matters forward to get a preferred purchaser on board in the coming months. I am seeking shareholder approval to move this process forward".

83. Mr. Casey replied to this letter on 28th January, 2019, commenting that this was "the first communication received from your Client with regard to the Liquidation since 20 April, 2018". Mr. Casey raised twenty-two separate queries in the letter regarding the sale of the property and the respondent's dealings with CBRE.

84. The respondent's solicitors replied by letter of 11th February, 2019, which stated that the respondent considered

> "…that the matters in dispute in the proceedings could be largely resolved if the parties engage constructively to agree a mechanism to dispose of the Osmanska 7 Property. To that end, the Liquidator has made a proposal in good faith to deal with that asset. The purpose of his letter of 10 January 2019 was to inform your client of that proposal and to seek shareholder approval to proceed with it. In light of the allegations made by your client in the course of the proceedings, the Liquidator does not intend to incur any further significant costs or finalise his proposal without shareholder approval… Please now confirm as a matter of urgency whether it is your client's position that it will not approve any action by the Liquidator to clear and/or dispose of the Osmanska 7 Property. If that is your client's position, then there is little to be gained from further correspondence concerning the Liquidator's proposals…".

85. The letter went on to provide answers to the various queries raised in Mr. Casey's letter of 28th January, 2019, and prompted a responding letter from Mr. Casey of 12th February, 2019, which set out the applicant's position as follows:

> "It is not our Client's position that it will not approve any action by Mr Dowdall to clear and/or dispose of the Osmanska 7 property. It is our Client's position that, pending that [sic] Court's adjudication upon our Client's application to remove Mr Dowdall as company liquidator, Mr Dowdall should have taken, and even at this late stage he should be taking, urgent steps to proceed to clear the Property in a manner which does not deplete the dividend which would otherwise accrue to our Client. Insofar as your Client has to date failed to take steps in this regard and this has and is continuing to result in the further accrual of costs and expenses relating to the Property, such costs and expenses in our Client's view are also matters which fall for payment and/or reimbursement other than from funds which should enure for our Client. The fact of the matter is that the massive costs now associated with the Property clearance all arose by virtue of the fact during the course of the liquidation individuals were allowed in possession of the Property, they were permitted to carry out the dereliction and waste of the Property and had the Property been properly managed and supervised this would not have occurred".

86. Mr. Casey did not accept that the replies furnished in the letter of 11th February, 2019 were "substantive and proper", and stated that:

> "The content of your letter indicating that because there may be some residual distribution available to our Client, our Client should forego or ignore the losses

incurred by virtue of Mr Dowdall's mishandling of the liquidation is simply outrageous".

87. At the hearing of the present application, the court was presented with a further affidavit from Mr. Jim Conway sworn on 21st January, 2020, the day before the hearing commenced. The purpose of this affidavit was to update the court in relation to the correspondence between the parties over the course of 2019 and up to the date of the hearing. The company's AGM had taken place on 7th May, 2019, subsequent to which the respondent's solicitors by letter of 20th May, 2019 furnished to Mr. Casey minutes of the AGM and certain loan documentation sought by the applicant.

88. Over the course of June and July, the solicitors to the applicant and respondent corresponded mostly in relation to the respondent's proposal to obtain funding to remove the waste material from the Osmanska 7 property. Mr. Casey on behalf of the respondent expressed his client's position in his letter of 11th June, 2019 as follows:

> "At this point we must state that it is not credible for your client to continue to maintain that there are ongoing discussions taking place with a Polish financial institution with regards to the Company and/or Grosbeak securing substantial funding to fund the removal of the waste material which was allowed to be placed on the Osmanska property, and, noting that your Client refused at the AGM to disclose the identity of the Polish financial institution with whom discussions have apparently being [sic] taking place since at least 7 December 2018, we are instructed to state that our Client simply does not believe that your client is communicating the truth to our Client with regard to what is, or is not, transpiring in this regard. Insofar as your Client wishes to put forward any evidence vouching the fact that ongoing discussions have been and continue to be taking place with a Polish financial institution as he has been communicating to our client since January 2019 we would at this point invite him to do so".

89. In their letter of 17th June, 2019, Messrs Hayes Solicitors on behalf of the respondent stated that:

> "Our client is continuing to engage with a Polish financial institution in order to secure funding for the removal of the landfill from the Osmanska property. As previously advised to you by our client, he will provide a further update in relation to the funding as soon as same is to hand…whilst our client is making every effort to secure the funding, he has made it clear to your client and to the Court that he does not intend to finalise that process while your client's proceedings are on-going or without the agreement of the shareholders (including your client)."

90. On 23rd December, 2019, the respondent wrote to the applicant enclosing a report outlining the proposed sale process for Osmanska 7, which the respondent described as "the final remaining asset within the Dominar Group", the disposal of which was "the last remaining step in the wind-down of the group". It was clear from the report that a sale process had been devised by Grosbeak's selling agents, CBRE, and the report of the

respondent contained his recommendations for sale based on offers received. The report of CBRE in relation to the process, setting out "a summary and explanation of the legal issues that affect the sale of commercial property in Poland and the conditions specific to the proposed transaction" was also furnished. The letter requested that the applicant revert with any queries by 6th January, 2020, and a meeting of shareholders on 13th January, 2020 was proposed "for the purpose of seeking approval of the sale strategy from shareholders". The respondent concluded his letter by stating that, in the event that the applicant did not approve the proposed sales strategy, he would apply to this Court for directions "endorsing the sales strategy with a view to bringing the liquidation to a conclusion".

91. The report outlined the offers received, and recommended one particular offer, setting out the reasons for this choice. The soil was to be removed at a cost of €840,000 plus VAT, with the directors of Grosbeak – Mr. Curneen and Miss Frejlichowska – providing the funding to complete the soil removal on the basis that they would be reimbursed from the sale proceeds. An estimated outcome of the liquidation indicated that a surplus of €1.2m would be available to the shareholders on the basis of the proposed sale. This estimated outcome provided for a further €190,000 to be discharged in liquidator's fees, and €180,000 in legal fees.

92. Due to delay occasioned by the Christmas vacation, the parties agreed that the applicant would have until 10th January 2020 to provide a list of queries. The applicant's solicitors duly wrote by letter of 10th January, 2020, raising extensive queries on virtually all aspects of the respondent's report and proposals. Notably, the letter addressed the proposals for the removal of the soil, and raised the following queries:

> "1. Please advise if it is your position that the shareholders are to bear this loss.
>
> 2. Please advise if it is your position that the circumstances giving rise to this cost and the recovery of this cost from the person or persons who had control of and responsibility for the supervision and protection of the Property is not a matter which warrants investigation."

93. A comprehensive reply to the 22 queries was furnished by the respondent's solicitors by letter of 15th January, 2020. In relation to the two queries raised as set out above, the respondent's solicitors replied as follows:

> "1. The removal costs of approximately €840,000.00 plus VAT are costs which will incur in the context of the liquidation and as a result, will need to be met by the funds realised from the sale of the lands.
>
> 2. Our client has extensively investigated the prospect of recovering such costs from the former tenant responsible for the deposit of this soil material and this has been explained to your client in detail."

94. Mr. Casey responded on behalf of the applicant to this letter in detail on 17th January, 2020. The response to the reply by the respondent's solicitors quoted above was as follows:

> "1. We take it from the response that your Client's position is that the shareholders are to bear this loss. Please again advise if we are incorrect in this position.
>
> 2. Your response ignores the enquiry made."

95. A meeting of the shareholders was then held on 20th January, 2020 – two days before the hearing. A transcript of this meeting was exhibited to Mr. Conway's affidavit. While counsel for the respondent noted at the hearing that the respondent had not seen this transcript prior to the hearing, in the event no objection was taken to the court having regard to it. Mr. Curneen was present at the meeting. A discussion of the various issues arising from the Osmanska 7 disposal took place. It does not appear from the transcript that any consensus evolved in relation to proceeding with the sale. Mr. Curneen stated that, as a shareholder, he was supporting the sale. Mr. Jim Conway confirmed that the applicant did not want to block the sale. However, the applicant insisted on getting answers to the various queries raised in its solicitor's letter of 17th January, 2020, and the respondent agreed to get a letter addressing these queries to the applicant by 21st January, 2020. Mr. Conway also indicated that he would wish to engage with the applicant's advisers, Colliers, before the question of approving the sale would arise. It is evident therefore that, while the applicant was favourably disposed in general towards the proposed sale, it was not yet prepared to give shareholder approval to the respondent to proceed in the matter as he intended.

96. By letter of 21st January, 2020 the respondent's solicitors replied to the queries raised in the letter of 17th January, 2020 from the applicant's solicitors. The answer to the two queries regarding soil removal quoted above were as follows:

> "1. The shareholders will ultimately bear the costs of funding the soil removal which as outlined above will be incurred as a result of the unlawful act of a third party for which our client is not responsible.
>
> 2. Our client and the directors of Grosbeak acted in a timely manner and took all available steps in relation to this issue. It is entirely regrettable that this has resulted in liability to Dominar Group Limited. However, our client is not responsible for the unlawful act of a third party."

97. The letter went on to answer various queries raised at the shareholders meeting, enclosing *inter alia* the preliminary agreement with the proposed purchaser of Osmanska 7. The letter set out detailed particulars of the timeline for the funding of the soil removal and the CBRE sales process. The respondent's intention to apply to court for directions authorising the proposed sale to ensure that the sale to the proposed vendor was not jeopardised in the event that shareholder approval was not forthcoming was reiterated.

**Mr. Curneen's affidavit**

98. An affidavit was sworn by Mr. Curneen on 15th January, 2020. The affidavit was filed by Mr. Curneen's own solicitor, and thus appears to be filed in his capacity as a notice party. However, Mr. Curneen states that he makes the affidavit:

> "… in support of the position of the respondent, Mr Dowdall. In my view, it is very much in the interests of all parties that Mr Dowdall be allowed to remain in place as liquidator to complete the sale of the last remaining asset, the property in Poland known as Osmanska 7…Once this has occurred, the final costs and distributions to shareholders can be dealt with, the liquidation closed off and Mr Dowdall discharged".

99. Mr. Curneen avers that he has "worked in Poland managing and operating Dominar's business and assets there since before its incorporation in 1999, commuting from Ireland on a weekly basis since 2011". He states that, in his view, the respondent "has done a good job as liquidator in difficult circumstances".

100. In his affidavit, Mr. Curneen supports the account of the respondent in relation to the restitution claims and the PPKZ litigation. As to how the situation regarding soil removal evolved, Mr. Curneen offers this analysis:

> "9. In terms of the JMR issue, Grosbeak and Mr. Dowdall were the victims of unlawful activity by JMR who was a tenant of the Property. JMR entered into a lease with Grosbeak in April 2013 to use the Property (which was an unoccupied site) for the storage and processing of building materials. At that time, JMR had all the necessary permits for the use and had a track record of working with reputable companies. Initially, JMR was an environmentally compliant tenant, but over a short period of time between December 2014 and May 2015 it built up a considerable amount of unsegregated materials on site in breach of its lease obligations and environmental regulations and permits. Grosbeak tried to engage JMR on this issue but JMR ignored it and also neighbouring owners and the Polish Environmental Authorities. Grosbeak was advised at the time that it was not possible to obtain an injunction against JMR. Grosbeak continued to raise the issue with the Polish Environmental Authorities which resulted in the institution by those authorities of environmental proceedings against JMR in February 2015. The Polish Environmental Authorities secured an order against JMR to remove the offending materials from the Properties. JMR appealed this decision. Ultimately, as a result of this legal action and in an effort to bring the saga to an end and avoid further legal costs, Grosbeak became the owner of the material on site. This now means that Grosbeak bears the obligation to remove the material from the Property."

101. In relation to the present offer, Mr. Curneen states that he is satisfied that the present offer for the purchase of Osmanska 7 represents the current market value "as it results from a professional sale process run by internationally renowned property agents". He further states that he fully supports the proposed sale of the property and believes that it

is very much in the interests of all parties that the respondent be allowed to conclude the proposed sale. In this regard, he avers as follows:

"13. Should Mr Dowdall be discharged as liquidator, there will inevitably be further delay and additional costs as [the proposed replacement liquidator] or any other replacement liquidator will have to become familiar with the complex background and history associated with the Property. In this regard, I note that the Applicant's proposed replacement liquidator…does not purport to have any knowledge or experience of the Polish property market or legal systems nor does his firm appear to have any connection to or association with professional advisers or firms in Poland. I have been involved in business in Poland for over 25 years and it is quite different to Ireland in many ways, including its legal system and cultural norms. The experience and background detail which Mr Dowdall and his team have gained, both in terms of the Property and transacting business in Poland generally, is invaluable and cannot be replicated easily or quickly. Equally, I am aware that over the last 15 years many Irish property investors have tried and failed to make a return in Poland. Against this background and the particular problems associated with the Property, I am very anxious that every effort is now made to complete the sale of the Property with Mr Dowdall in place.

14. If Mr Dowdall is removed and another liquidator is to be appointed, there is a very real risk that [the present proposed purchaser] will withdraw from the current process. This is because the Property is intended to be included in a pre-developed state as part of a portfolio sale by [the present proposed purchaser] to institutional equity investors in 2020. Grosbeak has to confirm its shareholder approval to [the proposed purchaser] by 6th March, 2020. I do not believe that it is realistic to expect that a new liquidator could be in place and up to speed with all of the history of the matter and the complexities of a sale in Poland to allow this to happen. In those circumstances, I believe [the proposed purchaser] is likely to simply drop the Property from its plans and proceed with its other sites. In these circumstances, not only will there be further delay and expense but ultimately the return to the shareholders will be less than would be the case if Mr Dowdall remains in place to complete the current proposed sale. This would be personally very damaging and unfair to me."

**Examination of the respondent**

102. In accordance with the order of O'Connor J., the respondent was examined by counsel for the applicant, Mr. Louis McEntagart SC. The first topic of the examination was the PPKZ proceedings, and in particular the process by which a decision not to appeal the adverse decision was taken.

103. The respondent stated that the decision not to appeal the adverse ruling of the Polish Court in the PPKZ proceedings – which it appears from Mr. Curneen's affidavit was handed down on 5th February, 2015, and which according to Mr. Conway was not communicated to the applicant until receipt of the report of Mr. Curneen with the respondent's letter of 17th December, 2015 – was his decision. The decision whether or

not to appeal had to be taken within a "two-week window". The respondent stated that he had discussions with the management team at Grosbeak and consulted with PW Legal ('PW'), Ms. Wasik's firm. He sought legal advice from PW, and also consulted with his legal advisers in Dublin, A&L Goodbody. The respondent averred that he got "a very good briefing and a very good summation of what the case was from PW", but could not recall whether he got written advices in this regard. A&L Goodbody gave advice, but not in writing.

104. The Grosbeak management team advised the respondent as to the parlous financial position of PPKZ. The respondent gave evidence that he assessed the financial information and formed his own view on it. Although Grosbeak was the entity conducting the litigation, he "as liquidator had a job to oversee and to look at what was going on" [day 3 p. 106 lines 13-14]. The legal advice was given by PW to Grosbeak "but I would have considered those advices and I would also have considered if I needed to look at anything else" [day 3, p.107 lines 26-27].

105. The respondent was asked whether it had occurred to him to consult with the other shareholder of the company, i.e. the applicant. The respondent replied that he might have considered it, but that the decision whether or not to appeal was his to make, and that he decided not to consult the applicant. He accepted that there should have been communication with the applicant in relation to the outcome of the court case, but asserted that the decision whether or not to appeal rested with him.

106. The respondent was pressed as to the advice he had received from Ms. Wasik. It was put to him that the necessity to seek a summary of legal advice in 2018 for the purpose of the present proceedings suggested that no contemporaneous written advice had been received by him. He was asked if he recalled what legal advice Ms. Wasik gave in February 2015 regarding a possible appeal. The respondent replied that Ms. Wasik "ultimately formed a view that she was going to propose that we didn't go forward" [day 3, p.123 lines 12-13]. He accepted that he was told in February 2015 that there were strong legal arguments in favour of an appeal, but that his decision was based on whether PPKZ was "ultimately a mark so that we could get value" [day 3, p.127 lines 23-24].

107. It was put to the respondent that Ms. Wasik had acted for Grosbeak in relation to the purchase of the property, and therefore might be seen to have a conflict of interest in advising Grosbeak in relation to proceedings in which the vendor's warranties were an issue. The respondent said that he "did look at that but I still formed the view that we should continue in using Ms. Wasik" [day 3, p.129 lines 8-9]. The respondent accepted that he had formed this view without the benefit of legal advice, but said that he was "satisfied with the legal advices that were given".

108. On the fourth day of the hearing, eleven days after the third day, the respondent, who had been invited to check his records in the interim to see whether there were any records of advices from PW Legal in February 2015, indicated that there was a problem in that he had been unable to retrieve documentation beyond a certain date. On being questioned further about the advice from Ms. Wasik in February 2015, he now said that

he had not consulted with her, but that "the directors on my behalf consulted with her". He did not in fact seek advice from Ms. Wasik, because "I already knew her advices from the Directors of where she stood in relation to the matter" [day 4 p. 9, lines 13-14]. Neither did the respondent contact Ms. Wasik in relation to the undated summary report furnished by her in 2018 for the purpose of the present application; the respondent's evidence was that he instructed the directors of Grosbeak to procure it from Ms. Wasik.

109. The respondent was also asked about the costs of the unsuccessful litigation, and whether they might constitute a contingent liability in the liquidation. The respondent stated that he had had no intimation of an adverse costs order since 2015, but admitted that he had not been in communication with Ms. Wasik in this regard, and accepted that "there could be a contingent liability".

110. The respondent was then examined at length in relation to the clean-up of soil and rubble in Osmanska 7, and dealings between Grosbeak and JMR Trans. He acknowledged that his awareness of the solvency of JMR Trans and the issue of the liability of the tenant to Grosbeak derived mainly from the directors of Grosbeak, and stated that he did not need to retain a lawyer, as Grosbeak had already done so, and that he "got legal advice from PW through Grosbeak" [day 4, p.25 line 4]. He indicated that he told the directors of Grosbeak to take charge of the process of taking whatever action was required to deal with the illegal dumping, including taking legal advice and dealing with the environmental authorities. The respondent defended this course of action by stating that it was more appropriate to instruct Grosbeak to deal with the matter, given that "Grosbeak was the named party in those actions" [day 4, p.28 line 28].

111. The respondent conceded that commissioning the report as to whether the soil was decontaminated in 2018 did not occur until the present application commenced, and although "we were always going to have to get the soil tested", the application was "a factor" in commissioning the report, albeit that "until the restitution claims were finalised we weren't going to be doing anything with the land, with the soil, other than trying to enforce JMR Trans to remove the soil to take it away…" [day 4, p.33 lines 9-13].

112. The respondent then explained the means by which Grosbeak acquired the rights to the soil, saying that the cost of acquiring the soil in an auction by the authorities had been set against the liabilities to Grosbeak of JMR Trans.

113. The respondent was then questioned about when he became aware that the removal costs were not going to be met by JMR Trans. His evidence was that, in June 2015 when the tenant's lease expired, he took the view "that the force of the environmental authorities and the proceedings would hopefully lead to a situation where Trans would ultimately remove the soil, but that did not…transpire" [day 4, p.45 lines 2-7].

114. The respondent was asked whether it had ever occurred to him "that the management of Grosbeak could have a liability themselves arising out of the management of this tenancy" [day 4, p.47 lines 19-22]. The respondent said that this was not something he

considered in 2015; he had considered it since 2015, but had not sought legal advice in this regard.

115. Counsel for the applicant then referred to a letter of 7th December, 2018 from Ms. Wasik to the respondent, in which Ms. Wasik advised that any liability for breach of environmental regulations in relation to Osmanska 7 "remains Grosbeak's liability and potentially, Grosbeak's directors' liability". The respondent was asked whether this advice caused him to consider whether the directors of Grosbeak whom he had instructed to deal with the Osmanska 7 issues might be liable in some respect. The respondent replied to the effect that, while this was a possibility, he did not see it as a risk based on his knowledge and information in relation to the matter.

116. The following exchange between counsel for the applicant and the respondent ensued:

"Q. Okay. So we have somebody in charge of the sale process for example, or in charge of the clean-up process, in fact funding the clean-up process and getting a profit out of it by reference to interest, isn't that correct, who himself could be liable for the waste deposited on the site by reference to some environmental charge levied, isn't that correct?

A. Contingent, yes.

Q. Yes, and does it occur to you as overseer of this liquidation that that places Mr. Curneen and Katarzyna in the position of conflict. Do you see a conflict there?

A. What I see is that they have sought to manage a very difficult situation extremely well and extremely professional and I don't see a conflict.

Q. You don't see a conflict there, okay?

A. No.

Q. We do however accept that if we proceed as planned with regard to the levying of the clean-up costs; (a) I presume you will accept that Mr. Curneen will, as it were, not face the potential of the levying of a penalty, isn't that correct, because the land will be cleaned up, isn't that correct? And we also therefore have a situation arising, I hope you will accept, whereby that cost will be discharge [sic] by both shareholders, isn't that correct?

A. That's correct.

Q. Even though there is a potential liability on the part of Mr. Curneen personally for some of that liability, isn't that correct?

A. Potential.

Q. Okay. So you're asking the 50% shareholders who cannot have responsibility to accept the management of this issue by somebody who could have responsibility, isn't that correct?

A. Yes.

Q. Okay. Does that occur to you as representing a conflict of interest insofar as the management of this issue is concerned now?

A. I believe that the management situated in Grosbeak are the best people to take this forward." [Day 4. p.52 line 19 – p.54 line 1].

117. The respondent was questioned as to his means of knowledge of what the position was in relation to the site. He denied that he relied solely on the directors of Grosbeak in this regard, stating that he received information from a number of sources, including PW Legal, CBRE etc. While Mr. Curneen might collate much of this information, not all of his information in relation to the site came from Mr. Curneen.

118. Counsel for the applicant asked whether, given that the applicant was alleging that the management of the tenancy had given rise to a liability of €840,000 plus VAT which would have to be borne by the shareholders of the company, he believed that "a liquidator's liability in that precise scenario should be reviewed to see if you had any hand, act or part to play in that loss" [day 4, p.58 lines 23-25]. The respondent replied that "if your client had a problem with that then your client obviously has recourse to take a professional action against me or whatever" [day 4, p.58 lines 26-28]. It was put to the respondent that a replacement liquidator could "efficiently make a decision with respect to the merits of any claim without the necessity for further proceedings" [day 4, p.62 lines 8-10]. The respondent in his reply addressed the difficulties in terms of time and cost that a replacement liquidator would face, stating that the assignment as a replacement liquidator was "not an easy task and it is only done in extreme circumstances" [day 4, p.62 lines 20-22].

119. The examination concluded with *inter alia* the following exchange:

"Q. Are you suggesting that an €840,000 deduction from the distribution is something that should, for example, be ignored in the liquidation because of the time and costs?

A. I'm not suggesting anything.

Q. I am asking your view, Mr. Dowdall?

A. I'm not suggesting. I have set out in the papers how it arose, why it arose, and I set out that that liability, less, rests with the illegal actions of JMR Trans. That is my position, it is very clear.

Q. And lastly, you therefore assessed your position and decided that you don't have any case to answer in the liquidation?

A. I do not believe so.

Q. And you've formed that judgment yourself?

A. Yes.

Q. Without recourse to any independent advice on the issue whatsoever, yes or no?

A. I have formed that view, yes." [Day 4, p.63 lines 6-24].

120. The respondent was then examined by his own counsel, Mr. William Abrahamson BL. The respondent explained his view of the purpose of the memorandum of understanding of 8th May, 2008, and emphasised that Grosbeak was "a normal company running day-to-day". He said that he did not take over the running of Grosbeak, but retained an oversight role given the company's 100% shareholding in Grosbeak. In relation to the PPKZ proceedings, the respondent regarded the views of Grosbeak management in relation to the question of whether or not to appeal as relevant given their involvement with the issues "day-to-day", but that he had "had to bring [his] own objectivity to that".

121. The respondent said that the liquidation was not a hands-off liquidation: "it couldn't have been because of the sets of issues between both shareholders. It was a very actively managed liquidation" [day 4, pp.67-68, lines 29,1-2]. He outlined the role played by his assistant Mr. McNamara in the liquidation, but said that he "left dealings with the tenants to the Grosbeak management". He speculated – on the invitation of counsel – that if Mr. Conway had been informed of the adverse decision in the PPKZ case and urged him to appeal, this would not have altered his decision not to appeal. The respondent readily acknowledged that Mr. Conway should have been told of the decision at that time.

122. The respondent outlined the various proceedings which had been brought against JMR Trans, and explained what he saw as the necessity for Grosbeak to acquire the material on the land, expressing the view that "the land…with the soil on it, it wasn't a commercial proposition". Lastly, the respondent stated that the liability of the Grosbeak directors referred to in Ms. Wasik's letter of 7th December, 2018 was "more criminal prosecution and liability to be caught for environmental actions which wouldn't necessarily have a financial cost, but which would have possibly imprisonment or enforcement or whatever" [day 4, p.76, lines 20-24].

**The Experts' Reports**

123. The applicant and the respondent each exhibited reports from experts in support of their respective positions. Mr. Aidan Garcia Diaz of Collins Diaz and Mr. Jim Luby of McStay Luby compiled reports as follows:

Mr. Garcia Diaz, 21st September, 2018.

Mr. Luby, 6th November, 2018.

Mr. Garcia Diaz, 23rd November, 2018.

Mr. Luby, 12th December, 2018.

124. Not surprisingly, Mr. Garcia Diaz, instructed on behalf of the applicant, expressed the view in his report of 21st September, 2018 that the respondent's conduct as liquidator of the company had fallen short of the standards that could be expected from a competent and experienced insolvency practitioner, and that he had failed to carry out the liquidation in accordance with best practice. Equally unsurprisingly, Mr. Luby in his report of 6th November, 2018 took a position on these issues which was diametrically opposed to that of Mr. Garcia Diaz. The subsequent reports of each expert were short documents taking issue with comments or conclusions of the opposing expert in that expert's previous report.

125. Both experts are experienced practitioners who carried out their tasks in an efficient and conscientious manner, in accordance with their duty to the court. I have read their reports and I have fully considered their views as expressed therein in coming to my decision. However, in the circumstances of the case, I find their reports to be of little assistance to the court.

126. An expert can clarify issues in which the court has perhaps little or no experience or expertise, allowing the court to develop an understanding of those issues and the differing views in relation to them, so that the court may appraise the evidence more effectively. Generally, the more technical or abstruse the issues on which the experts are called to opine, the more valuable their assistance to the court tends to be.

127. In the present case, Mr. Garcia Diaz was engaged "with a view to ascertaining an expert view as to the manner in which the liquidator has discharged his functions". [Affidavit of Mr. Jim Conway sworn on 24th September, 2018, para. 2]. Mr. Garcia Diaz was provided for this purpose with documents by Mr. Casey, and expressly stated that he was giving his report on the assumption that all information received from Mr. Casey was "reliable and accurate". This in my view was in effect an entirely proper acknowledgement by Mr. Garcia Diaz that, while he no doubt had received appropriate instructions and documentation from Mr. Casey, he had not – other than by perusing documentation emanating from the respondent or his representatives – had the benefit of speaking to the respondent or getting his perspective on the matters at issue. Indeed, at the time of Mr. Garcia Diaz's main report, the respondent had not yet sworn an affidavit responding to the detailed exposition of the applicant's case in Mr. Conway's grounding affidavit.

128. In the event, the respondent addressed Mr. Garcia Diaz's report at paras. 51-62 of his affidavit of 2nd November, 2018. Mr. Luby's report of 6th November, 2018 addresses Mr. Garcia Diaz's original report. Mr. Luby at least had the benefit of the grounding affidavit of Mr. Conway with a view to considering the applicant's perspective, but obviously did not communicate with the applicant in compiling his report. The sequence of reports was complete by mid-December 2018. Neither expert therefore was in a position to consider

or address any of the correspondence or events from that period until the hearing, in particular the proposals of the respondent for removal of the soil and sale of Osmanska 7.

129. Given that this was so, it would perhaps have been instructive if the experts had been examined on their affidavits at the hearing, as they might have been in a position to indicate to the court whether the oral evidence given by the respondent or events subsequent to their reports had changed their views in any way. However, no application was made by either side in this regard.

130. The applicant is of the view that the removal of the respondent as liquidator of the company is warranted by his conduct of the liquidation. Accordingly, the judgment of the respondent throughout the course of the liquidation is called into question. The exercise of that judgment can only be assessed with regard to the circumstances in which the respondent found himself, and the information available to him, and the opinion of the experts would have been more valuable had they been made aware of all of the evidence at the hearing, including the respondent's evidence under examination. This would perhaps have enabled the experts to give a more informed and nuanced view as to the respondent's conduct, reducing the dangers of hindsight which, as the popular phrase has it, is often '20/20 vision'.

131. In any event, when I raised with counsel the problem caused by the fact that neither expert was to be examined, counsel for the applicant accepted that I could not determine matters where the experts were directly in dispute – as they were on almost every issue. In the circumstances, the utility of the experts' evidence was greatly diminished.

**The Law**

132. The applicant and the respondent both furnished detailed written submissions in relation to the application, and addressed those submissions at the hearing. There was little dispute between the parties as to what were the relevant case law and the principles to be derived therefrom. There was however complete disagreement as to the way in which those principles were to be applied to the facts of the case.

133. The application is made pursuant to s.638 of the Companies Act 2014 which provides, in as far as is relevant, as follows: -

> "(1) In any winding up, the court may, on the application by a member, creditor, liquidator or the Director or on its own motion - ...
>
> (b) on cause shown, remove a liquidator and appoint another liquidator.
>
> (2) Where the court makes an order under *subsection (1),* it may give such consequential directions, including directions as to the delivery and transfer of the seal, books, records and any property of the company, as it thinks fit." [emphasis in original]

134. The section as quoted above is in identical terms to the equivalent provisions – s.228(c) and 277(2) of the Companies Act 1963 – which preceded it. Section 108(2) of the

Insolvency Act 1986 in the UK is also expressed in the same terms, so that UK case law is helpful in understanding the section.

135. The leading authority in this jurisdiction is in *Re. Ballyrider Limited* (in voluntary liquidation): *Revenue Commissioners v. Fitzpatrick* [2016] IECA 228 ('Ballyrider'). That case involved a creditors' voluntary liquidation, in which the Revenue Commissioner applied for, *inter alia*, an order pursuant to s.277 of the Companies Act 1963 removing the respondent as voluntary liquidator of Ballyrider Limited. The High Court acceded to this application, and made certain consequential orders for payment over of certain monies and transfer of books, records and the seal of the company to the replacement liquidator. The liquidator appealed, and in a decision of the court given by Irvine J., the court dismissed the appeal. An application to the Supreme Court for leave to appeal to that court was refused: see the determination at [2015] IESC DET 119.

136. While it is not necessary to consider in detail the facts of that case, it is relevant to say that the Revenue Commissioners, whose application it was, raised ten separate complaints concerning the conduct of the liquidation. The High Court was satisfied that the liquidator had not conducted the liquidation in an efficient and cost-effective manner, and Irvine J. expressed herself to be "entirely satisfied as to the validity of Mr. Fitzpatrick's removal as liquidator" [para. 85, p.38].

137. The Court of Appeal cited with approval the judgment of Neuberger J. in *A.M.P. Music Box Enterprises Limited v. Hoffman* [2003] 1 BCLC 319, in which the court considered its power under s.108(2) of the Insolvency Act 1986 to remove a liquidator and appoint another "on cause [being] shown". The court found "particularly instructive" paras. 23-27 of the judgment, which, although lengthy, I set out below for ease of reference:

> "23. In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.
>
> 24. Support for this approach is not only to be found in *Keypack*, but also in some cases where the court has compulsorily wound up the company and appointed a new liquidator in circumstances where there is already a voluntary liquidator in place – see for instance, *Re. Zirceram Limited* [2000] 1 BCLC 751, especially at para. 25(5). Also, where the liquidator could not be seen as independent – see for instance, *Re. Lowerstoft Traffic Services Ltd* [1986] BCLC 81 (where the liquidator concerned seems to have been the same liquidator as in *Keypack*).
>
> 25. It may also be right to remove a liquidator where the circumstances are such that, through no fault of his own, he is perceived to be – even though he may not be – biased in favour of, say, one or more of the creditors – see per Robert Walker J in

*Re. Gordon & Breach Science Publishers Ltd* [1995] 2 BCLC 189, another case concerned with a compulsory winding-up order in circumstances where there was already a voluntary liquidator in place.

26. While the removal of the liquidator is not necessarily based on any fault on his part, most such cases will involve a degree of criticism. Although in *Keypack* Millett J emphasised that there was no criticism of the general ability, experience and professionalism of the liquidator, and that, even in relation to the particular case, there was no evidence of his being biased or dishonest, it is nonetheless clear that he was removed because the judge took a dim view of the way in which he had conducted the particular liquidation. As the judge said, the fact that this may to some extent resound to the discredit of the liquidator, does not mean that the court should shy away from making the order. On the contrary, in an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner.

27. On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s.108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who is appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay."

138. Irvine J. also referred to the decision of the English Court of Appeal in *Finnerty v. Clark* [2012] 1 BCLC 286, a case dealing with the discretion to remove an administrator from office, in which Mummery L.J. held that an applicant need not prove misconduct, personal fitness or lack of integrity on the part of the administrator. Irvine J. also found significant the emphasis placed by Mummery L.J. on "the importance of the court of first instance exercising its discretion in a judicial manner based on the evidence before it and on the

application of the correct legal principles and having regard to all the relevant circumstances" [para. 26, p.17].

139. The Court of Appeal set out the following principles which apply on an application to remove a liquidator:

"(i) The burden of proof is on the applicant to show good cause for the removal of the liquidator.

(ii) Whether good cause has been shown is to be measured by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed.

(iii) The Court has a wide discretion as to the circumstances in which it may remove a liquidator and it is not dependent on proof by the applicant of misconduct, personal unfitness or any particular of their statutory obligations. What will amount to good cause will depend upon the particular circumstances of each individual case.

(iv) Failure on the part of a liquidator to conduct the liquidation in a vigorous, efficient and cost-effective manner may provide good cause, as may a conflict of interest or loss of confidence in the liquidator on the part of one or more creditors. However, in the latter case the creditor/creditors concerns must be real and reasonable.

(v) The fact that a liquidator's conduct has been shown in one or possibly more than one respect to have fallen short of ideal will not afford good grounds to support an application to remove a liquidator.

(vi) The Court among other considerations, ought to pay due regard to the potential impact of the proposed removal on the liquidator's professional standing and reputation. If he has been generally effective and honest, the Court should think carefully before deciding to remove him.

(vii) The Court must bear in mind that in almost any case where an order to remove a liquidator is made the same will likely have undesirable consequences in terms of costs and delay.

(viii) In seeking to strike a careful balance in each case the Court should take into account whether, on the evidence before it, it could be confident that if left in *situ* the liquidator would not repeat matters complained of and could be relied upon to complete the liquidation in accordance with his obligations."

140. The applicant laid particular emphasis on the judgment of Etherton J. in *Re Buildlead Limited (No. 2)* [2006] 1 BCLC 9, in which the court referred with approval to the comments of Neuburger J. *A.M.P. Enterprises* that "it should not be easy to remove a liquidator merely because it can be shown that in one more respects his conduct has fallen short of the ideal, and it is necessary to bear in mind the expense and disruption of a substitute appointment". The court also referred to the dicta of Nourse J. in Re

*Edennote Limited* [1996] 2 BCLC 389 that "the creditor's lack of confidence must be reasonable, and the court will pay due regard to the impact of removal on the liquidator's professional standing and reputation". The court then cited the dicta of Millett J. in *Re Keypack Homecare Limited* [1987] BCLC 409, approved by the Court of Appeal in *Re Edennote*. These dicta include a passage particularly relied upon by the applicant in the present case:

> "…the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause required; and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation."

141. Mr. Abrahamson for the respondent did not demur in any material respect as to the relevance of the legal principles, although of course his view of how those principles applied to the facts differed considerably to that of counsel for the applicant.

142. Counsel did bring my attention to four decisions of the European Court of Human Rights: *Grabinski* (appeal no. 43702/02), *Tymieniecki* (33744/06), *Pradzynska-Pozdniakow* (20982/07) and *Radoszewska* (858/08). In each case, the respondent was the Republic of Poland. The cases involved complaints of delay by the respondent State in dealing with restitution claims similar to those involving Osmanska 7. Each of the applicants received a monetary award in respect of the cases, which involved delays of between 13 and 16 years. Counsel's point was that the delays involved in resolving the restitution claims in the present case were not unusual.

**Submissions**

143. Counsel for the applicant and the respondent each made detailed oral submissions in addition to their written submissions. I have reviewed the transcripts of these submissions, and propose to deal with them in the discussion of the issues below.

144. It should be borne in mind that the application before me requires that I decide whether the removal and replacement of the liquidator is appropriate. While a review of the respondent's conduct of the liquidation is to some degree necessary for this purpose, it is not in my view appropriate to embark on a detailed assessment of each allegation made or concern expressed by the applicant and to express a view as to whether, or the extent to which, it may or may not have constituted a breach of the liquidator's duties. I accept that my role is to assess the "cause shown", as Bowen L.J. concisely put it in *Re Adam Eyton Limited* [1887] 36 CHD 299 at p.306 - "…by reference to the real, substantial, honest interests of the liquidation, and to the purpose for the which liquidator is appointed".

145. Before addressing the concerns of the applicant, it is in my view appropriate to have a clear view of the current situation in relation to Osmanska 7. As we have seen, a detailed proposal for the removal of soil and sale of the property was made by the respondent on 23rd December, 2019. On the afternoon of the third day of the hearing, and bearing in mind that it would be some 11 days until the hearing could resume, I suggested to

counsel that "the parties might give some consideration as to how the sale could be advanced, if that is at all possible, and whether it would be possible to come back on Tuesday week to tell me that at least the parties have agreed a modus operandi in relation to the sale of the property" [Day 3, p.82 lines 3-8]. Counsel agreed with the suggestion, although Mr. McEntagart expressed the view that the issue of the sale of Osmanska 7 did not have "any bearing [on] the reason or rationale behind this application" [p.82, lines 19-20].

146. On the fourth day of the hearing, I was informed by Mr. Abrahamson that the applicant had confirmed its acceptance of the respondent's proposal. While certain conditions were specified in correspondence from the applicant's solicitors, it was stated that "our client is agreeable to proceeding with the property sale to [the proposed purchaser]". The letter of 3rd February, 2020 from the applicant's solicitors stated that the applicant's agreement to proceed was "Without prejudice to our Client's position that your Client should be replaced as company liquidator and inter alia that he has a conflict of interest in continuing to act as Company liquidator and the best interests of the liquidation are served by your being replaced as liquidator…".

147. On the assumption that the sale of Osmanska 7 can now be completed – and it appears from the respondent's letter to the applicant of 30th January, 2020 that the purchaser's due diligence has been completed, and that the proposed purchaser is satisfied that "no issues have arisen in relation to the environmental, legal and technical due diligence that they have been carrying out over the past number of weeks" – the way is clear to realisation of the last asset of the company and the distribution being made to the members.

148. However, that is by no means the end of the matter. The applicant maintains his position that the respondent should be removed as liquidator. At para.14 of its written submissions, the respondent states that it "legitimately raised concerns and advocated as a basis to the respondent's removal as liquidator serious issues relating *inter alia* [to]: -

(a) The financial position of the Liquidation,

(b) The potential failure to convert the MVL into a creditors Voluntary Winding up,

(c) The failure to achieve optimal price for assets,

(d) The failure to secure and protect the Company's assets and specifically the Osmanska 7 site,

(e) Lack of transparency in relation to how the liquidation has been conducted;

*(f) The costs of the liquidation, approval of fees and distributions made to date.*

(g) The failure to obtain approval of shareholders for the liquidator's remuneration,

(h) The Liquidator's fees compared to the assets of the company,

(i) The delay in realising value from the Company's shareholding in the Grospeak [sic] subsidiary/the Osmanska property,

(j) The failure to finalise the liquidation in an efficient manner within the specified timeframe and notwithstanding that significant recurring costs are being incurred in keeping the liquidation open and Grosbeak is operating at a loss, and,

(k) The open hostility demonstrated by the Applicant in his dealing with the Applicant and his representatives"

149. These written submissions bear the date of 13th May, 2019, and were intended for use in the application to examine the respondent as well as the present application. They do not take account of the progress made in relation to the sale of Osmanska 7 which has recently transpired.

150. Accordingly, I asked Mr. McEntagart during the course of his oral submissions what benefit he contended would accrue to the company in the event that the respondent was replaced. Counsel's position was that an independent liquidator replacing the respondent was "by far the most efficient way" to evaluate the respondent's conduct of the liquidation and, if necessary, take appropriate action.

151. Counsel gave a number of examples of matters which could be reviewed by a replacement liquidator. The first was the issue of unbilled work, in respect of which the respondent was claiming an entitlement to fees as set out in the 23rd December 2019 proposal. Counsel referred to the *Buildlead* case as authority for the proposition that a replacement liquidator could "look at that work and make a decision themselves as to whether or not those levies on the distributions are justifiable and challenge them" [day 4 p.105, lines 6-9].

152. Secondly, a replacement liquidator could review any loss that may have accrued as a result of the PPKZ litigation. Counsel commented that "it's manifest we need at this stage a review as to what actually happened there…we do not have sufficient evidence to suggest that all of the advices and communications and decisions made, as asserted by Mr. Dowdall, either actually happened, or if they did happen that they were justified, and that falls to the assessment of a third party…" [day 4, p.105, lines 15-21].

153. Counsel then referred to the necessity to incur €840,000 plus VAT in removing the material from the Osmanska 7 site. The directors of Grosbeak were proposing that the Osmanska 7 site be cleared up in circumstances where they would derive a profit from the loan extended to fund the site clearance, and where 50% of the cost of the clean-up would ultimately be borne by the applicant. Counsel submitted that the respondent could clearly not carry out an independent review of his own conduct in this regard, and in particular what the applicant sees as a fundamental issue, i.e. the extent to which the respondent relied on the management of Grosbeak in dealing with the Osmanska site, the extent to which the respondent was entitled to rely on the MOU, whether the MOU was

complied with, and whether the respondent was justified in relying on advices of Grosbeak and its advisors, rather than obtaining independent advice.

154. I asked counsel what options were open to the applicant if I did not grant the order sought by it. Counsel accepted that the respondent could be sued "at the behest of an aggrieved shareholder", but that these proceedings would "arise against the backdrop of no independent review. In fact what that requires and gives rise to is litigation which could be forestalled or dealt with in the vastly more efficient environment of an independent peer review" [Day 4, p.108, lines 14-18].

155. Counsel also raised the possibility that any proceedings against the respondent on behalf of the shareholders would have to be conducted by means of a derivative action, bearing in mind the strictures of the rule in *Foss v Harbottle*. A liquidator would represent the company and could launch proceedings without the need for a derivative action, and would do so having conducted a thorough investigation of the respondent's activities.

156. I should say in fairness to both parties that Mr. McEntagart confirmed in unequivocal terms that the applicant was not making the case that the respondent had acted dishonestly. The essence of the applicant's case was that the respondent's conduct of the liquidation required detailed scrutiny which could only be carried out by a replacement liquidator who would take action on behalf of the company if that were warranted.

157. In his written submissions, Mr. Abrahamson drew primarily upon the affidavits submitted by the respondent to address the various concerns raised in the applicant's submissions as set out at para. 148 above. It was submitted that there was no basis for suggesting the company was insolvent, and that the respondent had dealt with all liabilities existing at the time of his appointment. Significant distributions in excess of €1.6m had been made to the applicant. The uncontroverted evidence was that the sale proceeds of Osmanska would be sufficient to discharge all liabilities and yield a significant return for the shareholders.

158. The respondent's submission was that there was also no basis for converting the liquidation into a creditors' voluntary liquidation, as the company did not have any liabilities that would not be comfortably covered by the sale of Osmanska. Counsel further submitted that, if the company were insolvent so that conversion to a creditors' voluntary liquidation were necessary, the applicant as a member rather than a creditor of the company would lack *locus standi* to make an application to court in this regard. In fairness, the point was not pressed by counsel for the applicant during his submissions.

159. The allegation that the respondent failed to achieve optimal price for the assets appears – from the report of Mr. Garcia Diaz – to relate to the sale of P&D Polska. The respondent contends that his decision to sell the shareholding in that company to Mr. Curneen was "objectively justifiable", but was in any event the subject of separate proceedings, which the applicant had not advanced in any way. It was pointed out that it was difficult to see how an agreement to sell that company in 2010 could warrant removal of the respondent at this stage.

160. In relation to the alleged failure to secure and protect the company's interests – a reference to Osmanska – it was submitted that the respondent had relied appropriately on Grosbeak and its legal advisers. It was pointed out that no evidence had been adduced by the applicant to suggest that the advice given by Grosbeak's lawyer was incorrect, nor had it been suggested what additional steps the respondent ought to have taken to secure and protect the company's assets. The strategy of awaiting the ultimate resolution of the restitution claims was appropriate, and the applicant was informed of that strategy and did not object to it. The valuation of the site demonstrated that the value of the site would have been significantly lower if it had been sold subject to the claims.

161. In relation to the respondent's fees, his initial fee estimate was €250,000. The respondent's position is that the extent of the work was underestimated, and that although he received €389,000 up to April 2013, he took no further fees in order to preserve the resources available to fund the liquidation. The respondent accepts that his fees must ultimately either be agreed or sanctioned by this Court.

162. Finally, the respondent denies that he was hostile in his dealings with the applicant and its representatives. It is accepted that "relations between [the respondent] and the applicant have been strained at times", but that this of itself could not justify his removal as liquidator.

**Analysis**

163. The principles set out by the Court of Appeal referred to above provide a guide as to the criteria to be applied in deciding whether or not a liquidator should be removed. However, they are stated in general terms. This is because, as Irvine J. pointed out "…what will amount to good cause will depend upon the particular circumstances of a case".

164. In this regard, it is particularly notable that, unlike all of the many cases cited by counsel to me, the present case concerns a members' voluntary liquidation rather than a creditors' liquidation. It is not disputed by the applicant that all the pre-liquidation creditors of the company have been discharged, and it is apparent that the sale of Osmanska 7 will likely generate more than sufficient proceeds to cover all expenses of sale and yield a substantial dividend to the shareholders of the company, the applicant and Mr. Curneen.

165. In the present case therefore, the interests of the members rather than the creditors fall to be considered, and whether the concerns of the applicant as a shareholder of the company are, as Irvine J. put it, "real and reasonable".

166. In considering this question, it is appropriate to begin by considering the present status of the liquidation. The process of determining and discharging the creditors of the company has been complete for some time. The PPKZ proceedings have been determined, and while it appears from the examination of the respondent that there is the possibility of contingent liability in respect of the costs of those proceedings, the respondent has not been notified of any such liability in the five years since they were resolved. Even if there

were such a liability, provision could comfortably be made for it from the sales proceeds of Osmanska 7. The restitution claims in respect of the site, to which the company or Grosbeak were not parties, have now been resolved. There are some minor issues to which reference was made in the course of the present proceedings which will also require addressing, but nothing of such controversy or complexity as would be likely to delay the completion of the winding up.

167. The sole substantive issue regarding the realisation of assets is that of the clearance and sale of Osmanska 7. As we have seen, the respondent and the shareholders are keen to proceed with the sale, and the applicant is agreeable in principle to proceeding in the manner suggested by the respondent. One hopes that, since the hearing, progress has been made in advancing the sale.

168. What, then, is the "good cause" for removal of the respondent which must be established by the applicant? It is clear from the submissions on behalf of the applicant, to which I have referred in some detail above, that the applicant's position is that the conduct of the liquidation has been such that it warrants the removal of the liquidator and the appointment of a replacement who would conduct an independent scrutiny of that conduct with a view to determining whether action on behalf of the company is warranted against the respondent in order to recover monies which have been lost to the company due to what the applicant alleges is the incompetence or ineffectiveness of the respondent or some other third party. This scrutiny would extend to whether the fees already appropriated by the liquidator, and those now sought by him in respect of his work from 2013 onwards, are objectively justified.

169. The applicant also contends that the respondent is hopelessly compromised by conflict of interests. It is argued that, in circumstances where the actions of the respondent require scrutiny, only an independent liquidator can conduct an effective investigation of those actions and take action on behalf of the company against the respondent if that is warranted.

170. The complaints of the applicant address the actions of the respondent from an early stage of the liquidation. For this reason, it has been necessary in this judgment to examine, in more detail than would usually be necessary, how the liquidator dealt with the realisation of assets, and in particular how he has communicated with the applicant. In this respect, it is also necessary to have regard to the way in which the respondent interacted with both shareholders of the company, as the working relationship between the respondent and Mr. Curneen and/or Grosbeak is a source of comment and complaint by the applicant.

171. It is worth reminding oneself that the liquidation itself arose out of a compromise agreement between the shareholders of the company of litigation arising from what Mr. Conway calls in his grounding affidavit a "…catastrophic deterioration in the relationship between the company's shareholders". The agreement required that the liquidator who was to be appointed would realise the assets of the subsidiaries of the company "as soon as possible". The respondent would certainly have been aware, from the circumstances of

his appointment, of the depth of enmity and distrust between the principals of Print and Display Limited and Mr. Curneen.

172. Notwithstanding this, on 8th May, 2008 the respondent entered into the MOU with Mr. Curneen and Ms. Frejlichowska, who were the directors of the subsidiary companies, including P&D Polska and Grosbeak. The MOU acknowledged that the directors would remain in situ, subject to not being able to enter into transactions above a certain value or deal with certain other matters without the approval of the respondent, and notification requirements in relation to information such as accounts and marketing reports. It is not suggested in any of the evidence before me that the applicant was unaware of or objected to the fact that the respondent proposed to rely on the existing management of the Polish subsidiaries.

173. In any liquidation, a liquidator seeks to realise the assets of the company as effectively and economically as possible. In doing so, he will often rely to a significant degree for his understanding of the company's affairs on the knowledge and expertise of the company's directors. Often a liquidated company or its subsidiaries may continue to trade for a period so that the value of those companies may be maximised. It is therefore not uncommon that a liquidator will rely on directors for their specialised knowledge, or allow directors of subsidiary companies to continue in office subject to suitable oversight. If those subsidiaries operate abroad, it is even more likely that the liquidator will allow the directors to continue to some degree unless there are particular reasons not to do so.

174. Ultimately, the shareholding of the company in one of the subsidiaries, P&D Polska, was sold to Mr. Curneen rather than the applicant. I have addressed the matters relating to the sale at paras. 16-19 above. From all of the evidence available to me, it appears that this sale to Mr. Curneen was the genesis of a perception on the part of the applicant that the respondent was too close to Mr. Curneen and was relying on Polish management to an unacceptable degree, without sufficient scrutiny.

175. As regards the PPKZ proceedings, the respondent's evidence is that, when the adverse decision of the Polish Court was handed down in February 2015, he discussed the matter with the directors of Grosbeak, who had in turn consulted with Ms. Wasik, who had advised that there were strong grounds for appeal. The respondent ultimately formed a view that PPKZ was not a mark, and that the appeal should not proceed. The respondent suggested that Ms. Wasik had given advices to this effect, but it is unclear when or to whom such advice was given.

176. I did not find the respondent's evidence impressive in relation to this issue. He was unable to produce any documentation which would illustrate to whom he had spoken or the contemporaneous advice that either he or Grosbeak had received. It did not appear that he personally received any advice from Ms. Wasik, but relied on advice which he was told had been given to Grosbeak. The extent to which the respondent was involved in the decision not to appeal was unclear from his evidence, although I have no reason to believe that the respondent was not informed of the court's adverse decision or consulted by the directors of Grosbeak in the aftermath of that decision.

177. As set out above at para. 107, the respondent acknowledged that he did not seek independent legal advice in relation to the apparent conflict of interest of the legal advisors to Grosbeak, and whether proceedings against that firm might be appropriate. One would have thought that it would have been advisable for the respondent to do so, particularly as he acknowledged in his oral evidence that he had "looked at" the question of a possible conflict. The respondent did not offer any clear rationale as to why he did not seek legal advice in this regard. Of course, if the respondent had incurred the expense of getting an independent opinion in this regard, and the advice had been that proceedings against PW or Ms. Wasik should be issued, he would have had to persuade Grosbeak to incur the expense and risk of proceedings notwithstanding any ongoing matters on which PW may have been advising Grosbeak at the time, particularly in relation to dealings with JMR Trans. It might also have been the case that, for such a case to be validly grounded, it would be necessary to appeal the adverse decision of the Polish Court, thereby incurring further expense.

178. However, I am of the view that the respondent should have got legal advice in Poland on this issue, or at least been able to produce contemporaneous documentary evidence setting out the consideration he gave the matter, and the reasons why he decided that Grosbeak should not appeal. The respondent does acknowledge the delay in apprising the applicant of the decision not to appeal, and accepts that this should not have occurred, even if his decision would not have been altered. However, my impression from the evidence was that the discovery that the PPKZ case had been lost and not appealed without reference to it strengthened the perception of the applicant that the respondent was not conducting the liquidation in a proper and unbiased manner.

179. As regards the respondent's conduct in relation to Osmanska 7, I have considered the many criticisms of the applicant in this regard. Two issues are of particular concern to the applicant. The first is how the soil and rubble "mountain" came to be on the site, with the liability for its removal now that of Grosbeak at a cost of €840,000 plus VAT, and the dealings with the tenants. The second is the general question of the restitution claims and the reliance by the respondent on advice received from Grosbeak and its advisors in relation to both this issue and the soil and rubble issue.

180. I appreciate that the applicant, in appraising these issues, only has the information provided by the respondent and the evidence presented by him on affidavit and in person. The applicant contends that it suffers an information deficit, and cannot come to a view of the respondent's conduct without an investigation by an independent liquidator. However, the task of this Court is to decide whether such an investigation is warranted, and this can only be done by a consideration of the available evidence.

181. There is no evidence to suggest that there was any reason to believe that the tenants of Osmanska 7 were not suitable prior to their coming on site. When difficulties arose with payment of rent, and the dumping of material on the site, it appears that Grosbeak took legal advice and appropriate action where necessary. It was advised that an action to force JMR Trans to remove the material would not be successful for a number of reasons.

Ultimately, the material was acquired by Grosbeak at what in effect is a notional cost, thereby facilitating its removal.

182. The respondent appears to have monitored the situation on an ongoing basis. There is no reason to believe that he did not liaise with Grosbeak, or that he was not apprised of the advice that company was getting. The interactions which I have set out above in detail suggest to me that, by and large, he was responding to queries from the applicant's representatives as they arose, and reporting on any significant developments regarding the site.

183. To the extent that the applicant decided to accept the legal advice given to Grosbeak concerning the various issues regarding Osmanska 7, it seems to me that the respondent was entitled to do so. There is no reason to believe that the interests of the company and Grosbeak diverged in procuring the efficient administration of the site and the most advantageous sale possible. Any legal advice given to Grosbeak, or the advice of the directors in relation to the management of the site, was as much in the interests of the company as it was of Grosbeak and Mr. Curneen.

184. Also, while it is most unfortunate that the activities of JMR Trans have given rise to the necessity to incur a removal bill of €840,000 plus VAT, this reduces the amount ultimately payable to Mr. Curneen as much as it disadvantages the applicant. It is not apparent to me how this liability arises from some neglect of oversight on the part of the respondent; still less is it the case in my view that the respondent should have taken on the role of supervising the site himself, thereby incurring considerable expense in circumstances where he had no local knowledge.

185. As regards the restitution claims, the respondent relied on the advice provided by PW to Grosbeak as to the progress of these claims. The advice was to the effect that such a multitude of claims would take a long time to resolve, but that the land would be far more valuable if it were sold without the claims attaching. The valuation evidence presented by the respondent bore out this latter assertion. As neither Grosbeak nor the company was a party to the claims, the litigation was not subject to the respondent's control. While it may have taken an inordinate amount of time before the claims were resolved, it would appear from the ECHR cases relied upon by Mr. Abrahamson that such delays are not unusual.

186. In all the circumstances, it does not seem to me that the respondent's oversight of the restitution claims issue was ill-advised or unreasonable. The strategy of awaiting the resolution of the restitution claims was never seriously challenged by the applicant. As the respondent points out at para. 8.27 of his written submissions, in a letter of 17th August, 2015, the applicant's solicitor criticised the delay in realising the company's shareholding in Grosbeak. The liquidator's solicitors, in their reply of 28th August, 2015, replied as follows:

> "Since the commencement of the liquidation, the strategy which has consistently been adopted by the Liquidator with regard to the Grosbeak asset has been a

medium term strategy whereby the property will be 'cleansed' of the restitution claims before it is put on the market. This strategy was approved by both shareholders. Please clarify if your client now wishes for the property to be sold at a reduced price on account of the pending restitution claims."

No response was made to this request for clarification, notwithstanding that the applicant was well aware of this strategy prior to August 2015.

187. As regards the question of fees, the respondent's initial letter of engagement of 9th April, 2008 set out the basis of calculation of the respondent's fees and provided an initial estimate of €250,000. He asserts that the level of work necessitated by the liquidation was far in excess of that anticipated at his appointment, but that he has not received any fees since 2013. Mr. Garcia Diaz in his report criticises the level of fees, and states that "the transparency in relation to the fees incurred is unsatisfactory". Mr. Luby on the other hand describes the matter as "a complex and difficult liquidation, involving monitoring of the directors' management of foreign subsidiaries, foreign litigation, sale of foreign and Irish subsidiaries, and attempting to walk a fine line between disputing members. The duration and cost of the liquidation has also been significantly impacted by the restitution claims process, and by the extent of legal correspondence in this case. It is not at all surprising that fees have exceeded the early stage estimate".

188. The respondent acknowledges that, if his fees cannot be agreed with the shareholders, they will have to be sanctioned by this Court. The onus of proof of justifying the fees will rest with the respondent.

**Is an investigation necessary?**

189. As all of the creditors have been discharged, and as only one asset remains to be realised, the question of removing the respondent because of some ongoing defect in his conduct of the liquidation does not arise. I have to decide whether, notwithstanding that the liquidation is almost complete, I should order the respondent's removal to facilitate an investigation by an independent liquidator of his conduct of the liquidation. I am required to be satisfied that the applicant has shown good cause for such removal, with reference to the "real and substantial interests of the liquidation and the purpose for which a liquidator is appointed".

190. In deciding whether or not there is good cause, I am guided by the principles set out by Irvine J. in *Ballyrider*, which in my view are equally applicable to a members' voluntary liquidation.

191. I am also mindful of the cautionary words of Neuberger J. at para. 27 of his judgment in *A.M.P. Enterprises*, as set out at para. 137 above, and in particular his statement that "…it should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal". As the Court of Appeal remarked, if a liquidator has generally been effective and honest "…the Court should think carefully before deciding to remove him".

192. The applicant considers that an investigation of the respondent's conduct is necessary, so that an independent liquidator may investigate that conduct and determine whether action should be taken against the respondent on the company's behalf. The basis for this position is set out in detail above. The applicant is primarily concerned over what it sees as the ineffective and dilatory progress of the liquidation, the over-reliance on Grosbeak and its directors, the lack of transparency in the respondent's dealing with the applicant, and the perceived need for a review of the respondent's conduct which cannot be carried out by the respondent himself.

193. The allegation of lack of transparency is at the heart of the applicant's desire for an investigation of the respondent's conduct. Having commenced an active interrogation of the respondent's conduct in or about December 2013, the applicant and its representatives consistently expressed dissatisfaction in relation to both the actions of the respondent and the level of information supplied by him. A level of scepticism and suspicion seemed to permeate the correspondence emanating from or on behalf of the applicant at times. It is very clear that the sale of P&D Polska to Mr. Curneen, and the subsequent launch of proceedings by the applicant in relation to the matter, did nothing to foster a good relationship between the applicant and the respondent. The reliance of the respondent on Mr. Curneen and Ms. Frejlichowska in relation to matters concerning the affairs of Grosbeak and Osmanska 7 in particular seems to have exacerbated the applicant's concerns.

194. The respondent's conduct at times did not serve to assuage the evident disquiet of the applicant. There appears to have been some fractious exchanges at meetings, although the suggestion that the respondent's demeanour went as far as "open hostility…in his dealing with the applicant and its representatives" is denied by him. I think that this characterisation perhaps exaggerates the discord between the respondent and the applicant, but it is very evident that dealings between the parties were often tense, to say the least.

195. The atmosphere was not improved by the discovery in December 2015 by the applicant that the PPKZ proceedings had been lost in February 2015, and that a decision not to appeal had been taken by the respondent without either informing the applicant or seeking its opinion on the matter. This deepened the suspicion on the part of the applicant that matters were being decided by the respondent in conjunction with Mr. Curneen without reference to the applicant, and possibly that there was information relevant to the liquidation which was being withheld from the applicant.

196. However, having reviewed the course of the dealings and correspondence between the parties from 2013 to the issue of the present motion as summarised above, it does not seem to me that it can be said with justice that there has been a material lack of transparency on the part of the respondent. In relation to the sale of P&D Polska – a sale process in which the applicant was directly involved – the respondent made his files relating to the sale available to the applicant's solicitors, and, as we have seen, the proceedings issued by the applicant in this regard have not been advanced.

197. The course of correspondence between the parties indicates that the respondent furnished updates and accounts of Grosbeak, and generally responded to requests for information, keeping the applicant apprised of the Osmanska 7 situation in particular, and the progress – or lack of same – with the restitution proceedings. While the level of information and the regularity of supply of same may not have been to the standard demanded by the applicant, I do not consider, on the evidence available to me, that it can be said with justice that the respondent did not conduct the liquidation in a transparent manner.

198. If this is so, how can an investigation of the liquidation by a replacement liquidator be warranted? It might be that a replacement liquidator would turn up further information which would shed more light on the operational decisions taken by the respondent, and that such information could lead to a conclusion that proceedings against the respondent or some other party would be warranted. However, I consider that I would have to be convinced that there was at least a strong possibility that an investigation would reveal conduct or disclose hitherto unknown documentation or information which would suggest that such proceedings on behalf of the company were justified.

199. I am somewhat troubled by the respondent's conduct in relation to the PPKZ proceedings, in particular the failure to inform the applicant of the decision not to appeal the Polish Court's adverse decision, which the respondent attributes to inadvertence, and his failure to address the conflict of interest of Grosbeak's legal advisor who had acted for Grosbeak in the purchase of Osmanska 7. It is true to say that any decision to appeal was that of the respondent alone, as the controller of the shares of Grosbeak, although Grosbeak rather than the company was the party prosecuting the PPKZ proceedings. Likewise, any decision to pursue the possibility of Grosbeak taking action against its legal advisors was ultimately that of the respondent. While there may well have been valid reasons not to embark upon a possible legal action, it would have been far better if the respondent could show objectively that he had sought advice in that regard, or at least recorded his detailed reasons for not at least taking preliminary steps to establish whether proceedings were feasible or advisable. However, while I do not think that the respondent's actions in respect of the PPKZ proceedings represent his finest hour, neither do I consider that those actions alone warrant his removal as liquidator.

200. Complaint is made by the applicant of the delay in realising the company's interest in Osmanska 7. However, it seems to me that this delay arose mainly from the necessity to await the resolution of the restitution claims. Official confirmation that the claims were resolved was not received until June 2018. While the issue of removal of the material on site also delayed matters, it appears from the correspondence that steps to secure funding for the removal of the material were ongoing during the course of 2019. This culminated in the proposal of 23rd December, 2019, which both parties are now agreed should form the basis of the proposed sale.

201. There is no doubt that the liquidation has taken an inordinately lengthy period of time. However, there is no complaint as to the initial activities of the respondent, in which assets were realised and creditors paid. I am puzzled by the allegation of the applicant in

its submissions that the respondent failed "to finalise the liquidation in an efficient manner within the specified timeframe…". I am not aware of any timeframe within which the liquidation had to be completed. The settlement agreement between the applicant and the respondent of 3rd March, 2008 only required that the appointed liquidator "shall realise the assets of [the subsidiaries] as soon as possible". In his letter of engagement to the shareholders of 9th April, 2008, the respondent did not commit to completing the liquidation within any particular timeframe. The declaration of solvency – pursuant to s.256 Companies Act 1963 as amended, and which is now made pursuant to s.580(2) of the Companies Act 2014 – requires the directors to declare that they have formed the opinion that the company will be able to pay or discharge its debts in full within such period not exceeding twelve months after the commencement of the winding up. This does not mean that the liquidation, and in particular the realisation of the company's assets, must be completed within twelve months.

202. It seems to me that the factors causing delay have been sufficiently explained by the respondent, and do not warrant the appointment of a liquidator to investigate the causes of the delay. Equally, for the reasons set out above, I consider that the circumstances surrounding the necessity to incur liability of €840,000 plus VAT in respect of removal of the material from Osmanska 7 have been sufficiently explained, and do not require the appointment of a replacement liquidator to investigate them.

203. The court must consider the consequences of removing the respondent as liquidator. A replacement liquidator would have to become familiar with all matters relevant to the liquidation. The books and records of the respondent would have to be examined. Contact would have to be established with the directors of Grosbeak and Ms. Wasik and perhaps others to enable the new liquidator to investigate the conduct of the liquidation. The new liquidator would have to oversee the sale by Grosbeak of Osmanska 7, and the possibility that the proposed sale might be disrupted or delayed by the change of liquidator – who ultimately controls Grosbeak – cannot be discounted. A replacement liquidator would presumably have to engage legal advisors in Poland to review the various issues on which PW advised Grosbeak.

204. All of the foregoing matters would cause significant expense for the liquidation. The liquidator's costs would be borne equally by the shareholders, Print and Display Limited and Mr. Curneen. The removal of the respondent is strongly opposed by Mr. Curneen, although it should be said that his affidavit was submitted so late in the proceedings that an application for examination of Mr. Curneen as part of the hearing was not a realistic proposition. It might well be that, if he were examined, Mr. Curneen could have shed light on the issues of which the applicant requires investigation. However, the fact remains that the appointment of a replacement liquidator will inevitably give rise to the liquidation continuing for months and possibly years to come – particular if further litigation ensues – and considerable extra cost, 50% of which will be borne by Mr. Curneen.

205. The conduct of the applicant is perhaps relevant to the question of removal. In August 2014 and again in August 2015, the applicant's solicitor intimated the intention of the applicant to proceed with an application to remove the respondent from office: see paras. 32 & 38 above. At that stage, most of the issues in relation to realisation of assets were still "live", and it might have been that a significant loss of trust and confidence of a 50% shareholder in the respondent would have been a significant influence on the court's discretion in a removal application at that time, with so many crucial tasks to be performed and decisions to be taken. However, the applicant did not carry out its threat to apply to remove the liquidator until July 2018, at a time when it had been informed that the restitution claims had now been resolved, leaving the way open to a sale of Osmanska 7 free of restitution claims, and at an enhanced value.

**Conclusions**

206. Taking all of the foregoing into account, I do not believe that "good cause" has been shown for the removal of the respondent as liquidator. I am satisfied that the respondent will conduct the remainder of the matters in the liquidation – primarily the removal of the material from the site and the sale of Osmanska 7, the discharge of all expenses and the distribution of net sale proceeds to the shareholders – in a prompt and orderly fashion, and those issues do not warrant the appointment of a replacement liquidator.

207. I am not disposed to order the removal of the respondent where the only point of doing so would be to permit a replacement liquidator to investigate the respondent's conduct, at very considerable cost, and with the inevitability of prolonging the liquidation considerably. I would need to be persuaded that there was a strong possibility that such an investigation would reveal conduct or disclose hitherto unknown documentation or information which would reveal matters warranting action to be taken on behalf of the company. A failure of transparency or conduct on the part of the respondent, particularly since December 2013, might have pointed towards such a possibility. However, I do not believe that the respondent has, in general terms, been remiss in providing information and documentation to the applicant. It seems to me that any investigation which would be conducted by a replacement liquidator would be somewhat speculative.

208. I must also have regard to the potential impact of the proposed removal on the respondent's professional standing and reputation. There has been no suggestion – as the applicant's counsel very properly confirmed – of dishonesty on the part of the respondent. I am satisfied that the respondent gave his evidence under examination honestly, although his recall of events in relation to the circumstances surrounding the decision not to appeal the adverse PPKZ decision was somewhat confused and unsatisfactory. It was also hampered by an inability to retrieve documentation relevant to that issue, which was somewhat puzzling given that the respondent must have known that he would be examined thoroughly in relation to the matter. However, I am satisfied that the events surrounding that issue are tolerably clear, and do not require further investigation.

209. Having observed the respondent and heard his evidence under examination, in addition to assimilating all of the affidavit evidence, documentation and submissions, it seems to me

that while the respondent's conduct has on occasion fallen short of ideal, he has been – in the words of the Court of Appeal – "generally effective and honest". The court would not flinch from removing him as liquidator if there were compelling reasons for doing so. However, only in those circumstances would it be appropriate to remove a liquidator of such long standing and experience as the respondent, as the very removal of the respondent, even if no adverse consequences ultimately flowed from his replacement, would likely cause significant damage to his professional reputation.

210. I wish to clarify that the only substantive issue before me is whether or not to order the removal and replacement of the respondent as liquidator of the company, and the decision at which I have arrived must be viewed in that context only. I do not express any view as to whether the respondent's conduct of the liquidation gives rise to a cause of action against him on behalf of the company. This is entirely a matter for the applicant, which has already issued one set of proceedings against the respondent, and will take its own view as to whether further proceedings may be warranted.

211. Likewise, I express no view on the appropriateness or otherwise of the respondent's entitlement to fees, either those already discharged, or those now claimed by him. If these cannot be agreed, it may be necessary to apply to court to have that issue determined.

212. In all of the circumstances, I am refusing the application. As this judgment will be delivered electronically, I would welcome submissions from the parties as to the orders to be made, and particularly in relation to the issue of costs.