

THE HIGH COURT

IEHC [2021] 558  
[2019 No. 455 COS]

**IN THE MATTER OF COLD MOVE DUBLIN LIMITED (IN EXAMINERSHIP)  
AND IN THE MATTER OF MALONEVALE LIMITED (IN EXAMINERSHIP)  
AND IN THE MATTER OF THE COMPANIES ACT 2014**

**BETWEEN**

**DESSIE MORROW**

**APPLICANT**

**AND**

**DONWORTH CAPITAL LIMITED  
JOHN CASEY  
GALMERE FRESH FOODS LIMITED  
KATAP PROPERTIES LIMITED  
COLDMOVE LOGISTIC SOLUTIONS LIMITED  
LOADWISE LOGISTICS LIMITED**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Quinn delivered on the 6th day of August, 2021**

1. This judgment relates to the costs of an application pursuant to s. 557 of the Companies Act 2014 ("the Act") which sought orders directing the respondents to deliver to the applicant certain assets and/or sums of money in respect of the said assets. The application was struck out in unusual circumstances which I describe later.

2. Section 557 provides as follows: -

*"557. (1) Where, on the application of an examiner of a company that is under the protection of the court it can be shown to the satisfaction of the court that –*

- (a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect; and*
- (b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members,*

*the court may, if it deems it just and equitable to do so, make the following order.*

- (2) That order of the court is one requiring any person who appears to have the use, control or possession of such property or the proceeds of the sale or development of it to deliver it or pay a sum in respect of it to the examiner on such terms or conditions as the court sees fit.*
- (3) Subsection (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which section 604 [unfair preference] applies.*

- (4) *In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application”.*
3. The applicant was the examiner of Cold Move Dublin Limited (“Cold Move”) and of Malonevale Limited (“Malonevale”), to which I shall refer collectively as the “companies”. He brought an application pursuant to s. 557 against each of the respondents. That application was struck out by the court on the application of the applicant following what he described as an abrupt termination of the examinership and his discharge as examiner. The immediate cause of the termination was the decision of an intended investor to withdraw from the process, which left the examiner unable to proceed with his proposals for a scheme of arrangement.
  4. The applicant submitted that in the particular circumstances which arose and which, on his account, compelled him to make the application to strike out the proceedings under s. 557, no order should be made as to the costs of those proceedings. The respondents submit that an order should be made against the applicant for their costs incurred in opposing the proceedings.
  5. Section 557 provides that the application be made by the examiner of the relevant company, and not the company itself. Therefore, the only parties to the application are the examiner as applicant and the respondents. Any order this court would make in favour of the respondents can only be against the applicant as the moving party.
  6. A separate question may arise as to whether in respect of any liability of an examiner for costs awarded against him in connection with such proceedings the examiner would be entitled to on indemnity pursuant to s. 554 (2) of the Act, enjoying the priority conferred by s. 554 (3). Such a question does not fall to be determined on this application before me. Nonetheless, it was referred to in submissions and therefore I shall return to this subject later.
  7. Before I turn to the chronology of events which gave rise to these proceedings and to this application it is informative to refer to a number of anomalous features of s. 557.

**Section 557 of the Companies Act 2014**

8. A section corresponding to s. 557 and similarly headed “*return of assets improperly transferred*” appears in s. 443 of the Act, where it can be invoked by a receiver, and in s. 608 where it can be invoked by a liquidator.
9. Like s. 557, those sections provide that an order can be made for the delivery of assets or a sum of money to the appointed office holder, being the receiver or liquidator as the case may be. This is logical where a core function of a receiver or liquidator is to take possession of and realise assets of the company to which he has been appointed. By contrast, it is not the function of an examiner to realise assets of the company to which he has been appointed. It is strange that the provision corresponding to ss. 443 and 608 was imported into Part 10 of the Act (which governs examinerships) in precisely the same

form, notwithstanding the fact that an examiner has no function or authority in relation to the realisation of assets. It is however, clear that where an examiner issues such an application he, like a receiver and liquidator, is doing so not for his own personal benefit or gain, but for the benefit of the company and, the company being insolvent, the general body of its creditors.

10. In this case the applicant has stated that it was his intention that any proceeds of the application would be applied to finance what he has described as a "*secondary dividend to creditors of the companies*".
11. The second difficult feature of the section is that it will always be challenging for such proceedings, if defended, to be brought to a final conclusion within the statutory timeframe of an examinership provided for in Part 10 of the Act.
12. Part 10 provides for the examinership to be concluded within a period of 70 days of the presentation of the petition, extendable and frequently extended to 100 days, and thereafter only for such period as the court considers necessary to take a decision as to whether to confirm a scheme of arrangement pursuant to s. 541 of the Act.
13. The protection period under examinership is currently capable of being extended for an additional 50 days pursuant to s. 13 of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020. That additional 50 days was not available in these proceedings, which predated the Act of 2020.
14. O. 74A r. 25 of the Rules of the Superior Courts ("RSC") provides that an application under s. 557 shall be brought by motion on notice to the parties against whom relief is to be sought.
15. In a case where such an application is opposed there is potential, if not a likelihood, that the disposal of the matter could require cross-examination of deponents or even a plenary hearing. The respondents submit that this is such a case. Neither the Act or the Rules address the tension between the achievability of an outcome to such a proceeding and the statutory timeframe referred to above.
16. There are other provisions of Part 10 which can be equally contentious and opposed, notably repudiation of contracts by the company pursuant to s. 557. In many cases such applications, even vigorously opposed ones, have been disposed of within the timeframe of examinership.
17. A point made by a number of the respondents is that the commencement of such proceedings was on their description, utterly futile. They submit that this is illustrated by the fact that not only would a contested proceeding potentially require a plenary hearing, but a result could be appealed and this would be most unlikely to be capable of final disposal within the timeframe of examinership.

18. It is these difficulties which form the background to submissions made by the respondents that the bringing of these proceedings was variously, "*courageous*", "*ambitious*", "*an inherently difficult exercise*" and "*procedurally most unrealistic*".
19. The respondents have referred to the only academic or other commentary which has been made on this section in Courtney, *The Law of Companies* (4th edn) at paragraph 23.106 where he states: -

*"Of all the occasions when the jurisdiction to set aside a fraudulent disposition arises, examinership is probably the least appropriate as examiners will be preoccupied with formulating a scheme without having time to be raking over transactions to bolster the company's assets"*.
20. Notably, Dr. Courtney comments on the challenge for an examiner in circumstances where he would be focussed on formulating his scheme of arrangement. He makes no comment as to the challenges presented by the timeframe, or the anomaly to which I referred earlier of the relief being available to the examiner whose functions are totally different to those of a receiver or liquidator. Nor does Dr. Courtney go any further than to say that examinership is "*probably the least appropriate*" occasion for invoking such a power.

#### **The petition**

21. The core business of Cold Move was described in the petition as supply chain management services for businesses involved in retail, the food service industry and manufacturing. Its customers include household brands and the supply chain functions provided included order management, warehousing and physical distribution to customers. It was said that at the time of the presentation of the petition, the company was one of the market leaders in the supply chain services industry in Ireland.
22. Malonevale was the principal shareholder of Cold Move and also acted as head tenant on the lease of a premises in Dublin Port from which Cold Move traded.
23. On 4 December, 2019, a petition was presented to the High Court pursuant to s. 509 of the Act for the appointment of an examiner to both companies.
24. No application was made for the appointment of an interim examiner and the petition was made returnable for hearing before the court on 12 December, 2019.
25. The petition contained the usual information as to the companies' background, trading history, and the commercial and financial pressures which they encountered in 2018 and 2019. It also provided details of a restructuring which was effected in August 2019. It disclosed that in August 2019 the following actions took place:
  - (i) The company name was changed from Cold Move Galway Limited to Cold Move Dublin Limited;

- (ii) The Galway operations of Cold Move were transferred to a previously dormant company called Cold Move Logistic Solutions Limited;
  - (iii) Cold Move Dublin Limited continued its operations based in Dublin;
  - (iv) A property at Oranmore, Galway was sold by Malonevale Limited to a different company Katap Properties Limited (the fourth named respondent) and Katap leased that property to Cold Move Logistics Solutions Limited;
  - (v) Certain changes were effected to the composition of the Board of Directors, including the resignation of a Mr. John Casey the second named respondent;
  - (vi) A Mr. Jason Mallon purchased the shareholding in Malonevale Limited, previously held by a company called Donworth Capital Limited (the first named respondent) which is owned and controlled by Mr. John Casey and;
  - (vii) A separate and new company, Galway Malgill Holdings Limited, was incorporated to become the shareholder in Cold Move Logistics Solutions Limited (the fifth named respondent).
26. The petition referred also to the manner in which the consideration paid by Katap for the property at Oranmore was applied to discharge debt due to Bank of Ireland and to make a payment to the Revenue Commissioners in respect of debts of both of the companies. The petition disclosed that it was intended that the remaining funds would be used to make provision for capital gains tax arising from the transaction and to provide certain "respite" to the cash flow pressures within the Dublin business and to enable Cold Move Dublin Limited to return to profitability.
27. This is only a brief summary of the August 2019 restructuring transaction. A number of the steps taken in the course of that restructuring were the subject of the proceedings under s. 557.

**Report of Independent Expert**

28. The report of an independent expert, Mr. Alan McLean of Whiteside Cullinan Chartered Accountants, accompanied the petition.
29. Mr. McLean expressed the view in relation to the restructuring that "*on balance, the restructuring was more beneficial to creditors than the alternative which would have been to place the companies into liquidation and receivership at that time. However, it may be that any examiner, if appointed, should review the transaction further*".
30. S. 511(3)(i) of the Act requires the independent expert to state his opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under s. 610, s. 611 or s. 722, which relate to fraudulent and reckless trading. Mr. McLean stated that "*the facts disclosed do not warrant further inquiries with a view to proceedings under s.610, 611 or 722*". Mr. McLean continued as follows: –

*"Despite the limitations imposed in the preparation of this report, nothing has arisen which would cause me to consider that the directors have acted dishonestly or irresponsibly in relation to their conduct of the companies' affairs. However, the precise nature of the restructuring of the affairs of the companies in August 2019 is a matter which I believe would be appropriate for any examiner, if appointed, to consider further and in particular, the effect of that transaction on creditors of CMDL. This is relevant in the context of the manner in which it appears that value has been extracted from CMDL, at a time that CMDL was unable to discharge its obligations to creditors as they fell due, which may have been to the detriment of creditors."*

*"I recognise however, that this report has been prepared within a short timescale and it may be that the examiner may become aware of other factors, which may require to be brought to the attention of the court."*

31. The petition refers to these observations of the independent expert regarding the August 2019 transactions. It continues: –

*"...however he acknowledges that these transactions should be looked at closely by any examiner that may be appointed by the court. The directors of the companies now understand that their actions may be open to criticism from creditors. They want to make clear to this Honourable Court that the purpose of this application is to secure the jobs of the employees and to obtain the best possible outcome for the creditors of the company. They are not seeking to absolve themselves from any consequences which may flow from the restructuring which took place in August 2019."*

32. The petition was verified by an affidavit of Mr. James Mallon, a director of each of the companies and shareholder of Malonevale.
33. The petition was originally made returnable for hearing on 12 December, 2019. The matter was listed that day and adjourned for hearing to 17 December, 2019.
34. The petition was heard on 17 December, 2019 and the applicant, Dessie Morrow of Baker Tilly, 21/23 Joyce House, Holles Street, Dublin 2 was appointed examiner.

**The hearing of the petition**

35. The contents of the report of the independent expert and the references in the petition which I have quoted above concerning the August 2019 restructuring transactions were drawn to the attention of the court by the petitioner. The court noted those matters and stated that it would be a matter for the examiner to consider them further and to determine whether any steps were required in relation to them, or whether any measures should be taken in the context of any proposed scheme of arrangement which, if appropriate, would remedy any prejudice deriving from those transactions.
36. At the hearing the Revenue Commissioners, Dublin City Council, Galmere Fresh Foods (the third named respondent), and Brake Brothers Food Service Limited, a creditor, were

all represented. No objection was made to the appointment of the examiner. A number of reservations were expressed on behalf of parties represented, regarding the contents of the petition insofar as it referred to the August 2019 transactions.

37. Counsel for Galmere stated that Mr. Casey did not agree with the narrative concerning the August 2019 transactions provided in the petition and in the report of the independent expert. He said that his client would provide to the examiner his own narrative as regards those matters.
38. On 2 January, 2020, the applicant wrote to Mr. John Casey referring to the hearing on 17 December, 2019, and inviting him to provide the narrative referred to and raising certain questions in relation to the transactions of August 2019. This was followed by correspondence exchanged between the applicant's solicitors and Mr. Casey's solicitors.
39. On 14 January, 2020, Mr. Casey filed an affidavit. He described the narrative contained in the petition as "*a series of inaccurate descriptions, innuendo and unfair characterisations*" such that he felt the necessity to rebut same in writing. He stated that he did not in any way wish to jeopardise any scheme of arrangement which might ultimately be approved by the court.
40. The matter came before the court on 20 January, 2020, when the examiner applied for an extension of time for the delivery of his report pursuant to s. 534 of the Act. The period for delivering that report was extended by the court to 11 February, 2020.
41. At that hearing, counsel appeared again on behalf of the Revenue Commissioners, Dublin City Council, Galmere Fresh Foods and Brake Brothers Food Services Limited.

#### **Hearing of 11 February 2020**

42. On 11 February, 2020 the matter was listed before the court and counsel appeared for each of the examiner, the Revenue Commissioners, Dublin City Council, John Casey the second named respondent, Donworth Capital Limited, the first named respondent and Galmere Fresh Foods Limited.
43. An order was made on that date granting to the examiner an extension to 12 March, 2020, of the time for delivery of reports pursuant to s.534. The examiner also sought and was granted liberty to issue a motion pursuant to s.557 of the Act returnable to the 3 March, 2020, and it was directed that the matter be listed for hearing on 3 March, 2020, with directions for delivery of replying affidavits in advance of that date.
44. The report of the examiner exhibited before the court on 11 February, 2020, described his activities from 17 January, 2020 to 10 February, 2020. He outlined progress which had been made by him in his endeavours to secure the investment necessary to enable the formulation and confirmation of proposals for a scheme of arrangement in relation to the companies.
45. The examiner reported that following the initial advertisement seeking expressions of interest, he had been contacted by eighteen parties expressing an interest in investing in

the companies. An information memorandum had been issued to those parties and following this process a further five parties contacted his office expressing an interest in investing in the companies. He referred to two indicative investment proposals which had been received by him and a third received after the initial deadlines. In summary the examiner stated that as at the time of that report there were two live investment proposals before him and he was considering the conditionality and viability of those proposals. He reported that he intended to undertake work in terms of identifying a preferred investor and dealing with any conditionality attaching to their proposals. He said that if the protection period were extended he would, if it became apparent for whatever reason that he was unable to formulate proposals for presentation to the members and creditors, return to court.

46. The report contained a Section (4) headed "review of August 2019 transaction". He referred to the August 2019 transactions and said that he had collated as much information as possible with regard to the transaction and he referred to work undertaken by himself and members of his staff, and correspondence with a number of the counterparties to the transactions. He concluded by stating: – "*Based on my investigations to date, I have formed the view that value has been extracted from the companies in the August 2019 transaction by a number of parties at a time when the companies were insolvent.*" He made a summary of his findings as they affected the respondents. He said that he was engaged in ongoing correspondence with a number of the parties and stated as follows: –

*"Arising from the above, given that I am awaiting further replies and documentation I am considering whether an application should be brought pursuant to s.557 of the Act: 'Power of court to order return of assets which have been improperly transferred' in order to seek the return of assets and value to the companies in respect of the above transactions. However, on the basis of the material received to date, it appears likely that such an application should issue this week. In this regard, subject to this Honourable Court, I am proposing the following timeline in respect of hearing my motion pursuant to s.557 of the Act."*

47. The applicant then sought leave to bring the application by Friday 14 February, 2020, and proposed directions for the exchange of replying affidavits and a hearing date for the week commencing 2 March, 2020.
48. The applicant reported that he believed that he would be in a position to formulate proposals for a scheme of arrangement in the case. He referred to the support and continued supply from principal suppliers, certain new customers which had been identified, the cash surplus generated during the protection period for Cold Move Dublin Limited, the continued support of Bank of Ireland Finance and the investment proposals which have been received, both of which he stated he believed were at a level whereby proposals could be formulated.
49. The applicant stated that should the protection period be extended he was satisfied that he would be in a position to put forward proposals for presentation to meetings of



members and creditors which would ensure the preservation of jobs for the majority of staff currently employed by Cold Move Dublin Limited. It was in those circumstances that he sought the extension to Thursday 12 March, 2020.

50. The report contained an indicative timeline for advancing discussions with the investors, which included the selection of the preferred investor by 11 February, 2020, satisfying preconditions relating to the investment proposal by 21 February, 2020 and entering into an investment agreement with the preferred investor by 28 February, 2020 and securing investment funds to be placed in escrow and issuing proposals to all members and creditors of the company by 5 March, 2020 with a view to holding statutory meetings on 11 March 2020 and delivering his report pursuant to s.534 by 12 March, 2020, being day 100 of the protection period.
51. The examiner concluded as follows "*while the time remaining in the examinership is limited, any such application [being a reference to the s.557 application] could run parallel to the advancement of the investment process with the preferred investor. It appears to me that if the court was persuaded to make a determination on the proposed application pursuant to s.557 of the Act, any realisations derived therefrom should accrue to the benefit of creditors post discharge of costs associated with securing such realisations*".
52. S. 557 contains no requirement for prior sanction of the court before commencing the substantive application. Notwithstanding the absence of such a requirement, the application by the examiner for leave to bring such an application, and for certain directions regarding its hearing, was necessary and appropriate by reason of the fact that the examinership proceedings generally are case managed by this Court, particularly with reference to the timeframe and any substantive applications arising in the course of the proceedings.
53. Importantly it cannot be said that the application for leave to bring such a proceeding was of a substantive nature, addressing such matters as the substance and merits of the proposed proceedings, akin to applications of the type which were formerly required under s. 231(1)(a) of the Companies Act 1963 where a liquidator sought to bring legal proceedings in the name of or on behalf of the company, or to applications for leave to bring judicial review, each of which entail some examination of the substantive merits of the proposed proceedings. The only information before the court was the preliminary findings of the examiner in relation to the August 2019 transactions, and the statement that he had formed the view that value had been extracted from the companies in the August 2019 transaction and that he was therefore considering whether such an application should be brought. It was therefore appropriate that when the general examinership matter was before the court on 11 February, 2020, that occasion would be utilised to seek directions in relation to such an application.
54. This is important because a submission has been made on behalf of the respondents that the fact that the applicant sought leave to issue the motion would not "*insulate the examiner from an adverse costs order*". I agree with that submission.

55. Although the applicant himself refers to the fact of having obtained such leave in the context of considerations affecting the exercise of the court's discretion he does not go so far as to claim that the making of such an application had the "*insulating*" effect referred to.
56. The respondents have also pointed out that at the hearing before the court on 11 February, 2020, counsel for the first, second and third named respondent expressed their reservations as to the propriety of bringing such proceedings, *inter alia*, having regard to the timeframe applicable to the examinership proceedings.

**The s. 557 application**

57. On 14 February, 2020, the applicant issued these proceedings by way of notice of motion, returnable for 3 March, 2020. In the notice of motion orders were sought pursuant to the provisions of s. 557(2) of the Act directing the respondents to deliver or pay to the applicant property described in the schedule to the notice of motion or to pay to the applicant such sum as the court would deem fit in respect of that property.
58. As against the first, second and third respondents the relevant assets comprised a sum of €200,000 being a portion of the consideration payable on the sale of the property at Oranmore, two motor vehicles and a sum of €10,000 in respect of "*alleged expenses*" and a Frigoscandia Gyrohulk Spiral Freezer, together with ancillary components and other goods.
59. As against the fourth and sixth named respondents the relevant assets were a sum of €200,000 referable to the sale of the property at Oranmore and payments made to the fourth respondent in respect of a consultancy agreement.
60. As against the fifth named respondent the asset was the value of business and associated goodwill of Cold Move Dublin Limited "*transferred, assumed and/or undertaken by Cold Move Logistic Solutions Limited from in or about 16 August, 2019 for nil consideration*".
61. Following the service of the notice of motion and grounding affidavit there was an exchange of replying affidavits between the applicant and the respondents. Exhibits included reports of expert forensic accountants addressing substantive matters relating to the relevant transactions and their effect on the creditors of the companies.
62. The hearing of the matter was initially listed for 3 March, 2020. It was adjourned to 6 March, 2020 to facilitate the exchange of further affidavits.
63. The essence of the application was the applicant's assertion that transactions between the companies and the respondents effected in or about August 2019 constituted transactions which had the effect of perpetrating a fraud on the company, its creditors or members and that it would be just and equitable to order the delivery up to him in accordance with s.557 of those assets or the proceeds thereof.
64. The respondents all vigorously disputed the claims. Their replying affidavits addressed the substance of the claims as they saw them. They also expressed the view that the

proceedings were not capable of determination on a summary basis by reference to affidavits only. They asserted that at the minimum it may be necessary to undertake cross-examination of deponents on their affidavits, or if not to remit the matter to a plenary hearing, which they asserted could not come to a conclusion within the timeframe of the examinership.

**Sections 535 and 552**

65. Section 535 of the Act provides: –

- (1) *"If the examiner is not able to—*
  - (a) *enter into an agreement with the interested parties and any other persons concerned in the matter, or*
  - (b) *formulate proposals for a compromise or scheme of arrangement in relation to the company concerned,*

*the examiner may apply to the court for the grant of directions in the matter.*
- (2) *The court may, on such an application, give such directions or make such order as it deems fit, including, if it considers it just and equitable to do so, an order for the winding up of the company."*

66. Section 552 provides: –

- (1) *"Subject to the provisions of that section, the protection granted by virtue of section 520 to a company shall cease—*
  - (a) *on the coming into effect of a compromise or scheme of arrangement under this Part in relation to the company; or*
  - (b) *on such earlier date as the court may direct.*
- (2) *Where a company ceases to be under the protection of the court, the appointment of the examiner shall terminate on the date of such cessation."*

67. On 5 March, 2020, the applicant made an *ex parte* application to the court for directions regarding the termination of the protection of the court in relation to the companies and the winding up of the companies, and the discharge of the examiner. It was directed that the application be heard the following day on notice to all those parties who had been on notice of previous applications and the examinership and to the respondents in these proceedings.

68. The application was grounded on an affidavit sworn by the examiner on 5 March, 2020. He reported in detail on the investment process which he had been pursuing to secure the funding to facilitate the formulation of proposals for a scheme of arrangement in relation to the companies. Having been engaged with a number of parties, he had identified a preferred investor, with whom he had entered into detailed discussions. Detailed

engagement and due diligence had been undertaken as between his solicitors and the preferred investor's solicitors. On 18 February, 2020, a draft form of investment agreement had been provided to the preferred investor. He referred to the continuing engagement between the relevant parties and reported that a meeting to finalise the investment agreement and the payment of funds had been scheduled for the applicant's office at 3pm on Wednesday 4 March, 2020. This meeting was attended by himself and his solicitors and the preferred investor and his solicitors. The preferred investor unexpectedly notified the applicant that it had made a decision not to proceed with the investment process for commercial reasons, of which the examiner has not been made aware. The applicant stated that he had no reason to anticipate that the preferred investor would withdraw from the investment process in that way, particularly given the extent of the engagement which had taken place.

69. The examiner stated that it had been his intention immediately following the conclusion of that meeting to issue to the members and creditors of the company the proposals for a scheme of arrangement. He said that the unforeseen decision of the preferred investor to decline to execute the investment agreement had the result that it was not possible to identify an alternative investor and convene the necessary statutory meetings and report back to the court within the time limited by the Act.
70. The examiner concluded by stating that he believed that everything possible had been undertaken to rescue the companies and preserve employment. However, in the light of the above developments and in the absence of investment he had formed the view that he was unable to formulate proposals for presentation to members and creditors pursuant to s.534 of the Act.
71. Being unable to formulate such proposals the examiner recommended that the protection of the court be removed. He believed that an appropriate order in the circumstances was an order for the winding up of the companies.
72. The examiner stated that if the court saw fit to appoint him, he and Mr. Neil Hughes, Managing Partner of Messrs Baker Tilly, consented to act as joint liquidators.

#### **Hearing 6 March, 2020**

73. The court made the order lifting the protection of the court pursuant to s.552 of the Act and discharged the applicant as examiner.
74. Having heard submissions from creditors of the companies represented in court, the court made an order for the winding up of the companies. On the nomination of one of the creditors, Thomas Walton Transport Limited, the court appointed Aidan Murphy Chartered Accountant of Messrs Crowe Ireland as liquidator.
75. The applicant stated that he believed that the issues raised in the s.557 motion, and which resulted from his detailed investigation of the companies' affairs would equally require to be pursued in the course of a liquidation of the company. He said that if he and

Mr. Hughes were appointed joint liquidators they would undertake to pursue the issues outlined in the s. 557 motion pursuant to s. 608 of the Act.

76. When the court made the order discharging the applicant and appointing Mr. Murphy liquidator, counsel for the applicant stated that as he is no longer in office as examiner there would be no alternative but that the motion pursuant to s. 557 be struck out, and the court so ordered.
77. The respondents applied for their costs of the s. 557 motion against the applicant. I gave directions for the exchange of submissions regarding costs and listed the costs issue for hearing.
78. I also granted leave to the applicant to make his own application pursuant to s.554 of the Act in relation to remuneration costs and expenses properly incurred by him.

#### **Submissions of the respondents**

79. The respondents submit that the court should apply what they describe as the "normal rule" that costs follow the event unless the court first finds special reasons to direct otherwise. They submit that the relevant "event" was the striking out of the motion.
80. The respondents referred to the fact that when the application for leave to bring the s. 557 application was before the court on 11 February, 2020, the first to third named respondents pointed out the difficulty of concluding any such proceedings within the timeframe of the examinership. They submit therefore that from the very outset the applicant was on risk as to costs and can have been under no illusion as to this risk.
81. The respondents submit that the application constituted on the part of the examiner "*an attempt at an ambitious application against six different parties*". They submitted that the initiation of such an application during an examinership is an inherently difficult exercise having regard to the time constraints and they say that it was "*procedurally most unrealistic to commence an application of this type on day 77 of the examinership.*"
82. The respondents submit that it would be unfairly prejudicial to the respondents if they were unable to recover the significant legal cost which they have incurred in defending themselves against the allegations made in the application. They were required to respond to the application under extreme time pressure under abbreviated timelines, which in turn they say were caused by the late commencement of the application.
83. The respondents say that the application involved complex legal and factual matters and may have necessitated a plenary hearing and discovery.
84. The respondents referred to a number of cases in which liquidators have been held personally liable for costs awarded against them and in this regard they cite the case of *Re Visual Impact and Displays Ltd Murphy v. Murphy* [2003] 4 IR 133, and *Re Ballyrider Ltd (in Voluntary Liquidation) v The Revenue Commissioners* [2016] IECA 228.

#### **Applicant's submission**

85. The applicant submits that no "event" in the sense identified in case law on the subject has occurred and that instead the proceedings have become moot due to factors outside the control of all the parties. He says that the proximate cause of the application not proceeding is the fact that the preferred investor decided for unexplained reasons to withdraw from the investment process despite having participated extensively in a competitive investment process prior to that time. The applicant submits that in the exercise of its discretion the court should make no order as to costs of the application having regard to the following considerations.
86. Firstly, the court should have regard to all of the relevant circumstances, including the process in which the applicant was engaged in the performance of his function as examiner vis-à-vis the investment process on the one hand, and pursuing the issues which had been identified at the hearing of the petition as requiring investigation.
87. Secondly, the applicant says that in bringing the application he did not do so for any personal gain or advantage. He states that he had always made it clear that if successful in the s. 557 application the proceeds received would be applied to finance a secondary or "a supplemental" dividend to creditors of the company.
88. Thirdly, that having regard to the issues which were identified in the petition and the report of the independent expert, and discussion of those issues at the hearing of the petition, a scheme of arrangement which did not properly address any potential prejudice to creditors from the August 2019 restructuring transaction would not satisfy the criteria under s. 541 for confirmation of a scheme in the circumstances of this particular case.
89. Fourthly, although the time constraints of an examinership present obvious challenges for the resolution of proceedings under s. 557, the legislature clearly envisaged that this power would be available to and exercisable by an examiner even in the face of such time constraints.
90. Fifthly, the applicant submits that if an award were made against him personally in the circumstances of this case this would be "*unduly draconian*" and would have the effect of deterring examiners from bringing suitable applications under s. 557 where the facts justify such a cause of action. I question whether this is a valid answer to the matter of inter party costs, having regard to the discussion of s. 554 which follows at the conclusion of this judgment.
91. Sixthly, the applicant says that he stands over the central allegations made in the application and he submits that the affidavits exchanged on the application demonstrate that there was a good basis for seeking relief under s. 557.

**Order 99 of the Rules of the Superior Courts**

92. Order 99 r.2 provides as follows:

"2. *Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) (the Legal Services Regulation Act, 2015) and except as otherwise provided by these Rules:*

- (1) *The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*

...

- 3.(1) *The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."*

93. Prior to the enactment of the Legal Services Act, 2015, Order 99 r. 1 which has been the subject of discussion in the case law referred to below provides:

*"The cost of every issue or fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

**Section 169 of the Legal Services Regulation Act, 2015**

94. Section 169 provides as follows:

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

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

- (2) *Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."*

95. S. 169 continues, with statutory force and elaboration, the principle contained in the original O.99 to the effect that as a general rule, and subject to special cases, costs follow the event.
96. It is clear from a full reading of s. 169 that it requires the court to take into account all of the circumstances regarding the conduct of the parties. This may necessitate a wide ranging analysis which could typically be made only after the court has held a substantive hearing of the case itself.
97. In this case the matter was not determined by a substantive judgment of the court. The application was struck out as a consequence of an event unrelated to the matters at issue between the parties. Therefore, no party has been "*entirely successful*" as contemplated by s. 169 of the 2015 Act.

### **Mootness**

98. All the parties in their submissions have made references to the question of whether the proceedings have been rendered moot.
99. The classic meaning of the term "moot" is that because of the occurrence of new events or because of the passage of time the issue in the proceedings as formulated is no longer capable of being determined or does not require to be determined.
100. In this case the transactions the subject of the proceedings undoubtedly occurred and are a matter of record. The controversy is whether those transactions occurred in the manner described by the applicant in his grounding affidavit and whether the relevant events have the legal consequence identified in s. 557.
101. The liquidator may choose to pursue proceedings under the equivalent provision contained in s. 608. Whether he does so will be a matter on which he will make his own decision, informed by his own investigation of the matter and, to the extent that he considers them relevant, the affidavits exchanged between the parties in the s. 557 proceedings. What is clear however is that the application of the applicant under s. 557 was struck out not because the issue between the parties had become moot as described above but because the examiner was compelled to apply to court to terminate the examinership following the withdrawal of the investor, with the then unavoidable consequence of his discharge as examiner.
102. Although the issues in these proceedings have not become moot in the classic sense, a number of the authorities on the question of mootness are informative in deciding where the burden of costs should rest in this case.

### **Case law on mootness**

103. In *Telefonica O2 Ireland Ltd v Commission for Communications Regulation and Others* [2011] IEHC 380, Clarke J. said that mootness can arise for a range of reasons: –

*"It is impossible to be overly prescriptive as to the proper approach which the court should adopt for the range of factors that may be relevant are wide, However, it*



*seems to me that a factor which is at least of some significance is an analysis of how it came about that proceedings had become moot. Sometimes (as was the case in Eircom), external factors over which the parties have no control render proceedings moot. In many such cases there may at least be an argument for the court making no order as to costs. It clearly would, at least in the vast majority of cases, be an unacceptable use of scarce court resources for a hearing to have to go ahead to decide a moot issue simply for the purposes of deciding who should pay the costs.*

...

*where it is not possible to have any real view on which side would have won, there is, nonetheless, a potential for injustice to either side. A plaintiff or applicant may have launched proceedings only to find that, through no fault of that party and not arising out of any factors which could reasonably have been anticipated, the case has now become moot, will have incurred costs which it will not be able to recover in pursuing proceedings which, on one view, it might reasonably have been entitled to progress until external factors rendered it moot. Likewise, from the perspective of a defendant or respondent, such a party may have had to incur costs in defending proceedings until they became moot in circumstances where it might well have been that the proceedings could have been successfully defended and thus all costs incurred ordered to be paid on the basis of a costs order. In at least many cases the equity of both parties' position will be much the same. Neither party nor the court will know who would have won."*

104. Clarke J. continued as follows:

*"It seems to me, therefore, that a significant factor to be taken into account in the exercise of the court's discretion as to costs in proceedings which have become moot is to analyse whether it can reasonably be said that the actions of any relevant party have rendered the proceedings moot. If that be so, then that is a significant factor to be taken into account in the award of costs. The situation with which the court is then faced remains one where, in the absence of trying a moot case, the court will not know who would have won. However, the situation of any party who was not involved in rendering the issue moot, in not being able to establish that their side of the case was right, has resulted not from any action which that party took or, indeed, from some entirely external event over which no one had any control, but rather from actions taken by their opponent. That is a factor which ought to weigh significantly in favour of the grant of costs to the party who was not involved in the action which led to the proceedings being moot."*

105. The principles were summarised again by Clarke J. in *Cunningham v The President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222, where he said at paragraph 4.7 : –

*"... a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour*

*of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.*

...

*It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular, there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors.*

106. Finally, Clarke J. considered the relevance of "blame" when he said the following: –

*"It does not seem to me that it really is a question of blame. Rather it is a question of deciding on the just course of action to be adopted in relation to the costs of issues which have become moot. There may well, in many cases, be compelling reasons why a change of course is adopted by one or other party. Indeed, there might well be cases where it would be wrong not to adopt a changed position. However, that is not really the question. The problem with which the court is faced is that costs will have been incurred up to the point in time where proceedings become moot and some basis for dealing with those costs on a principled and rational basis needs to be adopted. In my view the proper basis to adopt is that already analysed in this judgment. A finding that proceedings have become moot by reason of the unilateral act of one party does not necessarily imply any blame on that party. Rather it is an acknowledgement that, by reason of that unilateral act, the merits of the case will not now come to be determined."*

107. Whilst I have concluded that the substantive issues in the s. 557 application did not become moot, it seems to be that it is appropriate to consider, by analogy with the approach to mootness adopted by Clarke J., whether the unilateral act of either party has caused the striking out of the motion. Before conducting that analysis, it is appropriate to refer to cases concerning the liability of insolvency office holders which were cited in submissions.

**Re Wogan's (Drogheda) Limited**

108. The fourth and sixth named respondents have referred me to the judgment of Costello J. in *Re Wogan's (Drogheda) Limited* [1992] 5 JIC 0703, 1993 WJSC-HC 2783. In particular, I have been referred to the following passage, at page 31, concerning the jurisdiction of the court to make an order in respect of costs against an examiner: –

*"Order 99 Rule (I) (1) of the Rules of the Superior Courts provides that the costs of and incidental to every proceeding in the Superior Court shall be in the discretion of those courts respectively. I think that this confers power to make orders relating to the costs incurred by parties including creditors who appeared in proceedings under the Act may be made. Having given the matter careful consideration, I do not think that the interests of justice require me to make an order that the examiner should pay the creditors costs. I think that such an order might be made in very exceptional circumstances but whilst the circumstances in this case were such as to justify the refusal of an order in the examiner's favour under section 29 (the predecessor of s. 554 of the Act of 2014) I do not think they would justify an Order against him under Order 99."*

109. In that case the court had found that the examiner failed to fulfil the duty to exercise good faith to the court and acted improperly in failing to inform the Revenue Commissioners of certain requirements of the proposed investor. The court also found that there were serious defects in the proposed scheme of arrangement and concluded that those defects and the conduct of examiner in relation to certain of the defects in the scheme taken together obliged the court to refuse to sanction the examiner's remuneration and costs. However, the court concluded that although his several breaches of duty were sufficiently serious as to refuse sanction of the examiner's remuneration and costs, the interests of justice in that case did not require an order that the examiner pay the creditors' costs.
110. A number of distinctions may be drawn between the facts of that case and the present case. In particular, in *Re Wogan's (Drogheda) Limited* the costs which the creditors were seeking were the costs associated with their appearance at the hearing of the petition and the application to confirm the proposals for a scheme of arrangement. These were what might be described as "ordinary course" applications which every examiner is typically required to undertake in the course of the process assuming it goes as far as a scheme of arrangement confirmation hearing. By contrast, the proceedings the subject of the application in this case were clearly not "ordinary course" applications similar to those in respect of which the creditors were seeking their costs in *Re Wogan's (Drogheda) Limited*. Instead they were adversarial proceedings which the respondents considered they should defend and were entitled to defend. Nonetheless the position adopted by Costello J. in the case of serial egregious breaches of duty by the examiner, which are not alleged in this case, is informative in terms of identifying the category of circumstances in which such an order might be made against an examiner.
111. In *Re Visual Impact and Displays Limited; Murphy v Murphy* [2003] IEHC 91, [2003] 4 IR 451, the liquidator was fixed with personal liability for the costs of unsuccessful restriction proceedings in circumstances where he had submitted a report to the Office of the Director of Corporate Enforcement erroneously stating that the fourth named respondent had been a director within twelve months of the commencement of the liquidation. That case illustrated a fundamental error of fact on the part of the liquidator which caused the costs of the unsuccessful proceedings. This was a very rare event of respondent directors

recovering costs of restriction proceedings from a liquidator, deriving directly from a basic error by the liquidator.

112. The respondents referred also to the case of *Re Ballyrider Limited (In Voluntary Liquidation)* [2016] IECA 228 and unreported, Supreme Court, 31 July, 2019, Appeal No. 2016/107. In that case the court made an order that the respondent liquidator personally pay the costs of a successful application pursuant to s. 638 of the Act to remove him as liquidator for cause shown. In substance, that costs order was a classic case of costs "following the event", in that the respondent liquidator was removed by reason of his conduct as found by the court.

### **Termination of the examinership and conclusions**

113. The immediate event causing the abrupt termination of these proceedings was the application of the examiner to terminate the protection of the court leading to his discharge and the requirement that the motion be struck out. Whilst this act was "unilateral" as between the parties to the proceedings, the examiner was compelled to take it when the proposed investor withdrew without warning.
114. Much criticism has been made of the applicant for the timing of the bringing of these proceedings, and it is said that there was no certainty of a conclusion during the timeframe of an examinership. It would be inappropriate to embark on speculation as to what would have occurred if the investor had not withdrawn and the examiner had been in a position to proceed with the presentation of proposals for a scheme of arrangement, although the examiner himself has to an extent engaged in such speculation when he says that if the examinership had succeeded and if the application under s. 557 had succeeded the proceeds thereby generated would have been applied to generate an enhanced or second dividend for creditors under the scheme. The respondents say that this was a "mission impossible" having regard to the vigorous opposition to the proceedings and their assertions that a plenary hearing would have been required entailing discovery of documents, and the possibility, they say, of an appeal from any result. These were undoubtedly challenging matters but this submission is tantamount to submitting that no examiner should ever bring proceedings under s. 557. This in turn would mean that the section would be otiose, and this cannot have been in the contemplation of the legislature when it transposed this provision into Part 10 of the Act.
115. The respondents were total strangers to what transpired between the examiner and the prospective investor. By contrast the examiner was directly involved in the investment negotiations. He was by definition in that sense closer than the respondents to the events which occurred and which gave rise to the termination of the proceedings.
116. In as much as the applicant was a party to the events which occurred and to which the respondents were strangers, this was a necessary consequence of the performance by him of his duties as examiner. For all the respondents have said in their submissions in criticism of the examiner in bringing the application, and in their submissions as to the merits of the proceedings, they do not assert that he was in dereliction of his duty or

party to any failure of duty or breach of duty in the performance of his functions as examiner.

117. The evidence in his final report is that the applicant had scheduled a meeting on 4 March, 2020, for the purpose of signing the investment agreement so that on the next day he would issue his notices convening meetings of members and creditors to consider his proposals for a scheme of arrangement. No criticism has been made of the manner in which he conducted the process of seeking investors, engaging with interested parties, and bringing that process to a stage where a meeting was scheduled at which the applicant expected that the investment agreement required to support the scheme of arrangement would be executed. The failure of such arrangements to conclude at a late stage of an examinership is not an uncommon occurrence, but that is no reason not to pursue the investment process where the examiner believes that it can be brought to fruition. That he so acted is not disputed.
118. Not only can no blame be attached (although as Clarke J. indicated in *Cunningham v The President of the Circuit Court* it is not a matter of blame) but it would be inequitable if as a consequence of his pursuit of the investment arrangements in the performance of his statutory function of examiner, which came to an abrupt end by no fault on his part, he should carry the burden of the costs associated with the s. 557 application.
119. At their height the criticisms made of the examiner in relation to the bringing of these proceedings are that he was overly "ambitious" and that the application was procedurally "unrealistic". In as much as it may be said that the bringing of the application was ambitious, the fact that no examiner has previously pursued proceedings under s.557 cannot of itself constitute a reason to find that an examiner ought not to do so in a case where he considers it appropriate to do so having regard to the facts or events which have occurred.
120. Although the respondents purport to focus on the conduct of the examiner in terms of timing and procedure, their criticisms are rooted in their vigorous opposition to the merits of the proceedings. That is understandable and they were entitled to defend their roles in the transactions of August 2019. The submissions that the proceedings would potentially require a plenary hearing and would be challenging in terms of the timing of a conclusion within the framework of an examinership are criticisms not so much of the conduct of the applicant, but which if anything expose flaws in this aspect of the legislation, discussed earlier at paragraphs 8 - 20. The related submission that the applicant should never have brought the application because of timing constraints would mean that in an examinership there would never be scrutiny of disposals of assets or pre-petition transactions by reference to s.557.
121. Taking all of the above considerations into account it would be unjust to make an order for costs against the applicant in the events which have occurred in this case.

## **Section 554 of the Companies Act 2014**

122. It has been submitted on behalf of the examiner that to make a costs order against him on this application in the events which have occurred would have a "chilling" effect on future examiners and the prospect of bringing such proceedings. I do not agree with that submission, for reasons which I discuss below.
123. As s. 557 requires that the application be made by the examiner and not by the company to which he is appointed, the only question determined by this judgment is the respondents' application for an order that the applicant pay their costs. No order could be made in favour of the respondents against the company.
124. Because of the decision I have made as to costs I shall limit what I say in relation to s. 554. However, the parties in submissions have referred to the judgment of Baker J in *Re Harley Mechanical Services Limited* [2018] IEHC 80, as authority for a proposition that no order could be made that the costs of the respondents be treated as costs or expenses in the examinership.
125. *Harley Mechanical* concerned an application by the Revenue Commissioners for an order that certain taxes which had fallen due during the period when the company was under court protection be deemed to be a cost in the examinership.
126. The question arose as to whether such taxes constituted liabilities which, had they been certified liabilities which should be treated as expenses properly incurred by the examiner which would attract the priority of payment provided for in s. 554 of the Act.
127. It is appropriate to refer in full to the provisions of s. 529 and s. 554.
128. Section 529 provides as follows: -
- "(1) *Any liabilities incurred by the company (emphasis added) during the protection period which are specified in sub. (2) should be treated as expenses properly incurred, for the purpose of s.554, by the examiner.*
- (2) *The liabilities referred to in sub. (1) are those certified in writing by the examiner, at the time they are incurred, to have been incurred in circumstances where, in the opinion of the examiner, the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced."*
129. Unhelpfully, the heading in the text of the Act over s. 529 refers to "*incurring of certain liabilities by examiner*". However, it is clear from a reading of subs. (1) and (2) that the section refers to liabilities incurred by the company, and not the examiner, and which the examiner certifies are being incurred in the circumstances referred to in sub. (2).
130. Section 554 of the Act provides as follows:
- "(1) *The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner.*

- (2) *Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he or she has been appointed, or the proceeds of realisation of the assets (including investments).*
- (3) *The remuneration, costs and expenses of an examiner which have been sanctioned by order of the court (other than the expenses referred to in subsection (4)) shall be paid in full and shall be paid before any other claim, secured or unsecured, under any compromise or scheme of arrangement or in any receivership or winding up of the company to which he or she has been appointed.*
- (4) *Liabilities incurred by the company to which an examiner has been appointed that, by virtue of section 529, are treated as expenses properly incurred by the examiner shall be paid in full and shall be paid before any other claim (including a claim secured by a floating charge), but after any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature or a pledge, under any compromise or scheme of arrangement or in any receivership or winding up of the company.*
- (5) *In subsections (3) and (4), references to a claim shall be deemed to include references to any payment in a winding up of the company in respect of the costs, charges and expenses of that winding up (including the remuneration of any liquidator)."*

131. The issue in *Harley Mechanical* was whether the court had jurisdiction to declare that liabilities incurred by the company, in that case taxes during the protection period, would rank as expenses of the examiner notwithstanding that they had not been certified by him pursuant to s. 529.
132. Baker J considered the scheme of the Act in relation to the treatment of such expenses and liabilities and said "*the court has no express jurisdiction under part 10 of the Act to deem liabilities as having the status of certified expenses and in my view there exists no standalone power to deem certain liabilities to be expenses in the examinership and entitled therefore to special statutory priority*".
133. That case concerned liabilities of the company and not of the examiner and the application made by Revenue was to confer on such liabilities the status of expenses which would enjoy the priority conferred by s. 554, in the absence of certification pursuant to s. 529.
134. Baker J said "*the effect of the treatment of the liabilities of a company as expenses properly incurred by the examiner and so certified by the examiner is to elevate those liabilities so that they are paid before any other claims in a receivership or winding up, and before the costs, charges and expenses of a winding up including the remuneration of a liquidator.*"

135. It is clear from the judgment of Baker J. that the ruling was based on the proposition that the liabilities of the company cannot be treated as expenses of the examiner unless they have been certified by the examiner pursuant to s. 529. When she stated that the court has no jurisdiction under the Act to deem liabilities as having the status of certified expenses, she is clearly referring to liabilities of the company and not liabilities of the examiner. The judgment therefore is not an authority for a proposition that liabilities incurred by the examiner could not be sanctioned by the court pursuant to s. 554 (2) and thus enjoy the priority provided for in the section. On the contrary, s. 554 (1) – (3) clearly confer jurisdiction on the court to sanction remuneration, costs and expenses of an examiner. As to whether such expenses extends to an examiner’s liability for adverse costs in a given case is a matter for another day, having regard to the decision I have made in this case.
136. There is extensive case law on the question of the scope of costs, expenses and other liabilities, including adverse costs orders, incurred by office holders, notably liquidators, some of which was referred to in submissions. If an examiner were to suffer an adverse costs and seek indemnity in respect thereof pursuant to s. 554 (2) any such application would be on notice to the liquidator and potentially to creditors affected by the outcome of the winding up, and not the respondents. On such an application submissions could be made by those interested parties and it would therefore be inappropriate for me to make any further observations in relation to this question save that the decision in *Harley Mechanical* does not preclude such an application.

**Conclusion**

137. For the reasons given earlier in this judgment no order will be made as to costs between the applicant and the respondents.