THE HIGH COURT

IN THE MATTER OF THE COMPANIES ACT 2014 AND IN THE MATTER OF REDEFINE AUSTRALIAN INVESTMENTS LIMITED (IN VOLUNTARY LIQUIDATION)

Record No.: 2023/65 COS

BETWEEN:

MARTIN FERRIS

Applicant

-And-

BRIGHTBAY REAL ESTATE PARTNERS LIMITED

and

REDEFINE CYPRUS LIMITED

Respondents

JUDGMENT of Mr Justice Rory Mulcahy delivered on 27 May 2024

Introduction

1. Redefine Australian Investments Limited ("**the Company**") was placed in voluntary liquidation on 24 January 2018 and the applicant was appointed as liquidator ("**the Liquidator**"). By originating Notice of Motion dated 27 April 2023, the Liquidator sought orders pursuant to section 608 and/or section 604 of the Companies Act 2014 ("**the 2014 Act**") to, in effect, reverse a transaction by which the Company had paid the sum of GB£55,916,731 to the second respondent, Redefine Cyprus Limited ("**Redefine Cyprus**"), a Cyprus-registered company, on 18 September 2015. Redefine Cyprus was the sole

shareholder in the Company at the time it entered liquidation. The Liquidator claims that this transaction was a fraud on the creditors in circumstances where the Australian Tax Office ("**the ATO**") subsequently issued an assessment against the Company for in excess of AUS$29 million in capital gains tax (CGT) which, in light of the payment to Redefine Cyprus, the Liquidator is not in a position to discharge.

2. In this application, the respondents seek to strike out the Liquidator's originating notice of motion pursuant to Order 19, Rule 28 of the Rules of the Superior Courts and/or in the exercise of the court's inherent jurisdiction. A number of bases are advanced for the respondents' contention that the Liquidator's application discloses no reasonable cause of action, but the respondents' principal objection is that the Liquidator's claim is an indirect attempt to enforce a claim by a foreign tax authority. The respondents contend that there is a long-established rule, sometimes referred to as the revenue rule, that it is impermissible to bring an action in an Irish court for the recovery of tax owed to a foreign tax authority. They say that, accordingly, the Liquidator's claim is bound to fail.

3. The outcome of this application will depend on whether it can be determined, at this stage of the proceedings, that the revenue rule remains applicable in this jurisdiction and, if so, whether the Liquidator's claim is a claim to which the rule applies.

The Transaction at Issue

4. The Company is an Irish registered company and was established in 2009 for the purpose of investing in property securities in an Australian property fund, the Cromwell Property Group (CPG). The Company, or its parent, obtained tax advice from KPMG Tax Advisers, dated 27 January 2010, which stated that, if the investment was structured in a particular way, no Australian CGT consequences should arise.

5. In order to fund the investment, the Company obtained a loan in an aggregate sum of GB£100,000,000 from Redefine Cyprus pursuant to a Facility Agreement dated 28 May 2010 ("**the Facility Agreement**"). The interest provisions in the loan facility were unusual. Clause 8.1(b) of the Facility Agreement stipulated that interest on the loan *"shall equal one hundred percent (100%) of the Adjusted Net Income of the Company"*. In other words, the Company was required to pay any profit it made as interest on the loan. As acknowledged

by counsel for the respondents, the Facility Agreement was designed to ensure that the Company never returned a profit.

6. The Facility Agreement also provided, at Clause 10.1(a), that the Company was to make all payments to Redefine Cyprus *"without any Tax Deduction, unless a Tax Deduction is required by applicable law."*

7. The investment in CPG proved successful. On the basis of the figures used by the ATO, the Company acquired AUS$232,224,276.90 in CPG stapled securities up to 14 December 2012. Between 26 March 2013 and 31 August 2015, it disposed of these for a total aggregate consideration of AUS$313,642,517.89. Each stapled security comprised a share in a CPG company, Cromwell Corporation Limited (CCL) and a unit in a CPG Trust, Cromwell Diversified Property Trust (CDPT).

8. On 4 September 2015, the Company paid the sum of GB£23,245,998 to Investec Bank (Australia) Ltd, repaying a loan secured against the Company's shares in CPG. Although the Liquidator avers that he is satisfied that the Company was insolvent at the time this payment was made, he makes no application in relation to this payment. As discussed below, the Liquidator is, in any event, plainly incorrect in asserting that the Company was insolvent at the date of this payment.

9. On 18 September 2015, the Company paid the sum of GB£55,916,731 to Redefine Cyprus in accordance with the terms of the Facility Agreement. It is this payment which the Liquidator seeks to reverse.

10. The Company lodged tax returns with the ATO for the years ended 30 June 2013, 30 June 2014 and 30 June 2015. On 7 October 2016, the ATO wrote to the Company to advise that it was conducting a review of its tax affairs for the years 2013 to 2015 and sought certain information. The Company's advisers engaged with the ATO regarding this review.

The Australian Tax Office (ATO) Claim

11. Following the ATO's initial request for information and the Company's response, the ATO advised the Company's agent, by letter dated 15 March 2017, that it had identified two risks which merited further investigation. The first risk related to whether the securities sold by the Company met the definition of "indirect Australian real property interests". If so, a CGT liability would arise upon their disposal. The Company disputed that the securities met that definition. The second risk related to the manner in which the Company had apportioned the consideration it had received for the stapled securities. The consideration received was undivided as between the shares in CCL and the units in CDPT. The sale of the units in CDPT was subject to CGT, but the sale of shares in CCL was not. The ATO disputed the manner in which the Company had apportioned the consideration received as between the CCL shares and the CDPT units in its tax returns from 2013 to 2015, and the consequent calculation of its CGT liability. The Company stood over the manner in which it had apportioned the consideration.

12. At a meeting with the Company's advisers on 8 December 2017, the ATO informed the Company that it had reached a preliminary view that the Company had additional liabilities on foot of both risks and that it would be imposing administrative penalties. On 15 December 2017, it issued an amended assessment for 2013, increasing the Company's tax payable from AUS$3,291,543.30 to AUS$7,894,485.60.

13. On 25 January 2018, the ATO advised that it had finalised its review and provided a detailed document entitled "Reasons for Decision". On 6 February 2018, it issued amended assessments for 2014, 2015 and 2016 and notices of shortfall penalties for 2013 to 2015. The total sum claimed by the ATO in these notices, together with the amended assessment for 2013, totalled AUS$29,044,007.40.

The Liquidation

14. In affidavits filed on behalf of the respondents it is averred that prior to the receipt of the initial request for information from the ATO in October 2016, the Company's directors were preparing to place the Company into members' voluntary liquidation (MVL). To be

placed in MVL, a company must be able to pay its debts as they fall due at the date of liquidation, *i.e.* the company must be solvent. The proposed MVL was placed on hold pending the resolution of the questions raised by the ATO.

15. On 5 January 2018, the Company resolved that it be recommended to the Company's sole shareholder, Redefine Cyprus, that the Company be wound up voluntarily as a creditor's voluntary winding-up and that the applicant be appointed as liquidator. The minutes of the meeting record that the reason that it was recommended that the Company be placed in a creditors' rather than a members' voluntary liquidation was that, in light of the ATO claim, the directors were not in a position to swear the necessary declaration of solvency to place the Company into solvent liquidation.

16. On 24 January 2018, Redefine Cyprus resolved to place the Company in creditors' voluntary liquidation and to appoint the applicant as Liquidator.

The Liquidator's Application

17. In his affidavit grounding his Originating Notice of Motion, the Liquidator sets out the background to the dispute. He explains that the first Respondent, Brightbay Real Estate Partners Limited ("**Brightbay**") was incorporated in the Isle of Man in 2004 as Redefine International plc. On 4 December 2013, it was converted into a REIT and on 1 December 2017 it changed its name to RDI REIT. Following the acquisition of its entire issued share capital by a third party, it changed its name to Brightbay on 20 December 2021.

18. Brightbay's Annual Report for the year ended 2022 indicates that Redefine Cyprus is a subsidiary of Brightbay and that Brightbay has 100% "effective ownership" of Redefine Cyprus.

19. The Liquidator's affidavit sets out the background to the ATO claim, the payment by the Company to Redefine Cyprus in September 2015 and the liquidation. He refers to the fact that, in 2015, the Company's accounts stated that Brightbay had provided an undertaking to provide the necessary support to meet the Company's liabilities for at least twelve months. The Liquidator avers that the effect of the payment to Redefine Cyprus was

to deprive the creditors of the Company of a significant asset and that the transaction should be reversed pursuant to section 608 or, in the alternative, section 604 of the 2014 Act.

20. It is accepted by the Liquidator that, but for the ATO claim, the Company would have been solvent at the time of the payment to Redefine Cyprus and at the time that it entered liquidation. When wound up, the Company had assets which exceeded its liabilities, other than the Australian tax liability. Although the Liquidator avers to his belief that the Company was insolvent when it repaid its loan to Investec, since the Company retained funds in excess of GB£55 million thereafter – which it then repaid to Redefine Cyprus – and the Australian tax liability is for a sum significantly less than that, it is clear that the Company was not, on any view, insolvent at the time it repaid the Investec loan.

Statutory Provisions

21. The statutory provisions in respect of which the Liquidator seeks orders are section 608 and 604 of the 2014 Act. Section 608 provides a power to a court to make orders in relation to a company which is being wound up, requiring the return of assets or the repayment of sums paid out where the court is satisfied that the effect of the disposal of an asset (or the payment of monies) by the company was to perpetrate a fraud on the company, its creditors or members.

22. Section 608 of the 2014 Act, in relevant part, provides as follows:

> *(1) The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, 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.*

(2) That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have—

(a) the use, control or possession of the property concerned, or

(b) the proceeds of the sale or development of that property,

to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit.

(3) This section 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 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.

(5) This section is in addition to, and not in substitution for, any restitutionary or other relief by way of recovery (including the remedy of tracing) that is available to a liquidator or any other person.

23. Section 604 addresses unfair preferences and applies to transactions occurring in the period immediately before a company is wound up. Any payment to a creditor during the six-month period prior to winding up (or two years if the payment is to a connected person) is deemed void if, at the time of the payment, the company was unable to pay its debts. In relevant part, section 604 provides as follows:

(1) Subsection (2) applies to each of the following acts, namely, any:

…

(c) delivery of goods, payment, execution or other act,

relating to property made or done by or against a company, which is unable to pay its debts as they become due, in favour of—

(i) any creditor of the company,

...

(2) An act to which this subsection applies, that is done with a view to giving the creditor referred to in subsection (1)(i) or (ii), or any surety or guarantor for the debt due to such creditor, a preference over the other creditors of the company, shall be deemed an unfair preference of its creditors and be invalid accordingly if—

(a) a winding up of the company commences within 6 months after the date of the doing of the act, and

(b) the company is, at the time of the commencement of the winding up, unable to pay its debts (taking into account the contingent and prospective liabilities).

...

(4) An act to which subsection (2) applies in favour of a connected person which was done within 2 years before the commencement of the winding up of the company shall, unless the contrary is shown, be deemed in the event of the company being wound up—

(a) to have been done with a view to giving such person a preference over the other creditors, and

(b) to be an unfair preference, and be invalid accordingly.

24. The Liquidator also relies on the provisions of section 620 of the 2014 Act:

(1) Subject to the provisions of this section, in a winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) the following shall be admissible to proof against the company:

(a) all debts payable on a contingency; and

(b) all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages;

a just estimate being made, so far as possible, of the value of such debts or claims which may be subject to any contingency or which sound only in damages, or for some other reason do not bear a certain value.

The Application to Dismiss

25. The respondents' application to dismiss the Liquidator's claim is grounded on three affidavits of Stephen Oakenfull, a director of Brightbay. The Liquidator has filed two affidavits in response.

26. The main factual disputes in the proceedings relate to whether the ATO is correct in determining that the transactions described above incurred a liability to CGT, and, if so, whether there was anything improper regarding the scheme by which the Company invested in the Australian property securities. The respondents' position is that there was no wrongdoing by them or the Company and that they legitimately structured their business to limit their exposure to tax in Ireland and Australia. Prior to the liquidation, the Company contested the ATO's preliminary view that CGT was due. No evidence has been adduced regarding any tax liabilities of any of the companies involved in Cyprus or the UK.

27. The Liquidator, by contrast, argues that the respondents employed an "unorthodox scheme" which had the effect of perpetrating a fraud on the Company, its creditors and/or its members.

28. Neither party suggests that this court could or should engage in any assessment of whether the ATO has properly raised an assessment for CGT against the Company in this application. The respondents accept that, for the purpose of this application, the court must take the Liquidator's claim at its height.

29. Other than the underlying factual dispute about the liability to the ATO and the propriety of the entire transaction, the respondents do not dispute the factual narrative set out above. In particular, they do not dispute, that arising from the disposal by the Company of its assets in Australia, the ATO has raised a claim against the Company in a sum in excess of AUS$29 million plus interest. The affidavit of Stephen Oakenfull, director of Brightbay, grounding the respondents' application, notes that the period for challenging the ATO assessments passed on 11 January 2022 and that, although an extension of time is available, he infers from the Liquidator's application that the Liquidator has accepted that the sum assessed by the ATO is in fact due.

30. Notwithstanding the necessary acceptance by the respondents of the facts as pleaded by the Liquidator, they argue that the claims are bound to fail on a variety of grounds. They claim that there is no basis for a claim against the first respondent since it was not a party to the transaction sought to be reversed. They argue that the claims under section 604 and 608 are both statute-barred, and that section 608 does not apply to the discharge of a pre-existing liability. But their primary argument is that the entire claim is bound to fail as it breaches a common law rule that the courts of this jurisdiction will not entertain a claim to enforce, directly or indirectly, tax liabilities in a foreign jurisdiction, a rule sometimes referred to as the revenue rule.

31. The respondents' application was heard over three days from 17 – 19 April 2024. On the third day, the Liquidator raised a new argument in opposition to the Liquidator's motion, regarding the applicability of the revenue rule, which is described below. In the circumstances, I provided an opportunity to the respondents' to make further submissions in reply to that new argument. They filed supplemental submissions on 23 April 2024. The Liquidator, in turn, filed supplemental submissions on 30 April 2024 in which he sought to rely on correspondence from the ATO to him dated 26 April 2024, *i.e.* post-dating the original hearing. I heard further oral submissions on 2 May 2024 and asked the Liquidator to file an affidavit explaining the circumstances in which he had received the correspondence from the ATO. That affidavit was sworn and delivered on 9 May 2024.

32. Since the respondents' argument based on the revenue rule would, if accepted, dispose of this application and these proceedings, I propose to deal with it first before addressing the respondents' other arguments.

The Revenue Rule

33. The principal basis for the respondents' application is the so-called revenue rule, which is a shorthand description of a common law rule of some antiquity. The general principle is stated in Rule 20 in Dicey, Morris & Collins, *The Conflict of Laws*, 16th Ed., (Sweet & Maxwell, 2022) as follows (at paragraph 8-001):

> *English Courts have no jurisdiction to entertain an action:*

(i) *for the enforcement, either directly or indirectly of a penal, revenue or other public law of a foreign state; or*

(ii) *founded upon an act of state.*

34. This rule is described by the editors of Dicey as being a *"well established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another country."* They say as follows (at paragraph 8-002):

> *"Although the theoretical basis for the Rule is a matter of some controversy, the best explanation, it is submitted, is that suggested by Lord Keith of Avonholm in* Government of India .v. Taylor *[1955] AC 491 at 511, that enforcement of such claims is an extension of the sovereign power which imposed the taxes, and "an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."*

35. There is no doubt that the rule forms part of Irish common law. In fact, the leading Irish authority, *Peter Buchanan Ltd v McVey* [1954] IR 89, is regularly endorsed in international common law jurisprudence, including in the leading UK decisions of *Government of India v Taylor*, referred to in the passage quoted above, and, more recently, by the UK Supreme Court in *Skatterforvalteningen v Solo Capital Partners* [2023] 3 WLR 886. Both cases are considered below.

36. In *Buchanan*, the liquidators of a Scottish company brought a claim against the director of a company who had taken up residence in the State. The company had traded successfully in whiskey at a time of rising value. Retroactive fiscal legislation having been introduced in Scotland, the High Court (Kingsmill More J) described the director's response in colourful terms (at p. 91):

> *"He evolved a plan both swift and simple. He would secretly dispose of all of the valuable whiskey stocks scraped together by Peter Buchanan Limited, transfer the proceeds together with his private assets to safe hands in Ireland, and in due time follow*

his money to this jurisdiction from where, he was advised, he might safely snap his fingers in the face of a disgruntled Scottish Revenue".

37. A summons issued in Ireland claiming an account of all monies due to the company by the defendant as director, trustee and agent or, alternatively, claiming payment of the sum of some GB£303,179 due by the defendant to the company as money had and received to the use of the company. The High Court rejected the argument that the Irish court could not consider whether a transaction was fraudulent, and therefore void, according to the laws of another country. Kingsmill More J concluded that the transaction was not honest, was a fraud on the creditors, in particular the Scottish Revenue, and that the Company was entitled to question its validity *"when in a position to do so."*

38. However, he considered that the question of whether the Irish courts would aid the collection of foreign taxes was another matter. Following a detailed review of the relevant case law, not only in the UK and Ireland, but also in the US, the court summarised the position as follows (at pp. 102-103):

> *"These decisions establish that the Courts of our country will not enforce the revenue claims of a foreign country in a suit for the purpose by a foreign public authority or the representative of such authority; and that, even if a judgment for a foreign penalty or debt be obtained in the country in which it was incurred, it is not possible successfully to sue in this country on such judgment."*

39. He made clear that the rule applied not just to direct enforcement but also to indirect enforcement (at pp. 104-105):

> *"Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel*

between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the Courts of this country, relief cannot be given."

40. He ultimately concluded (at p. 108):

"I hold as a fact—and indeed I understood it to be admitted —that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There is no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland and as far as ordinary creditors are concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a Revenue debt. I hold also that the sole object of the present proceedings before me is to collect a Scottish Revenue debt, and that if I were to decide for the plaintiffs the only result of those proceedings would be that every penny recovered, after paying certain costs and liquidator's remuneration could be claimed by the Scottish Revenue. That in my opinion is the substance of the suit—to collect the revenue claim of a foreign State. Being of this opinion, I reject the claim."

41. The Supreme Court unanimously upheld the High Court decision. Maguire CJ, referring to Dicey's formulation of the rule, said at page 116:

"This General Principle and rule are exceptions to the rule arising from the comity of nations that respect is paid to the laws of foreign countries. Note no. 39 in Dicey (op. cit.), at p. 152, cites a number of cases which support the rule in so far as it relates to the enforcement of the revenue laws of another State. Most of these cases were referred to in the argument both in the Court below and in this Court. They are fully reviewed by the trial Judge in his judgment. In In re Visser. Queen of Holland v. Drukker *Tomlin J., as he then was, discusses the rule. Having examined its history he says— "My own opinion is that there is a well-recognised rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign states." The rule is equally part*

of our law. It is unnecessary to look for the origin of or reason for the rule nor is it necessary to consider the criticism which has been directed against Lord Mansfield's dictum in Holman v. Johnson*:— "No country ever takes notice of the revenue laws of another." At p. 642 of Dicey's Conflict of Laws (6th ed., 1949), Anson on Contracts (19th ed. at p. 218) is quoted apparently with approval as saying that the dictum is "not supported by authority" and grounds are given for the view that the dictum is too wide. Dicey goes on to say that:— "The doctrine that the law of England does not pay any regard to the revenue laws of a foreign State does not, it is submitted, extend beyond the recognised principle that an English Court will not directly enforce foreign tax claims or judgments for the payment of foreign taxes." It is suggested that some significance should be given to the omission of the word, "indirectly," in this passage. In my view, however, it was not intended by the author to modify in any way Rule 22 (1) which in my opinion states a recognised rule."*

42. The decision in *Buchanan* was subsequently endorsed by the Supreme Court in *Byrne v Conroy* [1998] 3 IR 1. That case involved an application under the Extradition Act 1965. At issue was section 50 of that Act which provided that the Court could direct the release of a person under that Act if, *inter alia*, they had been charged with a revenue offence. The question for the court was whether the offence in respect of which the applicant's extradition was sought, was a revenue offence. The court concluded that it wasn't. However, in the course of its decision, the court referred in detail to the decision in *Buchanan*. Having quoted extensively from it, the court stated (at p. 38):

"This decision clearly established that the courts in this country will not enforce the revenue claims of a foreign country.

It is reasonable to assume that the Oireachtas, in exempting those alleged to be guilty of a revenue offence from the provisions of the Act, were aware of the approach of the Irish courts, viz. the refusal to enforce the revenue claims of a foreign country and the reasons therefor."

43. In other words, the principle identified in *Buchanan* not only remained good at common law, but had been given statutory recognition in the 1965 Act. As will be seen below, the

principle has also been recognised in the main case on which the Liquidator relies, *Re Cedarlease Ltd* [2005] 1 IR 470.

44. The implications of the revenue rule for liquidations were addressed by the UK House of Lords in the *Government of India* case. This involved an attempt by the Government of India to prove in the voluntary liquidation of a company registered in the United Kingdom but trading in India, for a sum due in respect of Indian income tax, including capital gains tax, which arose in respect of the sale of the Company's undertaking in India.

45. The House of Lords found that the *"*liabilities*"* for which a liquidator is required to provide in a liquidation of a company did not include claims unenforceable in the English courts and therefore the claim was not such a liability. As noted in *Byrne v Conroy*, the Lords relied in that case on the "*admirable judgment*" of Kingsmill More J in *Buchanan.* Viscount Simonds stated as follows (at pp. 508 – 509):

> *"We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed. And since it is a rule which operates equally in regard to natural and artificial persons, the company, with which we are here concerned, could not on the day before its resolution to wind up became effective have been sued by the Indian Government for the recovery of tax in the courts of this country. But it is said that from the moment that the company went into liquidation the situation changed, the old rule of law was abrogated, and our courts became the means of collecting the taxes of a foreign power. This may seem the more surprising when it is remembered that the winding up of a company, whether voluntarily or by the court, is only the machinery by which an entity, which can no longer, or at least no longer usefully, carry on its business, is brought to its statutory end. It is difficult to see why such a process should create new rights in foreign powers hitherto unknown in this or any other country. But it is said that under section 302 of the Companies Act, 1948, the "liabilities" which the liquidator in a voluntary winding up is bound to discharge include an obligation to pay tax due to a foreign State. All turns on the meaning of the word "liabilities" in this section. On the one hand it is said by the respondents that it means only those obligations which are enforceable in an*

English court, and on the other hand that its meaning is extended – I do not know how far – but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.

My Lords, I have no hesitation in adopting the former of these meanings. I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides. It would be a strange result if it were found that the statute introduced a new category of creditors to compete with those who alone, apart from it, could enforce their claims."

Exceptions to the Rule

46. In a world where companies habitually trade, and incur revenue liabilities, in countries other than those in which they are registered or domiciled, the rule may seem part of a different age. It is, however, for governments not the courts to decide whether to derogate from the rule. As noted by the Liquidator in his submissions (para. 65):

"In simple terms, it is a matter for governments to engage in international agreements or treaties to recognise taxes due to foreign states. It is not a matter for courts to do so, given that, absent an international agreement, the court may lack jurisdiction to recognise the revenue debts of another state.

47. He quotes Dicey (at paragraph 8-012):

*"**International co-operation**. Substantial inroads have been made into the revenue rule by international agreement. Thus, the Cross-Border Insolvency Regulations eliminate the rule in Government of India v. Taylor that foreign revenue authorities are not*

competent to submit proofs in English insolvency proceedings, and there are international arrangements for mutual assistance in the collection of tax debts."

48. As an example of such international co-operation, the liquidator places significant emphasis on the decision in *Re Cedarlease*. In that case, the High Court (Laffoy J) noted that *"it is well settled that this court will not entertain a suit brought for the purpose of enforcing, directly or indirectly, the revenue claim of a foreign state"*, citing both *Buchanan* and *Byrne v Conroy.* The court had to consider whether Council Regulation (EC) 1436/2000 on Insolvency Proceedings had any bearing on that common law principle.

49. The court referred to the provisions of the Regulation, including, in particular, Recital 21 and Article 39. Recital 21 provides as follows:

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions.

50. Article 39 states:

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

51. The Court's conclusions were as follows:

"9 The cross-border element on this application is the fact that the creditor petitioner is located in another member state. It is clear beyond doubt that, if proceedings to wind up the company which had been initiated on the petition of a third party were pending in this court, the petitioner would be entitled to prove for its debt in the winding-up proceedings by virtue of article 39, notwithstanding that it is a tax authority of a foreign state. The effect of the common law principle would thereby be overridden.

10 The grounds on which this court may wind up a company and the standing of a person or body to initiate the winding-up proceedings are governed by Irish law - the Companies Act 1963, as amended. In the instant case it has been established that the company has failed to comply with a demand under s. 214 of the Act of 1963, so that the company is deemed to be unable to pay its debts. Therefore, a ground on which the company may be wound up by the court exists (s. 213(e)). While Council Regulation (E.C.) 1436/2000 on Insolvency Proceedings does not expressly provide that a creditor located in another member state shall have the right to initiate insolvency proceedings, in my view, as the instant case illustrates, it would defeat the purpose of Council Regulation (E.C.) 1436/2000 on Insolvency Proceedings if that were not the case.

11 I have come to the conclusion that Council Regulation (E.C.) 1436/2000 on Insolvency Proceedings confers jurisdiction on the court to wind up the company on the petition of the petitioner and that, in effect, the common law principle is rendered inapplicable by this regulation."

52. It was unnecessary for the court to express the entirely obvious fact that, insofar as the court considered that the common law principle was "rendered inapplicable by" the regulation, the common law principle was rendered inapplicable *in cases to which the regulation applied.* It also goes without saying that the court in *Cedarlease* could no more have overruled two earlier decisions of the Supreme Court than could this court. Thus, the headnote to the report of the case, which refers to *Buchanan* and *Byrne v Conroy* as having been "overruled", is apt to mislead. In fact, it is quite clear from the judgment that the High Court *re-affirmed* the existence of the common law principle but concluded that it was *disapplied* in that case by the express provisions of the regulation.

53. One further case on the common law rule is worthy of note, that is the recent UK Supreme Court decision in *Skatterforvalteningen v Solo Capital Partners*, cited above. As is apparent the judgment in that case, the UK court concluded that the revenue rule didn't apply in that case because the claim being was not for the direct or indirect enforcement of a revenue debt. As in *Cedarlease*, although the rule was not an obstacle to the proceedings being pursued in that case, the decision confirms the continuing vitality of the rule in that jurisdiction and, indeed, the precedential force of *Buchanan v McVey*. Lord Lloyd Jones delivered the single judgment of the court. The judgment considered in detail the decision

in *Buchanan* and the parameters of the revenue rule. The court concluded as follows (at p. 897):

> *"36. I consider that the respondent is correct in its submission that the revenue rule is limited in the manner described by Lord Mackay in* Williams & Humbert *[1986] AC 368. The revenue rule only applies to proceedings in which there is an unsatisfied demand for tax which foreign tax authorities seek directly or indirectly to recover. In my view, the statement of principle by Lord Mackay cited above forms a part of the ratio decidendi of the decision in* Williams & Humbert*; it is an essential step in the reasoning which supports the decision. In any event, it is consistent with what I consider to be the rationale of the revenue rule. If there is no claim, directly or indirectly, to recover tax which is due, there is no attempt to assert the sovereign authority of the state which imposed the taxes within the territory of another. It is also consistent with the authorities considered above. Furthermore, there can be no justification for extending this exclusionary rule beyond what is required by its rationale. Finally, this limitation on the revenue rule is consistent with the principle, which is well established and which was common ground before us, that the revenue rule does not prohibit courts in this jurisdiction from recognising, as opposed to enforcing, a foreign tax law, provided that such recognition does not otherwise conflict with the public policy of this jurisdiction."*

Jurisdiction to strike out

54. The court's jurisdiction to strike out proceedings pursuant to Order 19, Rule 28 of the Rules of the Superior Court and/or its inherent jurisdiction, and the principles applicable to such applications, are well settled. In *Lopes v Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 IR 301, the Supreme Court (Clarke J) emphasised the distinction between the jurisdiction under the Rules and the court's inherent jurisdiction (at p. 309):

> *"[17] The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in* Barry v Buckley *[1981] I.R. 306, an inherent jurisdiction exists side by*

side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked."

55. I note that the provisions of Order 19, Rule 28 were amended by SI 456/2023 such that Order 19, Rule 28 now provides as follows:

28. (1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which:
(i) discloses no reasonable cause of action, or
(ii) amounts to an abuse of the process of the Court, or
(iii) is bound to fail, or
(iv) has no reasonable chance of succeeding.

(2)… …

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.

56. The rule, accordingly, no longer makes reference to a claim being struck out as being "frivolous or vexatious" but for the purpose of these proceedings, neither party suggested that the amendment to the rule had any bearing on the issues which this court must address. The respondents' submissions did address the question of how the jurisdiction to strike out is engaged in an application commenced by way of originating notice of motion in circumstances where the version of Order 19, Rule 28 in force at the time that the respondents' motion issued referred to any "pleading" being struck out. They refer to Delaney and McGrath, *Civil Procedure,* 4th ed., (Round Hall) at p. 678, footnote 7:

"Order 125, rule 1 defines "pleading" as including "an originating summons, statement of claim, defence, counter-claim, reply, petition or answer". Although the definition does not include an originating notice of motion, an "action" is defined to mean "a civil proceeding commenced by origination summons or in such other manner as may be authorised by [the] Rules" and, thus, the better view would seem to be that the court also has jurisdiction under Order 19, Rule 28 to strike out an originating notice of motion."

57. Insofar as it is necessary to accept the facts as pleaded when making an application to strike out, the respondents suggest that, by analogy, it must accept the facts as deposed to by the Liquidator in his affidavit grounding his originating motion.

58. The fifth edition of Delaney and McGrath addresses the amended rule, which refers to striking out a "claim", and does not contain the same footnote. This reflects, correctly in my view, that any doubt as to the jurisdiction to strike out an originating notice of motion pursuant to the rules has been eliminated by the revised wording of rule 28(1). The entitlement of the court to consider the facts as deposed to on affidavit is confirmed by rule 28(3). For completeness, I should note that it is also clear from the re-formulated rule that an order can be made striking out part only of a claim.

59. The Liquidator does not dispute the court's jurisdiction to make the orders sought, rather he argues that this is a manifestly inappropriate case in which to make them. The relevant principles are not disputed between the parties, but the Liquidator places particular emphasis on the decision of the Supreme Court in *Moylist Construction Limited v Doheny* [2016] IESC 9; [2016] 2 IR 283. In that case, the court refused to strike out a claim owing to the complexity of the issues which the court had to address. Clarke J (as he then was) noted the following (at p. 292/293):

*"**[22]** But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in* Keohane v. Hynes *[2014] IESC 66, (Unreported, Supreme Court, 20 November 2014), nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the*

very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail.

***[23]** For the reasons identified by Murray J. in* Jodifern Ltd. v. Fitzgerald *[2000] 3 I.R. 321, and as applied in Keohane, a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex. Leaving aside those cases which might fall into the "seventeen noughts are still nothing" category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full day's hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail."*

Arguments

60. The respondents contend that these proceedings are manifestly an indirect attempt to enforce a tax liability owed in a foreign jurisdiction and, accordingly, cannot be entertained by this court. They rely in this regard on *Buchanan v McVey* which, they argue, remains the applicable law in this jurisdiction. Even on the Liquidator's case, argue the respondents, the only creditor of the company who cannot be paid out of the remaining assets of the Company is the ATO. In those circumstances, they contend that the attempt to reverse or void the transaction whereby the Company paid Redefine Cyprus can only be understood as being for the purpose of discharging the ATO claim, that is, the indirect enforcement of a foreign tax claim, and therefore should be struck out. They point to *Buchanan* and the *Government of India* case as authority for the proposition that a claim in a liquidation for a foreign tax debt will not be facilitated by an Irish court.

61. The Liquidator's response is three-fold. First, he argues that the application is premature, that the pleadings have not closed and that all the relevant facts have not been established. Second, he argues that the issues to be determined on his application are too complex to be capable of being fairly resolved on a summary basis and can only be determined in the context of a full plenary hearing. In this regard, he calls in aid the Supreme Court decision in *Moylist*.

62. With respect to the respondents' reliance on the revenue rule, the Liquidator advances a third argument, that the revenue rule has been disapplied in this instance, or at least that it is arguable that it has been, because the State has made provision for mutual recognition of taxes due in other states by "statutory exemptions" and/or "international agreements". In this regard, the Liquidator relies on (i) Council Regulation (EC) 1436/2000 on Insolvency Proceedings, which was the subject of the decision in *Cedarlease*; (ii) the 1983 Agreement between the Government of Ireland and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, as amended, ("the 1983 Agreement") to which legal effect was given by SI 406 of 1983; and (iii) the Convention on Mutual Administrative Assistance in Tax Matters 2011 ("the 2011 Convention") to which legal effect was given by SI 34 of 2013.

63. As to whether his claim should be regarded as an attempt to indirectly enforce the Australian tax debt, the Liquidator was somewhat equivocal. He did not expressly accept that this was a correct characterisation of his application, but nor was it expressly denied. The respondents' affidavits had, in fact, queried whether the ATO was funding the Liquidator. The Liquidator denied that this was the case, at the same time rejecting the implication that there would be anything improper if it were. There was an unusual development in the case which is of some relevance to the question of whether the purpose of this application was to enforce the ATO's claim. As noted above, on the final day of the hearing, the Liquidator advanced a new argument, relying for the first time on the 2011 Convention, contending that the Convention disapplied the revenue rule. As discussed in more detail below, the 2011 Convention sets out a procedure whereby a tax authority in one signatory state can request the tax authority of another signatory state for assistance in recovering tax due in the first signatory state. I afforded the parties an opportunity to make further submissions on the applicability of the 2011 Convention. In his submissions on the issue, the Liquidator attached a letter from the ATO to him dated 26 April 2024 in which the ATO indicated its intention to utilise this procedure and, subject to acceptance by the Irish Revenue, submit a revised proof of debt in the liquidation.

64. I sought an explanation from the Liquidator of how the ATO came to write to him at that time and in those terms, and in an affidavit sworn on 9 May 2024, the Liquidator explained that "*the ATO is far and away the most significant creditor of the Company*" and

that the Liquidator's "*office has been in contact with the ATO at various points during the liquidation in the ordinary way*". He avers that it would have been unusual not to have contacted the creditor "*most affected*" by the liquidation in this way. He further explains that since the commencement of this liquidation, the ATO has enquired about its progress and that following the recent hearing, his office provided an update to the ATO, and the ATO subsequently delivered the letter of 26 April 2024.

Discussion

65. There is no question that the revenue rule remains part of the common law in this jurisdiction. This is not seriously disputed by the Liquidator. *Buchanan v McVey* is binding Supreme Court authority in this regard, more recently confirmed in *Byrne v Conroy* and, as I have explained above, in *Cedarlease*.

66. It is also clear, as the Liquidator argues, that the rule can be disapplied by agreement between member states. As will be seen, the necessity to make specific provision for the enforcement of foreign revenue debts tends to reinforce rather than undermine the existence of the rule: had it, somehow, fallen into abeyance, there would be no need to legislate or enter agreements to disapply it.

67. The issues for the court, therefore, are first, should the Liquidator's application be characterised as an attempt to indirectly enforce the Company's Australian revenue debt? If so, it is *prima facie* unenforceable in this State, which gives rise to the second question. Is there any agreement or law which disapplies the revenue rule in the case of the ATO claim? To be more precise, the issue for the court on this application is whether those questions can be answered at this preliminary stage or whether a full hearing of the action is necessary.

i. Indirect enforcement of a foreign tax debt?

68. There is no doubt, in my view, that the Liquidator's application must be regarded as an attempt to indirectly enforce the Company's Australian tax debt. It is clear from the Liquidator's evidence that he has admitted the ATO claim as a debt in the liquidation and that the ATO is by far the largest creditor in the liquidation. The Liquidator accepts that there are sufficient funds in the liquidation to meet all other claims. Although the Liquidator

has avoided expressly acknowledging it, the only purpose that seeking to reverse the transaction the subject of these proceedings can serve is to enable the Liquidator to discharge the Australian revenue debt. That this is so is apparent from his engagement with the ATO, and indeed, the Liquidator doesn't suggest any other purpose. It seems that the Liquidator has not sought, as he was entitled to do, to contest the ATO claim, but rather has simply accepted the claim in full as a liability of the Company.

69. The Liquidator's application complains that the Company has fraudulently preferred Redefine Cyprus as a creditor before other creditors contrary to section 604, and/or that the Company's creditors have been defrauded, contrary to section 608. But for the ATO claim, there are *no* creditors who could have been prejudiced in the manner claimed and therefore no basis for the application other than to satisfy the ATO claim. Put otherwise, absent the ATO claim, there is no subtending basis for the Liquidator's application. That is so even if, as the Liquidator suggests, the scheme by which the Company and its related companies invested in the Australian securities involved some impropriety.

70. It is true that the transaction sought to be reversed involved the payment of a sum significantly in excess of the sum claimed by the ATO and that there would, if the transaction were reversed in full, be significant sums left in the Company after all creditors were paid. Any such sums would, inevitably, be returned to the only shareholder in the Company, *i.e.* Redefine Cyprus, the company against which the Liquidator seeks orders. Unsurprisingly, the Liquidator does not argue that that is the purpose of his application. Manifestly, therefore, the purpose is, indirectly, to secure funds to pay the ATO debt.

71. *Buchanan v McVey* was, itself, an example of an attempt to indirectly enforce a revenue debt in relation to a company in liquidation, and the Supreme Court attached significance to the fact that the revenue claim was the only claim in the liquidation (at p. 117):

> *"It is argued that while a company is in liquidation it is still a company and operates in Scotland by its liquidator. A foreign State it is said recognises the title given to a liquidator by the laws of his country. I agree that if the payment of a revenue claim was only incidental and had there been other claims to be met, it would be difficult for our Courts to refuse to lend assistance to bring assets of the Company under the control of the liquidator. But there is no question of that here. The position seems clearly to be as*

found by the trial Judge that these proceedings were started in Scotland with the purpose of collecting a tax— and that apart from costs and the expenses of the liquidator any moneys recovered will inevitably pass to the Revenue."

72. The underlying position here is almost identical. The ATO claim is not "incidental", there are no other claims to be met. The purpose of these proceedings is, as in *Buchanan*, the recovery of money for the purpose of passing it to a foreign revenue authority.

73. The Liquidator refers to the recent UK Supreme Court decision in *Solo Partners* cited above, and quotes Lord Lloyd-Jones discussing Dicey (at p. 892):

"However, the Rule does not prevent recognition of a foreign law of the type in question and where direct or indirect enforcement does not arise a foreign law of this type will be recognised if it is relevant to the issue and provided it is not contrary to public policy (paras 8-004, 8-011). The revenue rule is, furthermore, subject to exceptions where there exists a contrary agreement by treaty or convention and the editors note that substantial inroads have been made into the revenue rule by international agreement, for example international arrangements for mutual assistance in the collection of tax debts (paras 8-009, 8-012)."

74. In that case, the UK Supreme Court determined that the plaintiff, the Danish tax authority, was entitled to pursue a claim for repayment of refunds which had been given to the defendants in relation to withholding tax. The plaintiff's case was that the defendants were not entitled to those refunds, and that the monies should be repaid. The defendants sought to rely on the revenue rule. The proceedings were *not*, the UK Supreme Court determined, an attempt to indirectly enforce a revenue debt. The substance of the claim was to recover sums fraudulently paid to the defendants, not any taxes due from the defendants. As Lord Lloyd-Jones put it, the fact that no taxes were due from the defendants was "*a complete answer to the [defendants'] objection under the revenue rule*."

75. Although the decision in *Solo Partners* is helpful in understanding the parameters of the revenue rule, given the entirely different factual scenario in issue there, it is of no assistance to the Liquidator in seeking to argue that the revenue rule does not apply in this case.

76. It remains to be considered whether it is premature to determine at this stage that the claim should be regarded as an attempt to indirectly enforce the ATO debt. Could anything emerge on foot of further pleadings or discovery which could cast a different light on the question? Nothing has been suggested by the Liquidator and it is difficult to conceive of any factual matter which could possibly emerge which would alter the nature of the Liquidator's application. Critically, it is the Liquidator's case that it is only the ATO liability which renders the Company insolvent. Nor, it seems to me, is it a legal issue of any particular complexity more appropriate to be dealt with at the conclusion of a full hearing.

77. I am satisfied, therefore, that the Liquidator's application should be regarded, *prima facie*, as an application to which the revenue rule applies. The issue to be decided next is whether the rule has been disapplied in respect of this type of claim.

ii. Has the revenue rule been disapplied?

78. The Liquidator relies on the decision in *Cedarlease* and the provisions of Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, but it is somewhat unclear as to the precise basis for his so doing. Insofar as the headnote to *Cedarlease* refers to *Buchanan* and *Byrne v Conroy* as having been overruled, we have already seen that that is somewhat misleading. *Cedarlease* does, of course, provide an example of a circumstance in which the revenue rule is *disapplied*, that is, where the provisions of the Council Regulation apply, but that the revenue rule *can* be disapplied is not in dispute.

79. Of critical importance in *Cedarlease* was Article 39 of the Regulation quoted at paragraph 50 above, which provided that a tax authority of one member state could lodge a claim in a liquidation commenced in another member state. Article 39 thus provides for a legislative exception to the revenue rule in insolvency proceedings to which the Regulation applies. The fact that express provision was made for the entitlement of tax authorities to lodge claims tends to suggest that this was a regulatory acknowledgement of the rule which might otherwise have prevented such claims from being submitted. The Regulation was preceded by the Convention on Insolvency Proceedings of 23 November 1995, Article 39 of which was in identical terms to Article 39 of the Regulation. The European Council Report on the Convention, dated 3 May 1996, states the following about Article 39 (at p. 160):

> *265.Article 39 establishes a rule of substantive law, laying down the right of foreign creditors, i.e. of any creditor who has his habitual residence, domicile or registered office in another Contracting State, to lodge claims in writing in insolvency proceedings. This provision derogates, in the way specified below, from the application of national law, pursuant to Article 4(2)(h).*
> *To clear up any doubts, it is specified that the right of any foreign creditor to lodge claims includes the tax authorities and social security authorities of other Contracting States.*

80. Of greater significance for present purposes, however, is that the Regulation, obviously, has no application whatsoever to these proceedings in circumstances where no tax authority *of a member state* has submitted a claim in the liquidation.

81. It seems likely that the Liquidator simply refers to these matters as examples of what is required in order to disapply the revenue rule. As he fairly acknowledges in his submissions *"in the absence of an international agreement for the recognition or acknowledgement of the debt in question, the Court may be limited in considering a statutory application which substantively relies upon that debt."*

82. As noted above, he relies on two international agreements which *do* regulate the position between, *inter alia*, Ireland and Australia, the 1983 Agreement and the 2011 Convention. In my view, neither provides any basis for suggesting that there is in force any international instrument for the recognition of Australian tax liabilities in this jurisdiction.

83. In broad terms, the 1983 Agreement is an agreement principally designed to avoid double taxation, in other words, a person or company incurring tax liabilities in both Australia and Ireland in respect of the same transaction or activity. Its purpose is to assist in identifying to which state a person or company should be liable for income tax or capital gains tax in respect of any given transaction or activity. The Agreement provides, at Article 26, for a "mutual agreement procedure" whereby a person who claims that one of the contracting states is acting in a way which causes that person to be taxed other than in accordance with the agreement can present their case to the competent authority of the contracting state in which they are resident.

84. The Liquidator relies on Article 27:

> *(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement or of the domestic laws of the Contracting States concerning the taxes to which this Agreement applies insofar as the taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by the competent authority of a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this Agreement applies and shall be used only for such purposes.*

85. In particular, the Liquidator relies on the reference to "enforcement" in the foregoing provision and, in his written submissions, argues that there is therefore an international agreement that "*provides for the recognition and "*collection of, enforcement or prosecution in respect of*" taxes in Ireland and Australia*." With respect, there is simply no way in which the 1983 Agreement, or Article 27 thereof, could be interpreted in such a way. It makes no provision whatsoever for the enforcement of taxes, Australian or Irish, in either jurisdiction.

86. Article 27 of the Agreement simply provides for information sharing as between the competent authorities. The reference to "authorities concerned with the assessment or collection of, enforcement or prosecution in respect of…taxes" is for the purpose of identifying the parties with whom such information can be shared. The provision says nothing about the enforcement of one state's tax liabilities in the other, still less does it create a mechanism for such enforcement. There is nothing in the Agreement, or the amendments thereto made by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, signed by both countries on 7 June 2017, which has any bearing on the question of whether Australian tax liabilities can be enforced in an Irish court.

87. It may be, as the Liquidator suggests, that the CGT liabilities the subject of these proceedings are taxes encompassed by the 1983 Agreement. It may also be that the 1983

Agreement determines the state in which the Company incurs a tax liability. But, the 1983 Agreement has nothing whatsoever to do with the enforceability of a revenue liability incurred in Australia in an Irish court.

88. The other international agreement relied on by the Liquidator is the 2011 Convention. This Convention, promoted by the OECD, *does* provide mechanisms for the enforcement of tax liabilities arising in one signatory state in another signatory state. Article 11 is headed 'Recovery of Claims' and provides:

> *1 At the request of the applicant State, the requested State shall, subject to the provisions of Articles 14 and 15, take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims.*
> *2 The provision of paragraph 1 shall apply only to tax claims which form the subject of an instrument permitting their enforcement in the applicant State and, unless otherwise agreed between the Parties concerned, which are not contested.*
> *However, where the claim is against a person who is not a resident of the applicant State, paragraph 1 shall only apply, unless otherwise agreed between the Parties concerned, where the claim may no longer be contested.*

89. The detailed procedure for submitting claims to another state and for the enforcement of claims is set out at Article 12 to 23 of the Convention.

90. Since Ireland is a signatory to the Convention, it does appear to provide a basis for the Liquidator's contention that his claim is not, or might not be, defeated by the revenue rule. The respondents' response is two-fold. First, it points out that the Convention provides a mechanism for the enforcement of foreign tax liabilities in the State which has not been availed of. This is apparent from the ATO letter of 26 April 2024 which evinces an intention to submit a request to the Revenue Commissioners in accordance with the Convention.

91. The Liquidator responds that in light of the ATO's expressed intention, it would be "extraordinary" to strike out the Liquidator's claim at this juncture. I must confess that I would have had significant reservations about permitting the Liquidator to maintain his claims pursuant to sections 608 and 604 solely on the basis that a creditor might *in due course* submit a claim which was capable of being indirectly enforced in the liquidation. I

find it difficult to see any basis upon which the Liquidator could maintain his claim unless there was, in existence, an enforceable claim in the liquidation.

92. As it happens, that question does not need to be resolved because of the respondents' second answer to the Liquidator's reliance on the Convention. As the respondents point out, and as the Liquidator no doubt overlooked when seeking to invoke the Convention, Article 30 of the Convention permits signatories to reserve certain rights:

1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date, declare that it reserves the right:

a not to provide any form of assistance in relation to the taxes of other Parties in any of the categories listed in sub-paragraph b. of paragraph 1 of Article 2, provided that it has not included any domestic tax in that category under Annex A of the Convention;

b not to provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for taxes in one or more of the categories listed in paragraph 1 of Article 2;

c not to provide assistance in respect of any tax claim, which is in existence at the date of entry into force of the Convention in respect of that State or, where a reservation has previously been made under sub-paragraph a. or b. above, at the date of withdrawal of such a reservation in relation to taxes in the category in question;

d not to provide assistance in the service of documents for all taxes or only for taxes in one or more of the categories listed in paragraph 1 of Article 2;

e not to permit the service of documents through the post as provided for in paragraph 3 of Article 17.

93. Critically, Ireland *has* entered reservations in accordance with Article 30 of the Convention in the following terms:

Pursuant to Article 30, paragraph 1.a., of the Convention, Ireland will not provide any form of assistance in relation to the taxes of other Parties described in Article 2,

paragraph 1.b.i, ii or iv, of the Convention (taxes imposed by or on behalf of political subdivisions or local authorities and social security contributions).

Pursuant to Article 30, paragraph 1.b., of the Convention, Ireland will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes.

Pursuant to Article 30, paragraph 1.d., of the Convention, Ireland will not provide assistance in the service of documents for all taxes.

94. The respondents refer to the revised explanatory report on the Convention prepared by the OECD and, in particular, the paragraphs addressing the reservations:

281. The purpose of the Convention is to facilitate the provision of mutual administrative assistance in the field of taxes of any kind, including social security contributions, but excluding customs duties, for which a separate multilateral convention already exists. However, a State may not, for practical, constitutional or political reasons, be able at the time of signature to provide to other States the full assistance envisaged by the Convention. Some States, while able to provide information concerning income, profits, capital gains and net wealth taxes levied at central government level – a minimum requirement for acceding to the Convention – may not be able to do so in relation to such taxes imposed by subordinate levels of government or to other particular types of tax. Similarly, while able to provide assistance in the establishment of liability to tax, they may not be able to do so in the recovery of tax claims or service of documents in relation to all or any particular type of tax.
282. It would be unfortunate if this limited ability to provide assistance on the part of a State had the consequence that the State could not sign the Convention at all, and thus could neither benefit from it in any way nor provide any benefit to other States under it. Article 30 is designed to enable a State to sign the Convention with reservations about the type of tax to be covered and/or the type of assistance to be provided, so that it may limit its participation in the provision of mutual assistance under the Convention to certain taxes or certain forms of assistance. There are limits on what reservations can be made. Were States able to make whatever reservations they liked, without any restriction, this would detract from the multilateral nature of the Convention, as well

as from the principle of reciprocity. Paragraph 1 therefore, in conjunction with paragraph 2, sets out a system under which States are able to negotiate reservations within stated limits. This ensures the necessary minimum degree of uniformity of Parties' rights and obligations, facilitating implementation, interpretation and settlement of any disputes; and at the same time gives Parties the degree of flexibility which they need.

95. This court need not concern itself with why the State elected to enter the reservations that it did. It does appear, however, that in so doing, it was reasserting the applicability of the revenue rule: certainly, that is the effect of the second reservation which expresses in the clearest terms that the State will not provide assistance under the 2011 Convention in the recovery of any tax claim. Far from supporting the Liquidator's assertion that there is an international agreement in place which might disapply the revenue rule, Ireland's signing of the Convention subject to reservations serves to fatally undermine his claim. The fact that the ATO seems, belatedly, to have been operating under the same misapprehension as the Liquidator regarding its entitlement to seek assistance under the Convention does not alter the clear effect of the Irish reservation: the Convention does not disapply the revenue rule.

96. Although the respondents' application proceeded over a number of days and it has taken a little time to deal with the arguments raised in this judgment, the question of whether the Liquidator's application is bound to fail because it falls foul of the revenue rule is not of such complexity that it should only be determined on foot of a full hearing. It is, in substance, a legal question and in my view the law is clear. Of course, the legal question must be answered by reference to particular facts, but accepting all the facts as asserted by the Liquidator, his claim is bound to fail even if he were ultimately able to establish as a matter of fact that the payment to Redefine Cyprus was a fraudulent preference contrary to section 604, or a fraud on the creditors contrary to section 608 or that there was, as he asserts, impropriety. The type of complexity in issue in *Moylist* – where the precise intersection of the facts and the law remained in doubt – is simply not present here and, in truth, the situation in this case is closer to the "seventeen noughts are still nothing" category referred to by Clarke J, citing Denham J in *Bula v Tara Mines (No. 6)* [2000] 4 IR 412.

97. The Liquidator urges the court to dismiss the respondents' application due to the complexity of the matter, pointing, *inter alia*, to the length of time and effort involved in

hearing the strike out application, and the complexity and size of the underlying transaction. He asserts that the interests of justice entitle him to a full hearing of his claim. I am not satisfied that that is so. Where a court is asked to strike out a claim as being bound to fail, it is bound to try and determine whether that is so, applying the established principles. The interests of justice would not be served were a court simply to rely on some generalised assertion of complexity to avoid determining the issue, without identifying at least some basis for considering that the complexity means that it cannot be said that the claim is bound to fail. In this case, there are certain fixed points which are not subject to change in light of more detailed evidence. It is clear at this stage that the purpose of the Liquidator's application is to seek to satisfy, and therefore, enforce a foreign revenue debt and is thus subject to the revenue rule. It is equally clear that the revenue rule has not been disapplied by applicable international agreement. It is appropriate, therefore, to dismiss the claim *in limine* rather than require the parties to incur the significant costs of a full hearing for no practical or potential benefit. Though not determinative, it seems to me that this conclusion must apply with even greater force where, as here, the Liquidator is pursuing his application in his, no doubt, *bona fide* belief, that it is his duty to the Company's major creditor to do so. Where it can be determined, as here, that he is under no such duty and that the application is bound to fail, it is manifestly in the Liquidator and the liquidation's interest, that that decision be made sooner rather than later.

98. I should record that, as a last throw of the dice, counsel for the Liquidator argued for the first time when making supplementary oral submissions that section 620 of the 2014 Act, quoted above, somehow disapplied the revenue rule. Section 620 is merely concerned with the type of debts which may be admissible to proof in a liquidation. It does not purport to transform debts which were unenforceable into ones which become enforceable: such would clearly have the potential to do significant injustice to any creditor with an enforceable claim. The Liquidator's argument is, in effect, the same as that which was rejected as wholly illogical in *Government of India*, that a debt which is not enforceable against a company on the day prior to it entering liquidation becomes enforceable by virtue of the decision to wind it up. There is no basis for suggesting that section 620 has or was intended to have such a result, or that the Oireachtas has, by a sidewind, created an enormous statutory exception to the revenue rule without so much as referencing same.

99. In light of the foregoing, I conclude that the Liquidator's application is bound to fail because it seeks the indirect enforcement of a foreign revenue debt and should therefore be dismissed pursuant to the inherent jurisdiction of this court.

100. Strictly speaking, therefore, it is not necessary to consider the other grounds advanced by the respondents for seeking to strike out the Liquidator's claim. However, lest I am wrong in my conclusion on the application of the revenue rule and in deference to the detailed arguments which were made on the other issues, I propose addressing them briefly below.

Other Grounds

The payment does not fall within section 604

101. The respondents advance an entirely straightforward proposition that section 604 is only capable of applying to payments made by a company to a connected company in the two years prior to it being wound up. They refer to this as the maximum "look-back" period. There is no dispute but that the payment in respect of which the Liquidator seeks an order pursuant to section 604 was made to a connected company on 18 September 2015. The Company was not wound up until 24 January 2018. The transaction does not, therefore, fall within the maximum look-back period.

102. In truth, the Liquidator had no answer to this complaint. He did try to argue that the "act" for the purpose of section 604 which he is seeking to avoid might be regarded as including the Company challenging the ATO's preliminary findings, or, even more fancifully, the failure of the respondents to repay the sums paid to them once the ATO claim was made in 2018, but there is no substance to those arguments. It is impossible to see how either of those are "acts" to which section 604 could apply. The Company disputing the ATO preliminary findings is clearly not an "act" within the meaning of section 604. In any event, even if declared void, it would have no bearing on the payment made to Redefine Cyprus. At the time of the ATO claim in 2018, the respondents were not creditors of the Company and were under no obligation to repay any sums paid to them. In any event, such arguments fall wholly outside the Liquidator's claim which is made solely by reference to the 18 September 2015 payment. I accept that a claim should not be struck out if it could be saved by an amendment, such is clear from the authorities, but it would be improper to

permit a claim to be sustained only on the basis that it could be replaced by an entirely different claim.

103. In those circumstances, the claim pursuant to section 604 discloses no reasonable cause of action, as no transaction which is capable of being affected by section 604 of the 2014 Act has been identified. That claim is, therefore, bound to fail and should be dismissed pursuant to Order 19, Rule 28(1) of the Rules of the Superior Courts.

The claim under section 608 is statute-barred

104. The parties are agreed that section 11(1)(e) of the Statute of Limitations 1957, as amended ("**the Statute of Limitations**"), which fixes a limitation period for the recovery of sums due by virtue of any enactment, imposes a six-year time limit for bringing an action based on section 608. It is also common case that the proceedings were commenced more than six years after the payment was made, but less than six years after the Liquidator was appointed. The question, therefore, is whether time starts to run from the appointment of the Liquidator or from the date of payment. The respondents argue, by reference to the decision in *Southern Mineral Oil v Cooney (No. 2)* [1999] 1 IR 237, that time runs from the date of the payment. In that case, the High Court (Shanley J) was considering an application under section 297 of the Companies Act 1963, pursuant to which a director could be made personally liable for the debts of a company where it had carried on business with intent to defraud creditors. An equivalent provision is now contained in section 610 of the 2014 Act.

105. The proceedings had been commenced in the name of the companies in liquidation and the application before the court was to substitute the liquidator, the appropriate applicant under section 297, for the companies. In determining whether to make the order substituting the liquidator, the court considered whether a claim by the liquidator was statute-barred. The court concluded that the applicable time limit was that in section 11(e) of the Statute of Limitations. It further considered that the cause of action was founded upon the conduct of the director rather than the making of any declaration and therefore time ran from the date of the conduct complained of (at p. 242):

> *"While the proceedings brought pursuant to s. 297 of the Companies Act, 1963, are for a declaration that the respondents should be personally liable for the debts of the*

companies, they are nonetheless, in my opinion, "an action to recover any sum recoverable by virtue of any enactment" despite the fact that the court has a discretion as to whether or not to make a declaration and equally has a discretion as to what debts it will make the director liable for in the event of it making such a declaration. Thus, if I am correct in the view that the cause of action is not founded upon the declaration made pursuant to s. 297 of the Act of 1963 but rather upon the conduct which gives rise to the declaration in the first place, then the cause of action in the instant case accrued in 1988, prior to the winding up of each of these companies."

106. In circumstances where any claim under section 297 by the liquidator was statute-barred, the court refused to make the substitution order. In the course of his judgment, Shanley J cited the decision of the Court of Appeal of England and Wales in *Farmizer (Products) Limited v Gadd* [1997] 1 BCLC 589 with apparent approval. The Liquidator relies on *Farmizer* as supporting his contention that the cause of action accrued at the date of winding up. In *Farmizer*, the issue before the court was whether proceedings under the equivalent statutory provision in the UK were subject to a time limit *at all*. The Court of Appeal determined that they were subject to the equivalent limitation to that contained in section 11(e). It is upon that aspect of the Court of Appeal's judgment that Shanley J relied. There does not appear to have been any argument before the Court of Appeal that the cause of action accrued before the winding up and therefore that issue doesn't appear to have been considered by it.

107. I am satisfied that similar considerations apply to a claim under section 608 (and, if it did not contain its own limitation period, section 604) as applied in relation to section 297 of the 1990 Act, and that I ought, therefore, follow the decision of Shanley J in *Southern Mineral Oil (No. 2)*. To conclude that the time ran from the date of liquidation would be, in effect, to facilitate a "look-back" through the entire history of the company and allow the impugning of conduct irrespective of how long ago it had occurred. It is difficult to discern any rationale for applying a different basis for determining the date of accrual of a cause of action pursuant to section 11(e) than for any other cause of action under the Statute of Limitations. Thus, it seems obvious, any cause of action accrues on the date of the impugned conduct. The fact that some transactions may never be capable of being subject to scrutiny, as having occurred too long before the liquidation doesn't demand a different conclusion. Indeed, this is expressly provided for in section 604, which has a self-contained look-back

period of six months, or two years (in the case of a connected company). In effect, by operation of section 11(e), section 608 has a look-back period of six years. The transaction the subject matter of these proceedings falls outside that period.

108. The Liquidator raises a question regarding whether it is appropriate to determine that a claim is statute-barred in a preliminary or procedural application and notes the refusal of the High Court to do so in *Re CTO Greenclean Environmental Solutions Ltd* [2017] IEHC 246. That case involved an application to join a co-applicant in the proceedings, for similar reasons to those which prompted the application in *Southern Mineral Oil*, and the courts have always been reluctant to determine limitations issues in such motions. However, in *O'Connell v The Building and Allied Trades Union* [2012] IESC 36; [2012] 2 IR 371, the Supreme Court made clear that, though a court should be slow to determine limitations on such an application, it might be appropriate to do so where a claim was "clearly and manifestly statute-barred", and that (at p. 390):

> *"[A] court of first instance must always retain the discretion to dismiss an application to join co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process."*

109. In this case, it is clear, in light of *Southern Mineral Oil (No. 2)*, that the cause of action arose more than six years prior to the bringing of this application. It is, moreover, clear that the respondents will rely on the Statute. No issue of concealment could arise. In the circumstances, allowing an application which is clearly and manifestly statute-barred to proceed would be futile, and accordingly, the application should be dismissed in the exercise of this court's inherent jurisdiction.

110. The Liquidator argues that even if time did run from the date of the transaction in September 2015, the Company has admitted the debt and relies on section 56 of the Statute of Limitations which provides that where a person liable for a debt acknowledges the debt, it shall be deemed to have accrued on the date of acknowledgement. However, section 58 provides that an acknowledgement must be in writing and must be made to the person whose claim is being acknowledged.

111. On no account could the matters relied on by the Liquidator be considered an acknowledgement to the ATO of its claim, or to the Liquidator of his claim. The Liquidator identifies three matters which he identifies as acknowledgements of the debt. First, he refers to a statement in the Company's financial statements for the year ended 31 August 2015 to the following effect:

> *The Company's parent, Redefine International P.L.C has provided an undertaking to provide the necessary support to the Company to meet its liabilities as they fall due for a period of at least twelve months from the approval of these financial statements.*

112. Leaving aside that this was not a statement by either of the respondents, and was not made to either the ATO or the Liquidator, it couldn't, on any view, be regarded as an acknowledgement of *any* debt, still less an acknowledgement of the particular claims made, either by the ATO or the Liquidator. The statement is simply not capable of being regarded as an acknowledgement for the purpose of section 56 of the Statute of Limitations.

113. Second, he refers to the note to the Company's Directors' Statement of Affairs of 24 January 2018. The document exhibited is incomplete but Note 3 provides:

> *The Australian Tax Office has issued a tax assessment notice on the Company in the amount of AUS$5,606,223.54 incl [missing text]. The Company disputes this tax assessment, save for any proportion of this larger claim which includes the AUS$90,273.60 com [missing text] and in respect of which the ATO is admitted as a creitor [sic] per Note 4, item 3 below.*
> *The Company makes no comment as to whether this claim where admitted, would be a preferential claim in the liquidation.*

114. Note 4 refers to an ATO claim of GB£51,574.93.

115. As set out above, the basis and purpose of the Liquidator's application is the recovery of the ATO claim in excess of AUS$29 million which was raised in February 2018. On no analysis could the foregoing be regarded as an acknowledgement to the ATO, or the Liquidator, of that claim, which is expressly disputed.

116. Finally, the Liquidator refers to Note 34 to the 2021 Annual Report and Financial Statements of Brightbay, signed on 28 February 2022:

> *A former subsidiary of the Group has undergone a review by the Australian Tax Office in respect of the calculation of Capital Gains Tax arising from the disposal of securities formerly held in Cromwell Property Group during 2013, 2014, and 2015. Due to the subjective nature of the claim, it is not possible to reasonably estimate the exposure which could arise. The Directors continue to remain of the view, having sought advice from reputable tax agents and advisers that the respective filing positions were correct and therefore following the orderly wind down of activities, the Directors place the company in liquidation in January 2018. Due to the technical nature of the claim, the liquidators [sic] is taking longer than anticipated.*

117. A similar note is also contained at Note 34 of Brightbay's 2022 accounts.

118. Far from being an acknowledgement of the debt, this statement illustrates that the debt continues to be disputed.

119. As with the respondent's argument in relation to the revenue rule, there are fixed points – the date of the transaction, the date of the liquidation, and the date of the proceedings – which cannot change, irrespective of what evidence might emerge at a full hearing. In all the circumstances, it is clear that the Liquidator's claim pursuant to section 608 is bound to fail as being statute-barred by section 11(1)(e) of the Statute of Limitations and should be dismissed in the exercise of the court's inherent jurisdiction.

Section 608 does not apply to the preferential discharge of liabilities

120. The respondents advance two additional arguments, neither of which would, on their own, justify making orders dismissing the Liquidator's application.

121. The first additional argument is that section 608 does not apply to payments made to legitimate unsecured creditors even where the company is insolvent when the payment is made. In this regard, the respondents rely on the decision of the Court of Appeal (Costello J) in *Tucon Process Installations Ltd v Bank of Ireland* [2016] IECA 211. In that case, the

Court rejected the argument that a payment to one creditor by an insolvent company which had the effect of reducing the assets available to other creditors necessarily fell within the statutory predecessor to section 608, section 139 of the Companies Act 1990:

> *"The appellant's argument was that the transactions had the effect of reducing the assets available to the creditors of the company and therefore fell within the scope of s. 139 precisely because at the time of the transactions the company was insolvent (and indeed that the respondent was on notice of the intention to wind up the company). This is precisely the argument that Laffoy J. held was irrelevant to the application of s. 139. I accept that Laffoy J. was correct in her construction of s. 139 and therefore the argument of the appellant cannot be correct."*

122. The respondents point out that it is not disputed that, by the terms of the Facility Agreement, the Company was obliged to pay the monies it did to Redefine Cyprus and argue that, accordingly, it could not be a transaction to which section 608 applies. In my view, that is not a proposition which can be determined with sufficient certainty at this stage of the proceedings. It is true that *without more*, a lawful payment to a creditor does not come within section 608. However, having regard to the allegations of impropriety made by the Liquidator, it would, in my view, have been premature to conclude that section 608 couldn't apply to the transaction at issue here. I would not, therefore, have acceded to the respondents' application on this ground.

No claim against Brightbay

123. Nor would I have dismissed the claim against Brightbay, on the basis that it was not a party to the transactions. It seems to me that section 608, in particular, would allow an order to be made against a company which had the benefit of a transaction even if not a party to it. The possibility that Brightbay had the benefit of the transaction here, or that it was, in effect, in control of its subsidiaries cannot be ruled out.

124. Section 608(2) provides that the court may order any person who has control of property the subject matter of a section 608 application to deliver that property or pay a sum to the Liquidator. It is apparent, therefore, that an order under section 608 could be made against

Brightbay. Moreover, there is evidence, noted above, that Brightbay has "effective control" over the company which *was* a party to the transaction, Redefine Cyprus.

125. I should note that the Liquidator does seem to imply that Brightbay was controlling the Company prior to its liquidation, but his basis for so doing is tenuous at best. In his second affidavit in response to the motion, the Liquidator avers that his "investigations reveal" that the Company directors at the time of the payment to Redefine Cyprus were unaware of the payment. Those directors had been appointed on 1 September 2015. The Liquidator's assertion appears to be based on the contents of a letter from A & L Goodbody Solicitors (ALG), on behalf of those directors, to Mr Donald Grant of Brightbay dated 11 August 2017. Mr Grant was the sole director of the Company when it resolved to be wound up.

126. There is, in fact, no suggestion in the ALG letter that the directors were unaware of the payment by the Company to Redefine Cyprus. Rather, the complaint made in the letter is that the directors were not informed until June 2017 about the review by the ATO. Oddly, the ALG letter making this complaint refers to a letter having been received by the directors in May 2017 from Minter Ellison. As explained by Mr Grant in his replying letter, the directors signed an authority in May 2017 for Minter Ellison to act in relation to the matter. The 26 May 2017 letter was an objection letter to the ATO prepared by Minter Ellison.

127. In any event, had the other obstacles to the Liquidator's claim not been present, I do not think it could have been ruled out at this stage that orders might be made against Brightbay and I would not therefore have dismissed the Liquidator's application against the Brightbay as being bound to fail.

Summary of Conclusions

128. The respondents seek to have the Liquidator's application dismissed on a variety of grounds. In respect of each of the grounds advanced, I have concluded as follows:

1. It cannot be said at this stage that the Liquidator's claim under section 608 is bound to fail on the grounds that section 608 does not apply to the preferential

discharge of contractual liabilities. Accordingly, I refuse the respondents' application on this ground;

2. If orders could otherwise be made pursuant to section 604 and or section 608, it cannot be said at this stage that no order could possibly be made against the first respondent simply on the basis that it was not a party to the impugned transaction. I would, therefore, refuse the respondents' application on this ground;
3. It is clear, however, that the Liquidator's application is an application to indirectly enforce a foreign revenue debt. It is well settled that the courts will not facilitate such a claim. Absent any international agreement or law displacing the common law rule prohibiting such claims, the Liquidator's claim is bound to fail. I propose, therefore, making an order dismissing the Liquidator's application in the exercise of this court's inherent jurisdiction;
4. It is also clear that the Liquidator's does not disclose any transaction which is capable of being subject to an order pursuant to section 604 of the Companies Act 2014, *i.e.* any transaction which occurred in the two year period prior to the Company entering liquidation. In the circumstances, that aspect of the Liquidator's application discloses no cause of action and should be dismissed pursuant to Order 19, rule 28 of the Rules of the Superior Courts;
5. Finally, it is clear that the claim pursuant to section 608 is statute-barred. There has been no subsequent acknowledgement of the claim and no issue of fraudulent concealment arises. In the circumstances, that aspect of the Liquidator's claim should also be dismissed in the exercise of the court's inherent jurisdiction.

129. I will list the matter at 10.30 am on 6 June 2024 for the purpose of making final orders.