THE HIGH COURT

[2021] IEHC 382

[2020/192 COS]

IN THE MATTER OF DOONBEG INVESTMENT HOLDING COMPANY LIMITED (IN LIQUIDATION)

BETWEEN

TOM KAVANAGH, AS LIQUIDATOR OF DOONBEG INVESTMENT HOLDING COMPANY LIMITED (IN LIQUIDATION)

APPLICANT

AND

ALFRED GIULIANO, AS TRUSTEE IN BANKRUPTCY OF KIAWAH DOONBEG LLC (IN BANKRUPTCY)

NOTICE PARTY

JUDGMENT of Ms. Justice Butler delivered on the 2nd day of June, 2021.

Introduction

1. This is a preliminary judgment dealing with certain procedural issues which have arisen on an application made by the applicant as liquidator of Doonbeg Investment Holding Co. Ltd ("the company") under s. 631 of the Companies Act, 2014. The application concerns whether a debt claimed by the notice party should be admitted to proof in the liquidation. The applicant in making the application has studiously adopted a neutral position as to whether the debt should be admitted or not. The notice party, as might be expected, has argued strongly that it should. The court expressed concern as to the one-sided nature of the application, which concern was heightened when it transpired that only some of the parties likely to be effected by the outcome of this application had been put on notice of it. In order to fully understand these concerns it is necessary to appreciate the factual context in which this application is made.

Factual background

2. The issue underlying this application arises from a complex set of relationships between the company, its Irish subsidiaries and its US parent and that parent's parent. Very briefly, the company was incorporated in 2004 as the holding company in respect of three Irish subsidiary companies which developed, owned and operated a golf course and hotel at Doonbeg, County Clare ("the Irish subsidiaries"). The company was a wholly owned subsidiary of a US based company called Kiawah Doonbeg LLC ("Kiawah"). Kiawah was in turn part of a larger group of companies, its immediate parent being KRA Doonbeg LLC ("KRA"). The Irish subsidiary companies were financed in part by funding from the company and also by commercial loan funding from Ulster Bank which was subject to various security including a charge. The company's activities were financed by advances from Kiawah, KRA and other US based entities connected to Kiawah and KRA. As the company was a holding company which did not otherwise trade, the effect of the transfers of cash from the US companies was to finance the activities of the Irish subsidiaries. There is a lack of clarity as to whether these cash advances were formally paid to the holding company and transferred by it onwards to the Irish subsidiaries or were paid directly to the Irish subsidiaries by the US companies.

3. By 2014 KRA had been purchased by another US company called Coral Canary Land LLC and an affiliate of that company, Coral Doonbeg Holdings SARL (both of which I shall refer to for convenience as "Coral") acquired the Irish subsidiaries loan balances and related

security from Ulster Bank. Coral appointed a receiver over the assets of the Irish subsidiaries. The assets were sold and after the discharge of the secured debt, a surplus of €1,528,090 was remitted to the company. As the company was insolvent by this stage, its directors placed it into a creditor's voluntary winding up and the applicant was appointed liquidator. Meanwhile both Kiawah and KRA had also been placed into the US equivalent of liquidation, colloquially known as Chapter 7 bankruptcy. The notice party, a professional insolvency practitioner, was appointed trustee in bankruptcy for the purposes of Chapter 7.

4. The applicant, as liquidator, proceeded to ascertain the identity of the company's creditors and the amounts owing to each. The company had no secured creditors and no preferential creditors. A statement of affairs prepared by the directors and dated 25th February, 2014 identified some twenty-one potential creditors including Kiawah. A number of these potential creditors did not offer proof of their debts to the applicant and the proof of one creditor who was not listed in the statement of affairs has been provisionally admitted by the applicant. Ultimately claims were made on behalf of sixteen creditors including the notice party on behalf of Kiawah. (For the purpose of this judgment each claim is treated as belonging to a single creditor even though many were in fact made jointly by more than one person). Excluding the notice party's claim, the fifteen claims which have been provisionally admitted to proof amount to some €7,745,343. In light of the €1,528,090 available to the applicant, this would allow for a dividend of approximately 20% of the amount due to each of these creditors.

5. The notice party claims that as of the date of its liquidation the company was indebted to Kiawah in the sum of €12,214,524 being the amount shown as due in the director's statement of affairs and also in the company's financial accounts for the year ending December 2012. The original claim made by the notice party also included a much larger sum said to be due to KRA but as that element of the claim is no longer being pursued it need not be considered further. The admission of this claim to proof would have a significant effect on the amount that would be available for distribution to the other creditors reducing the likely return to those persons from some 20% to 7% of the amounts owing. Of course, Kiawah would achieve the same limited return on its debt and, if the sum is properly due, then the effect on other creditors is not a reason to refuse to admit it. However, the applicant has concerns as to whether Kiawah's claim has been sufficiently proved to be admitted.

6. The difficulties regarding the claim are multifaceted and, as I do not propose determining the issue at this point, I will simply outline the concerns rather than offer any view on them. Essentially the concerns relate to whether, by whom and on what basis monies were advanced to the company. It is unclear whether monies were advanced by Kiawah or by KRA or by related entities; whether monies were advanced to the company or directly to the Irish subsidiaries and whether any monies advanced were by way of loan or by way of equity/capital advances. The recording of the transfers for accountancy purposes in the USA does not match the records available in Ireland, although this may simply reflect different accountancy practises rather than anything untoward. The

applicant has encountered a number of practical difficulties in attempting to resolve these issues arising in part from an absence of contemporaneous documentation. Difficulties have also arisen because all of the relevant companies are now in liquidation meaning that there is little direct evidence available from those who were involved in the transactions at the material times. By and large the US based directors of the company have not communicated with the applicant for the purposes of the liquidation. The only Irish based director at the time the company went into liquidation has co-operated with the applicant but as he was only appointed in November 2013 his personal knowledge of the transactions between Kiawah and the company going back over a number of years prior to December 2012 is necessarily limited.

The applicable law

7. The principle duty of a liquidator under s. 624 of the Companies Act, 2014 is to administer the property of the company to which he has been appointed including, under s. 624(c), the distribution of that property in accordance with law. The 2014 Act confers a large number of statutory powers on a liquidator to enable him or her to discharge this duty. These are set out in tabular format in s. 627 and include at s. 3 (a) of the table a power to ascertain the debts and liabilities of the company.

8. Section 631, under which this application is made, provides as follows:

> *"(1) Each of the following:*
>
> *(a) the liquidator or the provisional liquidator;*
>
> *(b) any contributory or creditor of the company;*
>
> *(c) the Director;*
>
> *may apply to the court to determine any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator).*
>
> *(2) The court, if satisfied that the determination of the question will be just and beneficial, may accede wholly or partially to such an application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."*

Subsections (3) and (4) are not relevant for present purposes.

9. In light of these provisions, the applicant submits the court has jurisdiction to determine the question raised as to whether the notice party's debt should be admitted to proof in the company's liquidation since the admission of a debt is the exercise of a power by a liquidator. I accept in principle that this is so although for the reasons discussed more fully below I have concerns about the manner in which this matter has come before the court and the ability of the court to be satisfied in the circumstances that the determination of the question will be just and beneficial.

10. Part XV of Order 74 of the Rules of the Superior Courts contains the rules applicable to the ascertainment of a company's liability in the event of a winding up. The only formal procedure for the making of an application under s. 631 is to be found in O. 74 r.57 which states as follows:

> *"Any application to the Court under section 631 of the Act concerning the exercise or proposed exercise by the liquidator of any power concerning or affecting the ascertainment of the debts and liabilities of the company shall be made by motion on notice to the liquidator grounded upon an affidavit sworn by or on behalf of the moving party."*

11. This rule requires that where an application is made under s. 631 by a person other than the liquidator, the liquidator is to be put on notice of the application and, in effect, becomes the responding party. Notably the rules do not make provision as to who is to be notified in the event that the application is brought under s. 631 by the liquidator. I accept as probable the view expressed by counsel for the applicant that this is most likely a drafting oversight. Certainly, the fact that no express provision is made in the rules for the giving of notice by a liquidator of such an application cannot be taken as limiting the liquidator's statutory entitlement to make an application under s. 631 in any way. However, it does beg the question as to who is to be notified of such an application when made by the liquidator.

12. Finally, although not of direct relevance to the issues dealt with in this judgment, Part XVI of Order 74 makes provision for the proof of debts in a liquidation.

Procedure adopted

13. The applicant brought this application by originating notice of motion dated 24th June, 2020. The notice party was named in the notice of motion and on 30th June, 2020 the application papers were served on the solicitors who had been in correspondence with the applicant on behalf of the notice party. This was entirely proper as service of the notice party was clearly required in circumstances where the issue on which the applicant is seeking the court's determination, namely the admissibility of Kiawah's debt, is of direct concern to the notice party.

14. On the same date (30th June) the solicitors acting on behalf of the applicant served the application papers on eight of the other creditors whose claims have been provisionally admitted to proof in the liquidation. Of those eight, one was one of the Irish subsidiary companies (Doonbeg Property Company Ltd). Further, the two largest creditors (apart from the notice party) both of whom had significant amounts due pursuant to the company's buy-back obligations, were also each part of a couple to whom monies were owed by the company as Rental Guarantee Creditors and consequently were served twice, once in each capacity. This left a total of seven creditors who were not served. The parties who were served were kept advised of all directions made by the High Court in respect of the filing of affidavits etc. and were informed of the hearing date for this application. Indeed, this was done so assiduously that even though those parties chose not to engage with the process, on three occasions when registered post was returned

"not delivered", the applicant's solicitors proceeded to re-serve the same correspondence by certified post. Meanwhile there was no communication at all with the unserved parties. None of the eight additional parties served with this application sought to participate at the hearing or raised any objection to the admission of the notice party's debt to proof.

15. When opening the application, counsel for the applicant informed the court that the parties served were the nine largest creditors provisionally admitted to proof and that there was a reasonable gap between amounts owed to the 9th and the 10th. In fact, this group of nine included the notice party but nothing turns on this. In fairness, counsel also indicated that he would get clarification on and return to this issue which he did in due course. At that point he confirmed that there was not in fact a big differential between the amounts owed to those who had been served and to those who had not. An examination of the director's statement of affairs shows that this is indeed the case. At least three of the unserved Rental Guarantee Creditors were owed amounts in the order of €300,000 to €400,000 which is the same range as five of those were served. The statement of affairs suggests that the amount owed to at least one of the unserved creditors in this category was in fact greater than that owed to two of those served, although it may be the amounts proved by the various creditors are different to the amounts recorded in the director's statement of affairs.

16. The decision to serve only half of the creditors was justified on two grounds. The first was that since it is relatively common in a liquidation for an issue with knock-on effects on other creditors to be determined without notice to all creditors, a decision was made to serve the eight largest creditors in the expectation that if there was an argument to be made it would be raised by one of them. The second was that the applicant's solicitors decided that it was unnecessary to serve all the creditors as, given the nature of the issues, there was no factual material that these parties could add to the relevant evidence. It was submitted that the appropriateness of this approach was borne out by the fact that of the ten individuals served in respect of the eight largest debts, six had not contacted the applicant at all in response and the other two had said they were happy to accept the court's decision, whatever that might be. Consequently, it was argued that it was unlikely the unserved creditors would have taken a different stance.

Application under s. 631

17. The legislature has provided in s. 631 a very flexible mechanism through which questions arising in the course of the winding up can be brought before the High Court for determination. The flexibility of the mechanism is enhanced by the absence of any procedural strictures applying to its invocation save that the category of person entitled to make an application is defined by s. 631(1). However, it does not follow from the absence of stipulated procedures that s. 631 can be invoked in a manner which has the potential to be unfair to any person whose interests are likely to be affected by any determination a court is asked to make under its provisions. Pursuant O.74 r.57 an application, presumably made by a contributory or a creditor of the company or by the Director of Corporate Enforcement, must be made on notice to the liquidator. In cases where a determination is sought as to the exercise or proposed exercise by the liquidator of his

powers, this will usually entail a challenge to the action taken by or proposed to be taken by the liquidator and ensures that an appropriate *legitimus contradictor* is before the court to respond substantively to the application. The court's concern on this application is the absence of any *legitimus contradictor* to engage with a case being made by the notice party.

18. The problem arises for two reasons. The first, as noted above, is that only some of the other creditors potentially affected by the outcome of this application have been served. The second is that the applicant has deliberately adopted a neutral approach to the issues on which he is seeking the court's directions. This is in itself unusual. More commonly a liquidator making an application under s. 631 will ask for the court's approval for a proposed course of action which may be the subject of disagreement or dispute between the parties involved in a liquidation. Those who disagree with the proposal in the first instance are likely to appear as notice parties and, as such, provide a *legitimus contradictor* to assist the court in testing the legal soundness of the liquidator's proposal.

19. Of course, s. 631 does not require a liquidator (or any other applicant) to advance a specific proposition on which directions are then sought. It simply requires that a question has arisen in the winding up which the moving party wants the court to determine. In principle it is open to a liquidator to address a question to the court in respect of the exercise of his or her powers without providing any indication of how the liquidator proposes to exercise the power nor any suggestion as to how the question might be answered. Such an approach is legally permissible but not especially helpful to the court unless there are parties involved in the liquidation who are prepared to come to court to address opposing sides of the argument raised by the question. In those circumstances by raising a question under s. 631 the liquidator is in effect setting up an interpleader and allowing the parties direct access to the court rather than requiring one or other to take legal action to challenge whatever decision the liquidator might have taken.

20. For the liquidator to raise a question for the court's determination and then to step back so that only one side of the potential argument on that question is made to the court is manifestly unsatisfactory. In his written legal submissions, the notice party regarded it as "highly significant" that none of the other affected creditors had appeared or filed affidavits opposing the notice party's claim. However, it seems that the notice party mistakenly understood that "all affected creditors" had been served. I accept that if all affected creditors had been served then the fact that none of them sought to oppose the admission of the notice party's claim would be significant. The same significance cannot be attached to the failure of those parties served to oppose the claim when not all of the parties potentially affected have been served.

21. The applicant contended that the rules of court do not envisage or require service of all creditors and identified a number of cases from the UK and Australia in which applications of this nature had been made without all, or on occasion any, creditors being put on notice. Having looked at these cases I am not convinced that they are on point. In *In Re Browne (a Bankrupt)* [1960] 2 All ER 625 the issue before the court was whether a debt

which had been admitted to proof in a bankruptcy some 40 years earlier should be expunged in circumstances where a reversionary interest had fallen into possession in the now-deceased bankrupt's estate. The application by the trustee of the property of the deceased bankrupt was opposed by the trustees of the will of the deceased creditor. Thus, although all original creditors of the bankrupt were not placed on notice of the application, the court had the relevant parties before it to argue both for and against the expunging of the admitted proof.

22. The circumstances of *In Re the Fruit and Vegetable Company Limited* [1912] 12 SR (NSW) 52 are somewhat analogous to this case in that the liquidator of a company applied to court for directions as to whether he would be justified in making a particular payment. However, there are a number of material differences. The broker who was seeking payment and a group of shareholders who claimed he was not entitled to the payment sought were both represented and made opposing arguments to the court. Further, the liquidator was actively engaged in the proceedings before the court and rather than taking a neutral stance made a number of arguments as to how the law should be applied depending on the view the court might take of the evidence.

23. In addition to the liquidator, some five parties were represented before the court in *In Re the Pastoral Finance Association Limited* [1922] 23 SR (NSW) 43. Thus, whilst the report records the liquidator as having merely "*stated the facts and the question*", the court had the benefit of a wide range of opposing views representing *inter alia* the unsecured creditors and the shareholders of the company as well as the owners of different categories of property which had been held on consignment by the company and destroyed by fire. Thus, in all of these cases the court had at very least *a legitimus contradictor* before it. In the first two cases the liquidator (trustee) was proposing a particular course of action which was opposed by another party. In the third case the liquidator put the question before the court and a number of other parties made opposing submissions as to how that question should be determined.

24. The only one of the four cases cited on behalf of the applicant in which there does not appear to have been a *legitimus contradictor* before the court is *Banque des Marchands de Moscow (Koupetschesky): Re Wilenkin v. the Liquidator* (No. 2) [1953] 1 WLR 172. This seems to be a sui generis case in many respects. It concerned payment to a Russian barrister resident in England for work done by him in respect of the liquidation of a Russian bank which had been dissolved by Soviet decree in 1917. The barrister's proof for the amount claimed had been rejected by the liquidator who nonetheless stated that he considered the amount claimed to be fair and reasonable should the claim be sustained. An appeal against this rejection was unsuccessful but the court suggested that application be made to the registrar for an *ex gratia* payment in respect of the claim. The registrar rejected the application for an *ex gratia* payment of half of the amount of the original claim on the basis that the application was premature and the proper course would be to ascertain the views of the creditors. Perhaps ironically in light of the position adopted by the applicant in this case, Vaisey J. agreed in principle with the registrar that in normal course the views of the creditors should have been sought "*because, after all, the proof*

had been rejected and it was their money which was to be depleted for the purpose of making this proposed ex gratia payment". Nonetheless he approved the *ex gratia* payment not merely because the services already provided had been of great assistance in the winding up but also because it was anticipated that the same barrister's assistance would be of value in the future. Consequently, the court approved the *ex gratia* payment on the barrister's undertaking to continue to serve as a member of the committee of inspection. I do not think that this decision stands as authority for the proposition that it is unnecessary to notify those likely to be affected by the outcome of an application made to court in the course of a liquidation, especially since Vaisey J acknowledged that in general this should be done.

Legitimus Contradictor

25. I am not suggesting that there is a hard and fast rule that all creditors must be put on notice of every application to court by a liquidator under s.631, especially where it is clear that effective opposition to the application will be raised by one or more of those served. However, the position is different where either nobody is served or when none of those served indicate an intention to oppose the application. The benefit to the court of an adversarial system of law is that arguments do not go unchallenged unless they are manifestly correct. Having parties in court making contradictory arguments enables the court to appreciate the relative strengths and weaknesses of each parties' case. At present the strength of the evidence advanced and the arguments made by the notice party is totally untested.

26. In *Re Home Payments Ltd (in Liquidation)* [2013] 4 IR 141 the liquidators of a company which held customer funds sought court sanction for the payment of their fees out of moneys in the customer account. The judgment of Finlay Geoghegan J. notes that there had been no *legitimus contradictor "available to the court"* when the application was first made and that the court had directed the liquidators to put arrangements in place to set up a customer committee to represent the interests of those beneficially entitled to the moneys out of which was proposed to pay the liquidator. With the benefit of legal representation, the customer committee then participated in the application. Although it did not dispute the liquidator's entitlement to some fees nor the court's jurisdiction to sanction payment of fees from the customer account, it took issue with the quantum of fees and the priority which should be afforded to the liquidator's claim. It is interesting to note that Finlay Geoghegan J. regarded the presence of a *legitimus contradictor* as being of benefit to the court and no doubt this remained so even where the *legitimus contradictor,* when put in place, made significant concessions as regard the application.

27. More recently in *Re Mouldpro International Ltd (in Liquidation)* [2018] IECA 88 the Court of Appeal considered the failure of a liquidator to ensure the presence of a suitable *legitimus contradictor* with a sufficient stake in the outcome of the application before the court. The application was one for approval of the liquidator's interim fees which, naturally enough, was actively pursued by the liquidator and so the context is somewhat different to this case. Nonetheless the comments made by Whelan J. at para. 134 of her judgment are instructive:

> *"The court is charged with the obligation of being vigilant in scrutinising the application. The legitimus contradictor performs an important function in assisting the court in ensuring that a liquidator is held to account in regard to remuneration. Therefore, it is incumbent on the liquidator to ensure, in the interests of transparency, that the limited resilience which is afforded to the process and to assist the court in having a proper legitimus contradictor is not unduly diminished and that significant creditors are not excluded from being appointed as legitimus contradictor for reasons predominantly dictated by the official liquidator's personal convenience. In the instant case, from and including the first interim fee application onward, it would have been preferable to have a significant unsecured creditor constituted legitimus contradictor in the applications brought by the Liquidator to approve the interim fee application."*

It is clear from this passage that the benefit the Court of Appeal saw in the presence of a *legitimus contradictor* was not limited to the possibility that that party would have evidence or material directly relevant to the issue. Rather, the *legitimus contradictor* assists the court by testing the evidence and arguments made by the applicant. In this case the liquidator is correct to say that the unserved creditors are unlikely to have evidence or material relevant to the admissibility of the notice party's debt. However, if minded to oppose the application, they may have arguments to make which would assist the court in scrutinising the application.

Practical considerations

28. There are practical considerations which might mean that it is unnecessary or inappropriate to appoint a *legitimus contradictor* in all cases. Most significantly, to constitute a creditor a *legitimus contradictor* and to invite that party to come to court to make arguments to assist the court must carry with it an expectation that the cost of so doing will be met in the liquidation. In many cases the benefit of having a *legitimus contradictor* before the court may be outweighed by the cost that this will necessarily entail in light of the limited funds that may be available for distribution by the liquidator. Given the relatively limited funds available to this company in light of the debts which have already been admitted to proof and, even more so if the notice party's debt is also admitted to proof, this is not a case in which I would be minded to constitute a creditor a *legitimus contradictor* simply to ensure that there is a contrary argument available to the court.

29. In my view this makes it even more important that all parties likely to be affected by the admission of the notice party's debt to proof have been put on notice of this application and afforded the opportunity to come to court and object if they are so minded. If all parties had been put on notice and no objection were raised, I agree with the notice party's submission that that would, of itself, be significant. The fact that nobody affected by the outcome of this application raised any ground of opposition to it would not be determinative of the question the court has to answer but would certainly add weight to the case being made by the notice party.

30. Note also that I have deliberately spoken in terms of those likely to be affected by the application being put on notice of it rather than stating that they must be joined as notice parties to the application or even formally served with the entire of the pleadings. There are many ways in which a party can be put on notice of the fact that a step has been taken in a process which might affect his or her interests without necessarily being made a party to a court procedure in order that such notice can be given. For example, in the context of a liquidation a liquidator has a power to call a creditor's meeting under s. 628 (b) of the 2014 Act for any purpose which the liquidator thinks fit. This power could be utilised to call a meeting to advise creditors of the liquidator's intended action (in this case the making of an application to court) and of its potential consequences for them. Creditors would then be in a position to decide for themselves if they wish to become notice parties to the application. Provided there had been clear and effective communication of the intended action to the creditors and an opportunity afforded to them to become involved should they wish to, no objection could be taken to the fact that the entire pool of creditors had not been formally served with court proceedings.

31. Alternatively, creditors could be notified of the intended application by letter from the liquidator or his solicitor and advised that if any creditor wished to participate in the application a full set of papers would be served on them. It is important that any such correspondence is both comprehensive and clear. The nature of the intended application should be outlined as should the potential consequences for other creditors if the notice party's debt is admitted to proof. All of this should be explained in straightforward language avoiding technical or legal jargon. In the circumstances of this case, correspondence of this nature should make it clear that the liquidator does not propose making any submission to the court either in favour of or against the admission of the particular debt but that the liquidator anticipates that the notice party will make submissions urging the court to admit the debt. Sufficient contact details should be provided to enable creditors to respond easily and if papers are requested they should be provided promptly together with details, such as the next return date for the application, to enable the creditor to become involved. Again, if correspondence of this nature had been sent to all creditors and none had evidenced any desire to participate in the application, no objection could be made to the fact that the entire pool of creditors is not formally served with the proceedings.

32. The final possibility is simply to formally serve all potentially affected creditors with the proceedings. I appreciate that in more complex liquidations this may of itself become an unwieldly, burdensome and expensive task. However, in those liquidations there is more likely to be a substantial creditor with a sufficient interest who is prepared to come forward on their own account. Thus, it may be evident from an early stage that there will be one or more parties in the position of *legitimus contradictor* without all creditors necessarily having to be served. I understand that frequently this role will be taken by the Revenue Commissioners who, for many reasons, are ideally suited to fulfil it. In this case there was a limited pool of creditors and a relatively small number of those remain unserved. It would not have added enormously to the administrative burden or the expense on the liquidator to have served all of the creditors from the outset.

33. Matters would be even more straightforward if the liquidator were prepared to take a stance on the application rather than simply putting the question before the court. As previously noted s. 631, being entirely silent as to the procedure to be adopted, does not expressly require a liquidator either to put a concrete proposal to the court for approval nor to argue for or against the proposition inherent in a question posed. In cases such as *In Re the Pastoral Finance Association Ltd* (above) where there was a multiplicity of parties before the court it would be sufficient for a liquidator to treat an application under s. 631 as a form of interpleader and simply to state the facts and the question upon which the other parties can proceed to make submissions. However, in the particular circumstances of this case it would have been helpful both to the court and probably also to those creditors who have been served to know where the liquidator stood on the issue. Neutrality on the part of a liquidator may be of value where there are already many parties contesting an issue. Where there is only one party, the liquidator's ostensible neutrality affords that party an open goal.

34. The approach taken by the liquidator seems to me to be unnecessarily defensive. The court was informed that an application was made under s. 631 because the liquidator took the view that if he refused to admit the debt then notice party would have appealed and the matter would end up before the courts anyway and if he accepted the debt and it subsequently transpired he was incorrect to have done so he could be personally liable to third party creditors. It is certainly appropriate for a liquidator to seek a determination from the court under s. 631 on a question as finely balanced as the one raised on this application and in respect of which there is a high prospect of appeal no matter how the liquidator might resolve the question. However, that does not explain why the liquidator has sought to remain studiously neutral on the question he has raised. Whilst I think the risk of being made personally liable for the *bona fide* exercise of his powers as liquidator is perhaps overstated, equally that concern does not explain why the liquidator would decline to adopt any position on the question which he has put before the court under s. 631. The determination by the court of the question raised under s. 631 must surely remove any possibility of the liquidator being made personally liable to the creditors even if the court were to accept such arguments as had been made by the liquidator on the question. Naturally the court is not bound to accept any submissions made by the liquidator, but as the person with the greatest knowledge of the affairs of the company and with the least interest in the outcome of the application, his views are likely to be of great assistance to the court in all cases and should not be likely withheld. Apart from anything else if, in this case, the liquidator was to indicate that he was in principle opposed to the admission of the debt then there would be two opposing parties before the court and the concerns expressed in this judgment as to the absence of *legitimus contradictor* would not arise.

Conclusions

35. As matters stand the court is not satisfied that the determination of the question put to it under s. 631 would be just. In circumstances where the liquidator has declined to express any view on the question and the only other party appearing is the notice party who has, naturally enough, contended for the admissibility of the debt, the court is concerned that

all potentially affected creditors are not on notice of the application and that there is no *legitimus contradictor* before the court to contest the notice party's position. The court does not propose appointing a *legitimus contradictor* in order to secure a contrary argument when in fact there may not be anyone with an interest who wishes to oppose the application. This would constitute an unwarranted expense in the context of this liquidation. However, I will adjourn the application to allow the liquidator to put the to-date unserved creditors on notice of the application and to afford them the opportunity of participating in the application before any judgment is reached should they wish to avail of it.

36. Whilst it would have been sufficient at the outset to put creditors on notice through correspondence inviting them to request a full set of application papers if they wished to get involved, at this stage I think the unserved creditors should be provided with the application papers in full. They should also be advised of the nature of the application, that it has been part heard, that the only party advancing an argument to the court is the notice party and that the application has been adjourned to allow any creditors not previously on notice to make submissions to the court if they wish to do so. An appropriate timeframe should be fixed for response. If none of the parties served in this fashion wish to participate, the court will proceed to determine the application on the basis of the submissions already heard. If any party does come forward seeking to be heard it will be necessary to re-list the matter initially for directions in order to decide how best to proceed in circumstances where substantial argument has already been heard on the question.