THE COURT OF APPEAL
CIVIL

High Court Record No. 2019/88COS
Court of Appeal Record No. 2021/158
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UNAPPROVED
NO REDACTION NEEDED

Barniville P.
Murray J.
Haughton J.

IN THE MATTER OF BEGGASA LIMITED (IN RECEIVERSHIP)
AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

THE REVENUE COMMISSIONERS

APPLICANTS/APPELLANTS

– AND –

AENGUS BURNS AND PAUL MCCANN
(AS RECEIVERS AND MANAGERS OVER THE PROPERTY AND ASSETS OF BEGGASA LIMITED (IN RECEIVERSHIP))

RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 3 of February 2023

The issue

1. The respondents to this appeal ('the Receivers') were appointed receivers and managers to the Shannon Oaks Hotel and Country Club by Zurich Bank ('the Bank') on 9 September 2011. The appointment was made pursuant to two debentures of 18 July 2007 – a fixed and floating charge debenture between Beggasa Ltd ('the Company') and the Bank, and a fixed charge mortgage between a Mr. Flood and the Bank. The Receivers required funds to conduct the receivership and continue the trade of the company and in February 2012 they borrowed a sum of €293,000 from the Bank.

2. The issue in this appeal (which arises from an application for directions brought pursuant to *inter alia* s. 438 of the Companies Act 2014) *('CA14')* is whether the Receivers could lawfully repay some of that advance to the Bank out of floating charge realisations, or whether the Revenue Commissioners ('Revenue') enjoy priority in respect of some of those monies as a preferential creditor of the Company. The application brings sharply into focus the relationship between the costs and expenses incurred by a receiver appointed on foot of a floating charge who proceeds to carry on the business of the company, and the claims of preferential creditors whose recovery may be adversely impacted by the decision to continue the company's trade.

3. Revenue does not dispute that the cost of realising floating charge assets must be paid in priority to the preferential claims. Revenue's difficulty is with being visited with the costs and expenses of a trading receivership. The basic point it makes is that payment of monies to the Bank in respect of a loan to fund the costs and expenses of a trading receivership in priority to preferential claims represented a breach of the statutory

priorities governing the application of the proceeds of floating charge realisations contained in s. 440 of CA14.

4. The High Court ([2021] IEHC 110) found that there was no breach of this statutory obligation. It reached that conclusion on the basis that there was an antecedent priority attaching to the costs and expenses of a receivership derived either from the terms of the debenture entered into between the company and the Bank, or alternatively from a common law principle said to be expressed in the case of *Buchler v. Talbot* [2004] 2 AC 298. The High Court concluded that the loan was an expense of the receivership and that, on either one of these two legal bases, the Receivers were entitled to repay it.

5. Revenue says that this was wrong: a receiver appointed under a floating charge (Revenue says) is required by the provisions of s. 440 to ring fence liquid assets as they are obtained so as to ensure that the preferential creditor's claims can be satisfied. It is not entitled (as it is said the Receivers did in this case) to continue to trade the business of the company and to thereby run down the amounts due to the preferential creditor.

6. The Receivers, obviously, say that the High Court judge was correct. They contend that the preferential claims of Revenue are necessarily subordinated to the costs and expenses of the receivership and that given that the monies paid to the Bank in discharge of the loan comprised such costs and expenses, Revenue have no basis for objecting to the repayment of that loan.

The background

7. The resolution of the issue is complicated by the context and, in particular, by the fact (a) that part of the security was a fixed rather than a floating charge and (b) that there

were two borrowers, only one of which was a body corporate. In summary, Mr. Flood was the developer of the Shannon Oaks Hotel and Country Club (comprising a hotel and 39 holiday cottages in Portumna Co. Galway). He leased this premises to the Company, which operated the property. Separate loans were advanced by the Bank to the Company and to Mr. Flood giving rise to the distinct securities to which I have referred. The effect of those debentures was that the Company's leasehold interest in the hotel and apartments was charged in favour of the Bank by fixed charge, Mr. Flood's reversion also being charged in favour of the Bank.

8. By September 2011 each was in default, the Company and Mr. Flood, having failed to discharge then outstanding sums of (respectively) €1,603,502.59 and €22,165,873.72. On 5 September 2011 the Bank demanded repayment of these sums. Two days after the demands, the hotel building (but not the holiday apartments) was extensively damaged in a fire, and two days after that again the Receivers were appointed on foot of the powers conferred by each debenture. The evidence is that at the time the receivership commenced the Receivers had cash on hand of €70,956.46. Revenue's preferential claim amounts to €87,317.60.

9. The loan was advanced by the Bank to the Receivers on 28 February 2012. The purpose of the advance was stated to be to fund the two receiverships, €90,000 being advanced for the purposes of the ongoing maintenance of the apartments and €202,950 to finance an arbitration claim against the hotel's insurer arising from the fire. The evidence was that this loan was essential to the conduct of the receivership, and that it was ultimately applied to insurance premia, management fees, repairs, utility costs, caretaker wages, security costs, local property taxes, non-principal private residence and household charges, Receivers' fees, tax advice fees and various other receivership costs (in the

course of oral submissions counsel for the respondent advised the Court that the arbitration claim did not proceed, but that some monies were paid directly to the Bank as a party named on the relevant insurance policy). The Receivers have averred that these payments were essential to the conduct of the receivership.

10. The advance was secured on the existing first legal mortgage and charge dated 18 July 2008 from Mr. Flood over his interest in the hotel and apartments. The debenture issued by the Company was not stated to form part of the security for the loan. The Receiver's evidence is that the drawdown facility was provided on the basis that the funds would be repaid out of the assets realisation achieved after all receivership costs were paid.

11. At paragraph 10 of his judgment, Keane J. in the High Court summarised what then happened. On 1 December 2015, Revenue wrote to the Receivers, outlining the Company's outstanding PAYE/PRSI and VAT obligations and inquiring about the dividend that would be available to the Company's preferential creditors. The Receivers replied on 11 December 2015 stating that, according to their records, the sum due to preferential creditors was €100,344, comprising the Company's outstanding VAT and PAYE/PRSI liabilities, thus implying that Revenue was the Company's only preferential creditor. The Receivers' stated in their letter that the current draft estimated outcome statement showed an 80% dividend available to preferential creditors. On 15 December 2015, Revenue wrote to accept the receivers' proposal of the same date. Revenue confirmed that the preferential payment due to them from the Company was then €87,317.60, comprising PAYE/PRSI of €53,117.60 and VAT of €34,200.

12. It seems clear that from their appointment until 2016 the Receivers continued to carry on business renting the holiday apartments. On 13 June 2018 the Receivers wrote to

Revenue, stating that there was no dividend available to any class of creditor in the receivership. The statement in the letter I have just quoted to the effect that a dividend *would* be available to Revenue in an amount of approximately €87,000 was addressed in the following terms:

> *'this confirmation was issued in error and was not the correct position in the receivership'.*

13. Enclosed with that letter were the receivership's receipts and payments accounts prepared on a fixed and floating charge basis. That document was a combined statement of the assets charged by both the Company and Mr. Flood. The income and expenditure in each receivership was intermingled, but allocated as between the fixed and floating charges in the ratio of 72:28. The Receiver's drawdown of the bank loan of €234,589.33 appeared as a receipt in the fixed charge asset column, the company's cash in hand of €70,956.46 appeared as a receipt in the floating charge asset column and the partial payment of the bank loan in the amount of €208,570.00 appeared as a payment of €150,664.33 in the fixed charge asset column and one of €57,905.67 in the floating charge asset column.

14. Attention was drawn in the letter to the fact that the property was sold in 2016. The letter continued:

> *'You will see in the enclosed receipts and payments account that the fixed charge holder was required to provide a loan facility in the receivership in the sum of €234,589 in order to fund and discharge receivership costs as they arose.*

> *Following the sale of the Property the fixed charge holder received a payment of €208,570 in relation to the loan provided to the receivership.'*

15. As I have noted, the letter made it clear that monies were applied to various costs of the receivership, with income and expenditure being divided 28:72 as between the floating and fixed charges respectively. As Revenue observed in their replying letter of 18 August 2018, the sum of €208,570.00 repaid to the Bank was allocated as between these charges in the amount of €57,905.67 in respect of the floating charge, and €150,664.33 in respect of the fixed charge. In that letter Revenue recorded its position thus:

> '*It is Revenue's contention that the Preferential Creditors should have been paid before the loan repayment and, as such, the €57,950.67 should have been paid out to the creditors. Please advise why this did not occur having regard to the aforementioned provisions of [s. 440 of the 2014 Act].'*

16. The reply issued by the Receivers was to the effect that the Bank had to provide a drawdown facility to fund the day-to-day costs in the receivership, that that facility was provided on the basis that the funds provided would be repaid out of the assets realisation achieved after all receivership costs were paid and that the secured charge holder received only a partial repayment of the drawdown loan facility provided. Following further inconclusive correspondence in which the parties restated their positions, the application for directions giving rise to this appeal issued.

The High Court judgment

17. Section 440(1) CA14 provides as follows:

'Where either –

(a) a receiver of the property of a company is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or

(b) possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge,

then if the company is not at the time in the course of being wound up, ***the debts which in every winding up are, under the provisions of Part 11 relating to preferential payments, to be paid in priority to all other debts****, shall be paid out of any assets coming into the hands of the receiver or other person taking possession as mentioned above* ***in priority to any claim for principal or interest in respect of the debentures****.'*

(Emphasis added).

18. Revenue's basic proposition before the High Court was that this provision imposed a duty on the Receivers to pay their claims from available assets on appointment, or alternatively to preserve or 'ring fence' assets to that end. The Receivers, it was contended, could not run those assets down by carrying on the business of the Company, and therefore costs and expenses they incurred in so doing could not obtain priority over the preferential claims.

19. The Receivers had relied heavily in the High Court on the provisions of s. 617 CA14 (which appears in Part 11 of the Act) contending that the effect of the provision was to subordinate the claims of Revenue to the Receivers' costs and expenses, which they said included the monies that had been borrowed from the Bank. Rejecting this argument, Keane J. held that s. 617 referred to the antecedent priority of the costs of (rather than the debts in) the winding up. The provisions relevant to the preferential payment of debts were those of s. 621 as supplemented by s. 622 CA14. However, Keane J. found in favour of the Receivers on a different basis. It was his view (as I have previously noted) that the repayments to the Bank enjoyed priority either as a result of the binding terms of the debenture, or from the common law as reflected in the decision in *Buchler v. Talbot*.

20. In reaching that conclusion, the trial judge attached particular significance to two provisions of the debenture – clauses 7.4 and 7.5. These, he said, made clear that any receivership borrowings are distinct from, and to be repaid in priority to, the Company borrowings secured by the debenture.

21. The first of these provisions reads as follows:

> *'for the purpose of exercising any of the powers, authorities and discretions conferred on [them] by or pursuant to this Deed and/or of defraying any costs, charges, losses, liabilities or expenses (including [their] remuneration) incurred by or due to [them] in the exercise thereof and/or for any other purpose, to make advances or to borrow or raise money either unsecured or on the security of the Secured Assets (either in priority to, pari passu with or subsequent to the security hereby created or otherwise) at such rate or rates of*

interest and generally on such terms and conditions as [they] may think fit which borrowing shall be a receivership expense'

22. Clause 7.5 states:

'Any monies received by the bank or by any receiver shall, after the security hereby constituted has become enforceable but subject to the payment of any claims having priority to this security, be applied for the following purposes and unless otherwise determined by the bank in the following order or priority (but without prejudice to the right of the bank to recover any shortfall):-

7.5.1 in payment of all costs charges and expenses of and incidental to the appointment of any receiver and the exercise of all or any of the powers aforesaid and of all outgoings paid by and receiver and liabilities incurred by the receiver in the exercise of his powers including, but without limitation, any borrowings incurred by the receiver; and

7.5.2 in payment of remuneration to any receiver at such rate as may be agreed between him and the bank (or failing such agreement at such rate as is fixed by the bank) without being limited to the maximum rate specified in [s. 24(6) of the Conveyancing Act 1881]; and

7.5.3 in or towards payment and discharge of the secured obligations; and

7.5.4 any surplus shall be paid to the [company] or other person entitled thereto.'

23. Having regard to these provisions, the High Court judge reasoned as follows. First, he said, the fundamental difficulty with Revenue's argument was that in asserting that the

receivership loans fell within the broad and general definition of '*secured liabilities'* contained in the debenture, Revenue ignored the specific clause in the debenture that deems receivership borrowings to be a receivership expense and directs the repayment of receivership expenses – including receivership borrowings – in priority to the discharge of the secured obligations.

24. Second, while the relevant clause of the debenture makes all payments by the Receivers subject to the payment of any claims having priority to that security, that did not avail Revenue, as the priority accorded to preferential payments under s. 440 was priority over '*any claim for principal or interest'* under the debenture concerned, and not priority over the security more generally.

25. Third, Keane J. referred to the decision in *Buchler v. Talbot*, in which the House of Lords considered the effect of section 40 of the Insolvency Act in that jurisdiction, a provision which is similar in terms to s. 440. He noted, in particular, the judgment of Lord Millett, with which Lord Hoffman concurred, in which the following summary of the correct order of priorities under that section was identified (at para. 88):

> *'Assets subject to a floating charge: (section 40 of the 1986 Act): (i) the costs of preserving and realising the assets; (ii) the receiver's remuneration and the proper costs and expenses of the receivership; (iii) the debts which are preferential in the receivership; (iv) the principal and interest secured by the floating charge; (v) the company'* .

26. Keane J. explained the conclusion he felt followed from these considerations, as follows (at para. 59):

> *Accordingly, whether the issue is approached as one of the proper construction of the terms of the debenture or one of the correct interpretation of the words 'any claim for interest or principal in respect of the debentures' in s 440(1) of the 2014 Act, I conclude that, although the receivers undoubtedly act as agents for the company both under the debenture and at common law, receivership borrowings (as a receivership cost or expense) are distinct from company borrowings secured by the debenture and are not affected by the priority given to preferential payments under that provision.'*

27. Keane J. proceeded to observe that two decisions on which Revenue had placed particular reliance – *Re Eisc Teoranta* [1991] ILRM 760, and *Re Manning Furniture Ltd. (In receivership)* [1995] WJSC-HC 5130, [1996] 1 ILRM 13 – were authority for no more than that the clear statutory duty to pay preferential debts in priority to any claim for principal or interest in respect of the debenture arises at the time of the receiver's appointment. That proposition, Keane J. said, was not in issue in this case. The question here is not whether the receivers were from the date of their appointment statutorily obliged to pay preferential debts in priority to the repayment of interest or principal in respect of the debenture: clearly, he said, they were. The question instead is whether the Bank's loan to the Receivers was part of its claim for principal or interest in respect of the debenture, or was a separate receivership expense.

28. As I have earlier stated, Keane J. did not believe that s. 617 advanced the position of the Receivers, and he did not believe that s. 440 afforded a basis for Revenue's claim. He explained these conclusions as follows (at paras. 62-64):

> *'For completeness, I should add that I am not persuaded by the receivers' argument that the 'costs, charges and expenses properly incurred in the winding up of a company' identified in s. 617 in Part 11 of the 2014 fall within the description in s. 440(1) of 'debts, which in every winding up are, under the provisions of Part 11 relating to preferential payments, to be paid in priority to all other debts'. As I have already indicated, I believe that the priority accorded to the proper costs and expenses of a receivership over all other claims against the assets covered by it derives from either the law of contract (that is, the binding terms of the debenture) or the common law on receivers (as described in Buchler v Talbot) and not from the application to a receivership by s. 440(1) of the statutory priority accorded to the costs of a winding-up under s. 617. It seems to me that the provisions of Part 11 of the 2014 Act relating to the preferential payment of debts are those of s. 621, supplemented by s. 622, whereas s. 617 refers to the antecedent priority of the costs of – rather than 'debts in' - a winding-up.*
>
> *It is, thus, not open to the receivers to seek to rely on sub-ss. (3) and (4) of s. 617, which confer upon a person who has provided funds to discharge winding-up expenses the same priority in obtaining reimbursement as that accorded to the repayment of those costs and expenses under sub-ss. (1) and (2). As Revenue points out, it would not have been open to the receivers to do so in any event,*

as those provisions were introduced for the first time by the 2014 Act and came into force on 1 June 2015.

I base my conclusion on the proposition that, in granting priority in a floating charge receivership to certain preferential payments over any claim for principal or interest in respect of the debenture that created that charge, s. 440(1) does not displace the antecedent priority accorded to the repayment of receivership costs and expenses both by the terms of the debenture at issue and under the common law. As Murphy J concluded in United Bars Ltd (In receivership) v Revenue Commissioners [1991] 1 IR 396 on the equivalent provision in the 1963 Act (at 401):

> *"the purpose of s. 98 should be to equate the rights of preferential creditors in a receivership with those in a liquidation, not to improve on those rights".'*

29. Keane J. concluded on this aspect of the application (there were others which are not being pursued in this appeal), as follows (at para. 65):

'The funds in question were borrowed in the receivership and were applied to defray various identified costs and expenses associated with it. That loan was secured on the assets charged under the Flood debenture and not those charged under the company debenture. Further, the company debenture distinguishes between the loan obligations it secures and whatever borrowings there may in any receivership for which it provides. In those circumstances, I conclude that it would not be correct to characterise that receivership loan as 'a claim for

principal or interest in respect of the debenture' and, thus, one subject to the priority of preferential payments under s. 440(1) of the 2014 Act.'

Section 440

30. I have quoted the terms of s. 440 earlier. The provision is operative only where a debenture has been secured by a floating charge (following the decision in *Re JD Brian Ltd.* [2015] IESC 62, [2015] 2 ILRM 441 s. 440(1) was amended to replace the reference to '*floating charge'* to '*any charge created as a floating charge by the company'*, thereby avoiding the argument that a charge which had crystallised upon appointment was outside the provision). It is triggered when a receiver is appointed pursuant to such a debenture, or when possession is taken by the debenture holders of property subject to the charge. In that event – and provided the company is not at the time in the course of being wound up – preferential claims '*shall be'* paid out of any assets coming to the hands of the receiver *'in priority to any claim for principal or interest in respect of the debentures.'*

31. While some of the language has been altered through its various iterations, the basic thrust of the section has changed little since its original incarnation in s. 3 of the Preferential Payments in Bankruptcy (Amendment Act) 1897 ('the 1897 Act'). That, in turn, was enacted in a context in which the Companies Act 1883 had made provision for the priority in a winding up of certain preferential claims. Under s. 6 of that Act, and subject to retaining the amount needed for the costs of administration and otherwise, a liquidator was required to discharge those preferential debts '*forthwith'* (this remains the case in liquidations under s. 621(8) CA14). However, these provisions did not affect the proprietary rights of debenture holders; the Companies Acts gave

some protection to preferential claims *in a winding up* but otherwise, preferential creditors remained unsecured creditors and they had no claim to charged assets until the monies secured by the charges had been paid.

32. In understanding the cases that followed, it is important to note that s. 2 of the 1897 Act addressed the position of a company being wound up, stating that preferential debts shall have priority over the claims of holders of debentures or debenture stock under any floating charge created by a company, while s. 3 sought to make similar provision in relation to a company in receivership or where the debenture holders took possession of the charged assets. Neither purported to affect the position of fixed charge holders. Section 3 was replicated in s. 107 of the Companies (Consolidation) Act 1908 ('the 1908 Act'), and that provision continued to govern the relationship between the claims of preferential creditors and those of floating charge debenture holders in this jurisdiction until the enactment of the Companies Act 1963 (*'CA63'*).

33. Both s. 3 of the 1897 Act and s. 107 of the 1908 Act presented one feature which does not appear in s. 440 insofar as each stated that the preferential debts would be paid *'forthwith'* out of any assets coming to the hands of the receiver, while in both CA63 and CA14 this word was omitted. It appears that following the enactment of the 1897 Act, the judges of the Chancery Division in England directed that in all cases where a receiver was appointed in a debenture holder's action, a direction should be inserted in the order that the receiver '*forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture holder'* under the Act (see *In re Debenture-holder's Actions* [1900] WN 58).

Cases interpreting the UK provisions

34. Section 107 fell for consideration by Astbury J. in *Woods v. Winskill* [1913] 2 Ch. 303. The defendant was appointed as receiver and manager of a company's assets and business pursuant to certain debentures. He took possession of the assets following notification of a workman's compensation claim (which enjoyed preferential status). He continued the business of the company and applied its assets in carrying on that trade (as it is put in the report) '*in lieu of providing for the plaintiff's claim'*. The company was eventually wound up without the preferential claim being discharged, the accounts showing that the business had been carried on at a loss exceeding the amount or value of the assets at the date of appointment. There were no profits, and no payment was made to the debenture holder. Book debts were applied to make payments to ordinary creditors in the course of the trade, and to the managing director of the company (who had advanced monies to the company to enable the business to be carried on). The plaintiff (the widow of the deceased workman) claimed that the defendant had breached his statutory duty under s. 107 by applying the company's assets in payment of ordinary creditors without providing for her preferential claim. It is important to note that the action was one for breach of statutory duty, that the breach arose because the receiver continued to trade and pay ordinary creditors without discharging the claim, and that neither the claim nor the judgment raised any issue around the priority of the receiver's costs.

35. The plaintiff contended that the use of the term '*paid forthwith'* in s. 107 meant that immediate payment of the preferential claims was required, and that the provision thus did more than merely give the debts priority over the debentures. The receiver argued that the section could not have been intended to prevent a receiver and manager from

paying current liabilities necessarily incurred in carrying on the business, stressing that immediate payment of the preferential claim would have exhausted the assets and stopped the business altogether and that the defendant had paid nothing to the debenture holders. Astbury J., in a tersely reasoned decision, accepted the position of the plaintiff rejecting the contention (as he summarised it) that the receiver's only obligation '*is to avoid applying such assets, after notice, in actual payment of principal or interest to debenture-holders before satisfying thereout the preferential claim'* (at p. 311). The correct position, and the proposition Astbury J. approved was this:

> '*A receiver and manager with notice of a preferential claim is liable for damages in tort for exhausting the then assets of the company in making payments to ordinary creditors without first applying the same or a sufficient part thereof in satisfying such preferential claim'*.

36. The effect of that decision was considered by Tomlin J. in *In re Glyncorrwg Colliery Company, Railway Debenture and General Trust Company Ltd. v. The Company* [1926] Ch. 951. There, a receiver was appointed by court order in an action brought by debenture holders, the receiver then carrying on the business of the company for a period of three months, until that business was closed down. The assets were insufficient to meet the plaintiff's legal costs of bringing the application, the costs and remuneration of the trustees under the debenture trust deed, the receiver's remuneration and the preferential creditors. The debenture holders took out a summons to have it determined in which priority (if any) a variety of costs and expenses were entitled to priority over the payments to preferential creditors. The case, it should be stressed, came before the Court on a summons to determine priorities and did not involve any claim for breach of duty against the receivers (while counsel for the preferential creditor

did argue that the receivers ought to have paid the preferential debts before carrying on the business of the company, the report does not contain any information as to whether this would have made any difference to those creditors and there was no claim for damages before the Court). Tomlin J. viewed that issue as presenting a question of interpretation of s. 107 of the 1908 Act, and having considered the terms of that provision, determined that the assets were applicable in the order of (i) costs of realisation, (ii) costs and remuneration of the receiver, (iii) costs, charges and expenses of the trustees under the debenture trust deeds, including their remuneration, (iv) the plaintiff's legal costs and - only then - (v) preferential creditors and (vi) debenture holders.

37. Three features of that order of priorities should be noted. First, the entitlement to the costs of the trustee arose solely by reason of the provisions of the debenture, and it has been doubted whether Tomlin J. was correct in assuming that that trust deed could override the rights of the preferential creditors in that regard (see *Kerr and Hunter on Receivers and Administrators* 20th Ed. 2017 at para. 7-72 fn. 279). Second, the costs of the debenture holders' legal action were a peculiar feature of that particular case and arose from the fact that the receiver had been appointed by court order on foot of legal action by those creditors. Some of those costs, by definition, would have been incurred before the receiver was appointed. Third, the order of priorities was that applicable on the authorities to a receiver appointed by court order following a debenture holder's action (the judge relied on a statement in the *Annual Practice, 1926*). However, certainly as I read the case, his reasoning was based upon the implication into s. 107 of a set of priorities which aligned the provision with the priorities applicable in a winding-up. It was his interpretation of s. 107 – not the fact that this was a debenture-holder's

action – that determined which assets could be appropriated before the entitlement of the preferential creditors took hold.

38. Thus, Tomlin J. was heavily influenced in this conclusion by the fact that s. 107 did not apply where a company was being wound up, that whether or not a company was being wound up would often be a '*fortuitous circumstance'*, and that he should approach the provision on the basis that the system of priorities should be the same as would be the case if there was a liquidation (the latter being governed by s. 209 of the 1908 Act). Thus understood, he said, s. 107 meant that '*out of the assets available for the payments of principal and interest of the debenture holders, the claims of preferential creditors are to be paid forthwith irrespective of the claims of debenture holders'* (at p. 959). He continued (at p. 959-960):

> '*On the true construction of s. 107 the only direction to the receiver or person taking possession is that he shall at the earliest possible moment pay out of the assets which would otherwise go to the debenture holders in discharge of their principal and interest the claims of preferential creditors'*.

39. *Woods v. Winskill* was distinguished on the basis that there, the debenture holders had appointed the receivers themselves, and that the receiver was liable for having applied the assets in satisfaction of creditors whose claims had arisen in the carrying out of the business and, Tomlin J. said, he had on any version misapplied the assets. While it was suggested in the course of submissions by counsel for Revenue that there was tension between this decision and the reasoning in *Woods v. Winskill,* I do not think that is so. In the latter case, it was held that the receiver acted in breach of the statute if he did not pay to the preferential creditors of monies coming into his hands that could be used to

satisfy those claims. But, as I have noted, the question of the receiver's costs was not in issue in that case. In *In re Glyncorrwg Colliery Company*, Tomlin J. held that the extent of the duty was to '*pay out of the assets which would otherwise go to the debenture holders in discharge of their principal and interest the claims of preferential holders'* (in other words, to pay only the monies coming into their hands *less* the deductible expenses enjoying priority over them).

40. It is, perhaps, for that reason that Tomlin J. spoke of the obligation to pay the preferential creditors in more qualified terms than had Astbury J.: Tomlin J. rephrased the obligation as the more flexible duty to pay those monies '*at the earliest possible moment'* (at p. 959). It may be because of this that soon thereafter section 78 of the Companies Act 1929 removed the word '*forthwith*', that provision then being carried over to s. 94 of the United Kingdom Companies Act 1948 Act, which is similar to s. 98 CA63. In fact, it appears that following the decision the practice changed, so that orders for appointment of receivers merely required that they inquire as to whether there were preferential debts, directing that where there were clearly assets available for payment of those preferential debts, application should be made for a direction to pay them (see *Kerr and Hunter on Receivers and Administrators* 20th Ed. 2017 at para. 5-47).

41. In *Westminster Corporation v. Haste* [1950] Ch. 442, the claim was by a preferential creditor alleging that a receiver had breached a statutory duty to it by paying creditors who were not entitled to preferential payment thereby exhausting the assets of the company. A question arose as to whether the action against the receiver for breach of duty brought by the local authority in 1948 was statute barred, the receiver having been appointed in 1940 and the relevant limitation period being the six years generally applicable to claims in tort. The Court held that the action was not barred, as there was

a time in 1945 when the receiver had sufficient money to satisfy the demand and had therefore committed a tort within the statutory period.

42. Danckwerts J. appears not to have been referred to the decision in *In re Glyncorrwg Colliery Company*, viewing *Woods v. Winskill* as the only authority addressing the provision. Deciding that the omission of the word '*forthwith'* did not affect the proper construction of the provision, he interpreted Astbury J. as deciding that the section (at p. 447):

> '*is not simply a negative provision which means that the receiver is protected if he simply does not pay the debenture holders: it is a provision which requires him to pay the preferential creditors out of any assets coming to the hands of him as receiver. Therefore, it seems to me that, if he has had any assets out of which this payment could have been made, he is under a liability in tort to the plaintiffs'*

43. This passage was cited with approval by Goff J. in *Inland Revenue Commissioners v. Goldblatt* [1972] 1 Ch. 498. There, a receiver and manager appointed by the debenture holder was removed, having taken possession of the assets and collected monies owing to the company. He delivered up assets to the debenture holder without paying preferential creditors, who sued both the receiver and the debenture holder alleging a breach of statutory duty by the former. Relying upon *inter alia In re Glyncorrwg Colliery Co.* the receiver contended that s. 94 dealt only with priority of debts, and that the only duty the receiver had was to pay the preferential debts of which he had notice in priority to any other debt whether secured by the debenture or not and that this did not affect the case at hand in which the receiver had paid none of the debts. Rejecting

that contention, Goff J. approved the passage from the judgment in *Westminster v. Haste* to which I have referred: once the receiver had any assets out of which the payment could have been made his liability to the preferential creditor arose. In this way, assets which come in under the charge after it has crystallised (as may happen when the receiver trades) fall within the preferential net even though they were never subject to a floating charge: '*the statutory provisions catch all assets potentially within the scope of the floating charge, including those acquired by the company after crystallisation'* (R. Goode *Principles of Corporate Insolvency Law* 4th Ed. 2015 at para. 10-60).

Buchler v. Talbot

44. As evident from my earlier summary, the trial judge relied in the course of his judgment upon the decision of the House of Lords in 2004 in *Buchler v. Talbot.* There, the decision of the Court of Appeal in *In re Barleycorn Enterprises Ltd.* [1970] Ch. 465 - in which it had been held that the property comprised in a floating charge formed part of the assets of a company for the purposes of paying the costs and expenses of a winding up - was overturned. As it happens, in *In re Barleycorn Enterprises Ltd.* Lord Denning had shortly dismissed the different order of priorities suggested in *Re Glyncorrwg Colliery Co.* (at p. 475).

45. *Buchler v. Talbot* concerned a company – Leyland DAF Ltd. – which was in both receivership and in liquidation. It had issued debentures in 1992 which contained floating charges over the whole or substantially the whole of its undertaking. The company collapsed in 1993 and administrative receivers were appointed, thereby

causing the floating charge to crystallise. The receivers realised the assets captured by the charge and paid the preferential debts. They also paid dividends to the charge holder towards satisfying the secured indebtedness. Then in 1996 the company entered creditors' voluntary liquidation. There were insufficient free assets to meet the costs of the liquidation, unless the charged assets were made available to be paid in priority to the claims of the charge holder. So, the question before the Court was whether, when a company was being wound up, the costs and expenses incurred by the liquidator rank ahead of the claims of the holder of a charge which at its inception was a floating charge.

46. Each of the speeches in the House of Lords proceed on the assumption that, starting with s. 2 of the 1897 Act, the purpose of the provisions addressing the priority of preferential debts in liquidation was to '*bite*' into the proprietary rights of the debenture holders, and *not* to enable liquidation expenses to be discharged from the charged property (see Lord Nicholls at para. 15; Lord Hoffman at para. 35). As Lord Millett put it (at para. 58) the purpose of the 1897 Act was to provide a '*secondary fund'* for the payment of the preferential debts, not to relieve liquidators by making new provision for the payment of costs of a winding up at the expense of the holder of the floating charge (the '*primary'* fund, of course, was the assets available for the payment of general creditors – see para. 57 of the judgment). The liquidators had contended that in s. 2, Parliament must have intended that the liquidator should be paid costs and expenses incurred by him in discharging the statutory obligation imposed by that section. The judges had little difficulty in agreeing that a liquidator's costs and expenses in identifying preferential creditors and paying them pursuant to the statutory obligation, those administrative costs and expenses will be payable ahead of the debenture holder '*just as much as they would be if the debenture holder himself or a*

receiver appointed by him, had incurred costs and expenses in discharging this statutory duty' (Lord Nicholls at para. 19). As Lord Hoffmann put it, as the debenture holder is entitled to the proceeds, it is right that he should pay the cost of realisation (citing *In re Regent's Canal Ironworks Co; Ex p. Grissell* (1875) 3 Ch. D 411). This did not, however, mean that the liquidator could recover *all* his costs and expenses from the charged assets: '*[c]osts and expenses incurred in discharging the particular duty imposed by section 2 of the 1897 Act, or its modern equivalent, are one matter, the liquidation costs and expenses as a whole are quite another'* (Lord Nicholls at para. 20).

47. The issue in *Buchler v. Talbot* was thus obviously and quite fundamentally different from that with which we are concerned here. That decision was addressed to the costs of a liquidation and was concerned with the priorities as between the liquidators and the debenture holders; here the issue arises in a receivership and is as between the costs of the receiver and the claims of the preferential creditors. However, it does make some things clear. Many of these are self-evident, but they bear re-statement.

48. First, the House of Lords proceeded on the basis that the then applicable United Kingdom provisions (ss. 40 and 175 of the Insolvency Act 1986 addressing, respectively, receivership and winding-up) were intended to maintain in place the essential principles first introduced in the 1897 Act. Second, those provisions were directed to ensuring that the preferential creditors could appropriate some of the fund that would otherwise be otherwise available to the debenture holders. Third, albeit in the context of a winding-up, these provisions did not affect the principle that the expenses of the officer charged by law with the realisation of assets could properly be charged to the party benefitting from that realisation. Fourth there is a clear distinction

between the cost of realisation of assets for the benefit of one person, and the entire costs of the liquidation. This was explained as follows by Lord Millett (at para. 63):

> '*The costs of realising a particular property … must be distinguished from the general expenses of the winding-up or receivership. The costs of realisation are deductible from the proceeds of the property realised, whether it is realised by the liquidator or the receiver, for it is only the net proceeds of the property which are comprised in the winding-up or receivership as the case may be. Costs incurred in preserving an asset are treated in the same manner. The costs of preserving or realising assets comprised in a floating charge, if incurred by a liquidator, may therefore be recouped by him out of the charged assets in priority to the claims of the charge holder…'*

49. In passing, and in dealing with the decision in *In re Barleycorn Enterprises Ltd.*, Lord Millett referred to the decision in *In re Glyncorrwg Colliery Co Ltd.* which he described as establishing '*that the costs of the receivership (including the cost of realising the property comprised in the charge'* had priority to the claims of the charge holder (at para. 79). In that connection, he also observed that the liquidator had priority over secured creditors insofar as his costs were costs of preservation or realisation of the charged assets.

50. Finally, Lord Millet concluded (at para. 88) with the passage upon which Keane J. relied here. He preceded this by noting that there were two separate funds – assets subject to floating charges, and the company's 'free' (or unsecured) assets. As I have quoted it earlier, he identified the system of priorities governing the former, as follows:

> *'Assets subject to a floating charge: (section 40 of the 1986 Act): (i) the costs of preserving and realising the assets; (ii) the receiver's remuneration and the proper costs and expenses of the receivership; (iii) the debts which are preferential in the receivership; (iv) the principal and interest secured by the floating charge; (v) the company'* .

51. As I have noted it was, in part, this statement which led Keane J. to the conclusion that the receiver was entitled, having regard to the second in the list of priorities, to the costs and expenses of the receivership which, in turn, comprised the monies advanced by and repaid to, the Bank.

Summary of the UK law

52. These cases point to the following conclusions as to the law in the United Kingdom. First, the effect of the various provisions reflected in this jurisdiction in s. 440 CA14 was to impose on a receiver appointed pursuant to a debenture incorporating a floating charge security a duty to the preferential creditors. That duty required the receiver to pay the preferential creditors out of any assets available to him to which the debenture holder would otherwise have been entitled. The duty was enforceable in tort, so that if the receiver failed to pay those monies at that point, then he was liable to the preferential creditor for the difference between what the preferential creditor would have received had the receiver complied with his duty, and what it actually received at the conclusion of the receivership (see Lightman and Moss *The Law of Administrators and Receivers of Companies* 5th Ed. (with third suppl.) 2015 at para. 13-062). Time ran from the point at which the receiver so received the monies.

53. Second, the decision in *In re Glyncorrwg Colliery Company* continues to be cited in the United Kingdom as authority for the proposition that, under the provisions in that jurisdiction equivalent to s. 440 priority is given '*only over the claims of the debenture holders under the floating charge; their claims are subordinate to those of the receiver for the costs of preserving and realising the assets and his expenses and remuneration'* (R. Goode *Principles of Corporate Insolvency Law* at para. 10-60). For this purpose, the receiver's expenses include liabilities incurred by the receiver under contracts entered into by him on behalf of the company (id. at para. 10-56).

54. Third, the obligation to pay the preferential creditor only extended to the monies to which the debenture holder was entitled. It follows from what I have just said that the debenture holder was not entitled to the costs of realisation and preservation or to the receiver's costs and expenses. That conditioned the duty and put a limitation on the amount the receiver had to pay to the preferential creditors ('*the receiver's entitlement has priority over the claims of the debenture holders and preferential creditors even in the absence of an express provision in the debenture'* (R. Goode *Principles of Corporate Insolvency Law* at para. 10-56)).

55. Fourth, it is – of course – open to a receiver to decide to continue the company's trade. The secured creditor may want the receiver to do this in order to maximise the value to that creditor and, as was pointed out by counsel for the Receivers in this case, it will often be the case that the sale of an asset as a going concern will maximise the yield for all. However, if the receiver continues the trade and if that results in a situation in which monies that were available to pay the preferential creditors are lost, the receiver bears the loss: '*[a] receiver who after notice of a preferential claim neglects to satisfy it from assets available and instead applies those assets or their proceeds for other*

purposes – as … by exhausting the assets in continuance of the company's business – is liable in damages to the preferential creditor in tort' (R. Goode *Principles of Corporate Insolvency Law* at para. 10-63). This is explained in very clear terms by one of the leading English texts (*Kerr and Hunter on Receivers* (18th Ed. 2005)) where, having cited with approval the formulation of priorities as it appears in *In re Glyncorrwg Colliery Company*, the authors continue at para. 20-35:

> '*if at any stage, after taking* [costs of realisation, amounts due to the receiver, costs of trustees under the debenture] *into consideration, the receiver has in his hands sufficient moneys to enable him to discharge the preferential debts, either in whole or in part, then if he employs such moneys in any other manner (as for example in further trading), he does so entirely at his own risk. Accordingly, if he continues to carry on the business of the company and, as a consequence loses such moneys in the course of trading, he will be personally liable to the disappointed preferential creditors and the extent of his indemnity .. will not be relevant so far as they are concerned.'*

56. I should make one final point in this regard. It is easy to confuse the liability of the receiver to the preferential shareholder (in tort) and the issue of priorities. They are, however, distinct. The reason there seems at first glance to be a tension between *Woods v. Winskill* and *In re Glyncorrwg Colliery Company* is that the first of these cases was concerned with liability in tort, while the second was addressed to priorities. They are reconcilable because there was no issue around receiver's costs in the first case, and no action before the Court alleging a breach of duty by the receiver in the second.

57. If this case were to be decided under English law, the position of the Receivers here as regards priorities would be correct – the Receivers are entitled to their costs, expenses and remuneration in priority to the payment of the preferential creditor. However, if the Receivers have not paid the preferential creditor when they could and ought to, and if the preferential creditor has suffered in consequence a loss when the available funds are distributed in accordance with those priorities, the Receivers face liability in tort to the preferential creditor – if they are sued. Thus understood, provisions such as s. 440 do not merely alter the priorities by requiring that the preferential creditors are paid before the debenture holder, but they also create '*a duty which creates statutory private rights, enforceable as such by the preferential creditors'* (*Re Pearl Maintenance Services Ltd.* [1995] 1 BCLC 449, 457). The end point – insofar as the receiver's costs are concerned – may be the same, to the extent that the costs may fall to be deducted from any award of damages. But I think it important that the analysis is properly structured in a way that ensures that there is no doubt as to the entitlement of the receiver in ordinary course to his costs and expenses in priority to the claims of the debenture holder for principal and interest and, therefore, in priority to the preferential claims. His liability in tort, if any, is distinct and will only arise if, in an action brought within the applicable limitation period, it is established that he has breached his duty in the manner I have outlined.

The Irish provisions

58. Section 98 of CA63 was in all relevant respects identical to s. 440 CA14, and thus repeated the thrust of the provisions that had previously appeared in s. 107 of the 1908 Act, but without the term '*forthwith'*. The commentaries on s. 98n were clear that under

the provision, a receiver and manager who carries on the company's business at a loss, and thereby reduces the funds available for the preferential creditors, will be liable to make good the deficiency (McCann and ors. *The Companies Acts 1963-2006* at p. 192). The Irish cases relied upon by the parties in argument do not contradict this, and I think compliment that conclusion.

59. In *United Bars Ltd. and ors. v. Revenue Commissioners* [1991] 1 IR 396, the question was whether realisations from the sale of assets subject to fixed charge should, once the fixed charge-holder had had its debt discharged by the appointed receiver, be paid to preferential creditors in the manner provided for in s. 98 of the Act, or whether the sums could be remitted to the company. The issue arose in a context where the relevant debenture provided both a floating charge over all of the assets of the company and thereafter an additional or secondary security in the form of the fixed charge over the assets whose sale had generated the funds in issue. In *In re Lewis Merthyr Consolidated Collieries Ltd.* [1929] 1 Ch. 498, it had been held that s. 107 of the 1908 Act applied only in respect of accounts coming into the hands of the receiver which were the subject of a floating charge and not to assets subject to a fixed charge; this was followed in *In re GL Saunders Ltd. (In Liquidation)* [1986] 1 WLR 215, and Murphy J. – not without some reluctance – agreed to follow these decisions. In the course of his judgment he observed that the purpose of s. 98 was to '*equate the rights of preferential creditors in a receivership with those in a liquidation, not to improve on those rights'* (at p. 401).

60. In *In re Eisc Teo. (In Receivership and liquidation)* [1991] ILRM 760 a receiver had been appointed to the company on foot of a debenture which granted a floating charge over certain of its assets, and a fixed charge over others. The receiver realised the

charged assets and discharged all sums due under the debenture out of the proceeds of the assets subject to the fixed charge, retaining the proceeds of sale of the floating charge assets. An order for the winding of the company was then made, and the liquidator sought to compel delivery up of that surplus, the receiver objecting that he had a duty to discharge the debts owing to the preferential creditors from the proceeds of the sale of the floating charge assets. The essential response of the liquidator was that s. 98 had no application to the receiver once a winding-up order was made.

61. Rejecting the liquidator's submission, Lardner J. stressed the '*clear duty'* imposed by s. 98 on the receiver to pay the preferential debts, stating that this duty arose '*where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge.'* The Court was of the view that the duty arose on appointment, and that once having been imposed was not terminated or affected by the circumstance either that a winding up order was made three months after the receiver was appointed, or that the receiver did not in fact require to make any payment out of the asserts the subject of the floating charge.

62. That judgment of Lardner J. was referred to in *In re Manning Furniture Ltd (In Receivership)* [1995] WJSC-HC 5130, [1996] 1 ILRM 13. There, a receiver was appointed on foot of mortgage debentures and chattel mortgages, the former of which contained a floating charge in favour of the appointing bank. Having discharged the debenture holder's debt from the proceeds of sale of the fixed assets, the receiver sought directions as to whether he was obliged to pay preferential creditors out of a retained surplus before paying the balance to another legal charge holder. That charge-holder contended that the priority referred to in s. 98 was only in respect of the debts due under the debenture and that as no part of the assets subject to the floating charge were used

in the discharge of monies due under the debenture, the provision did not apply. In other words, the argument was that payment to the secured creditor was not a payment of principal and interest under the debenture and was not therefore captured by the section. McCracken J. said:

> '*The present case is similar to the Eisc Teoranta case in that the Receiver in fact discharged the debenture holders debt out of the fixed assets, but he did take possession of the assets which were subject to the floating charge. It was sought to be argued that the priority referred to in Section 98 was only in respect of the debts due under the debentures, and as no part of the assets subject to the floating charge were used to discharge any monies due under the debentures, the section never came into effect. This is dealt with in the judgment of Lardner J. where he holds, in effect, that once a claim has been made under the debenture, the obligation arises under Section 98. I cannot see any practical distinction between the two cases.'*

Priorities

63. Both parties agreed that in at least *some* situations, the receiver was entitled to payment of *some* costs in priority to the preferential creditors. Revenue defines the costs that may be so allowed as '*the costs of realisation of the floating charges that go to meet that preferential debt'*. What Revenue says cannot be allocated to the preferential creditors is the costs and expenses of a trading receivership. The critical error in the High Court judgment – Revenue says – arises from the failure of the High Court judge to distinguish the proper costs and expenses of bringing and realising the floating charge assets from the costs and expenses of a trading receivership. A trading receivership, it

contends, trades solely for the benefit of the secured creditor. That, Revenue says, is why the legislature has intruded as strongly as it has in the case of the receivership, because otherwise a receiver could simply come in, scrape out all of the floating charge assets pay down all of the floating charge assets in trading the company and not pay the preferential creditors. So, central to Revenue's case is the thesis that the costs of the receiver should be split, the preferential creditors only taking a deduction to reflect the costs incurred in enabling them to be paid.

64. The case before the High Court appears to have been argued on the basis that the priorities listed in s. 617 CA14 governed the position of a receiver. Here, I agree with the conclusion reached by the judge. While s. 617 appears in Part 11 CA14, and while Part 11 is referenced in s. 440, the former section addresses itself to the costs, charges and expenses '*properly incurred in the winding up of a company, including the remuneration of the liquidator'*. The provision has, as Keane J. said, no application in a case where the company is not being wound up. In point of fact, I do not see that the provisions of Part 11 carry in to the issue with which the Court is concerned on this appeal, at all. The reference in s. 440 to Part 11 arises only in the context of defining what the preferential debts are, not to the circumstances in which those debts must yield to costs or other expenses. That definition, as the trial judge correctly observed, is found in ss. 621 and 622 CA14.

65. Once that provision was removed from the mix, three other possible sources of the applicable priority rules were identified – the provisions of the debenture, the terms of s. 24(8) of the Conveyancing Act 1881 (which, insofar as the debenture was executed prior to the coming into effect of the Land Law and Conveyancing Reform Act 2009, was the provision applicable to the priorities under the debenture in issue) and the rule

applied by Tomlin J. in *Re Glyncorrwg Colliery Co.,* that seemingly being the priority stated – with modification – by Lord Millett in *Buchler v. Talbot*.

66. In this case, as counsel for the Receivers correctly observed in the course of his submission, if any one of these apply the effect is the same as each of the debenture (clause 7.5), s. 24(8) and the rule expressed in *Buchler v. Talbot* involve the prioritisation of costs of realisation and the costs and expenses of the receiver to the claims of preferential creditors. None of them envisage the splicing of costs by reference only to the interests of preferential creditors – nor indeed do the provisions governing priorities in a winding up.

67. In my view there can be no doubt as to the application here of the priorities suggested by Lord Millett and adopted by the trial judge. As I have noted, this is the order of priority identified by Tomlin J. as being implicit in s. 107 of the 1908 Act, and for precisely the reasons he concluded it should be implied there it should, in the absence of any other version of the priorities, be viewed as similarly limiting the assets to which the preferential claims attach in s. 440. It is, certainly, clearly and long established in this jurisdiction that a receiver is entitled to his remuneration and costs in priority to all other costs save those of realisation (Wylie *Irish Judicature Acts* 1905 at p. 697), and that was confirmed in *Healy deceased, Healy v. Oliver* [1918] 1 IR 366. I can see no basis on which it could be contended that the Oireachtas intended via s. 98 CA63 to depart not merely from that principle, but from the view adopted by the English courts in their interpretation of the immediate predecessor provision in the 1908 Act. Nor, I should say, do I think that there can be any doubt based on the evidence before the High Court that the loan from the Bank – which the evidence records as being used for the costs and expenses of the receivership – comes within the priority afforded to those

costs and those expenses. I cannot conclude – as Revenue suggests at points in their evidence and submissions – that the loan was for the exclusive benefit of the fixed charge holder.

68. Thus, while noting the potential difficulties arising where assets are realised that are the subject of both fixed and floating charges, the Irish texts confirm – having regard to the decision in *Buchler v. Talbot* – that s. 98 envisages costs of realisation and receiver's costs and expenses being paid in the manner prescribed by Lord Millett in that decision, in priority to the preferential debts (see Lynch-Fannon *Corporate Insolvency and Rescue* 2nd Ed. 2012 at para. 8.34; Forde and ors. *The Law of Company Insolvency* 3rd Ed. 2015 para. 15-71). A similar approach appears to have been adopted in other common law jurisdictions (see, for one example, *Waters v. Widdows* [1984] VR 503).

69. In those circumstances it is not necessary to engage in detail with arguments around the debenture or s. 24(8) as, if they do not apply, the theory to which I have just referred does. However, I would observe that it is hard to my mind – whatever about regulating priorities between the parties to that deed – to see how the debenture could affect the rights of preferential creditors which, of course, are provided for by law. Indeed, one might have thought it followed from *Inland Revenue Commissioners v. Goldblatt* (where, it will be recalled, the secured creditor purported to defeat the preferential claims by terminating the appointment of the receiver) that provisions purporting to adversely affect those rights by agreement would be unenforceable. As to section 24(8), that provision makes no reference to preferential claims at all, and at least one text relied upon in submissions in this case (Donnelly *Law of Credit and Security* 3rd Ed. 2021 at para. 21-68) refers to the provision being '*displaced'* which clearly - at least to some

extent - it is. For the reasons I have explained, it is not strictly necessary to select from the three options as, ultimately, they lead to the same destination insofar as relevant in this case. The costs of realisation, and the costs and expenses of the Receivers take priority over the preferential claims, and the loan in issue here is properly viewed as a cost and expense of the receivership.

Analysis

70. But this leaves the question of how the law addresses the situation in which a receiver trades away assets that were at one point available to pay the preferential claims. It appears to me that the starting point in the analysis of that issue must be the proposition – which is clearly established and, I would have thought, self-evidently correct - that the obligation on a receiver is to discharge the preferential debts out of such assets as are or become available to him or, at the very least, to make provision for the payment of those debts. This follows from the decision in *Woods v. Winskilll*, has been confirmed in *Inland Revenue Commissioners v. Goldblatt*, and reflects the general principles evident from the Irish cases to which I have referred. It also gives effect to the policy adopted by the Oireachtas that the preferential debts should be paid from those assets the subject of a floating charge which are upon crystallisation, otherwise, the property of the charge owner. Any other interpretation would undermine fundamentally the purpose of the provision, as it would render the recovery of preferential debts contingent on decisions made by the receiver and/or the secured creditor to continue the business of the company in the interests of the latter.

71. It must logically follow that a receiver who upon appointment has available to him such assets and who determines to proceed to carry on the business of the company without

discharging the preferential debts or at least ring-fencing assets for that purpose, takes a risk. It would make a nonsense of the duty imposed by the section if the receiver could, at the same time, carry on that business and as a consequence of the costs and expenses of so doing, eliminate the monies otherwise available to the preferential creditors. It follows that I cannot accept – or least cannot accept without significant qualification – the proposition that lies at the heart of the Receivers' case that they are entitled to simply rely upon the fact that the monies advanced by the Bank were used to discharge necessary costs and expenses of the receivership as a basis for avoiding their failure to comply with that duty and paying in consequence *none* of the preferential debts.

72. In the course of his clear and persuasive submissions, counsel for the Receivers made a number of points which it is convenient to consider in this context. First, he observed that the construction urged by Revenue – that the entitlement of the preferential creditor is to look at the assets the subject of the floating charge at the commencement of the receivership, subtract the costs of realisation and then ring fence or book those assets to the benefit of the preferential creditor – would, were it well placed, involve a departure from the logic of what actually occurs in a trading receivership. He emphasised the difficulty of attributing notional values to trading assets and suggested that the interpretation would contradict normal practice and would discourage trading receiverships. He also noted that Revenue was looking for what he described as '*a one-way ratchet*' banking the notional value of the assets at the beginning, but also taking the advantage of any uplift in the event that the receivership did trade, and the value of the assets increased.

73. In the absence of relevant evidence, this Court cannot speak to what is or is not standard practice in trading receivership.[1] The passage from *Kerr and Hunter* I have cited earlier makes it clear that a receiver who trades does so at his peril vis a vis the preferential creditors, and this is the only conclusion that can be drawn from the interpretation of the section reached in the consistent line of authority running from *Woods v. Winskill* to *Inland Revenue Commissioners v. Goldblatt*. Presumably it is open to a receiver to obtain relevant indemnities from the secured creditor or indeed to enter into the appropriate arrangements with preferential creditors, but it has been established for almost a century that receivers have a statutory obligation to pay or at least ring fence assets that are upon appointment, or that subsequently become, available to meet preferential debts and that they cannot trade with those funds without consequence. If that is likely to have a chilling effect on the practice of trading receiverships, that is a matter for the Oireachtas to address if it believes it necessary to do so.

74. Next, it was argued that on the clear language of s. 440, Revenue only had a preference over '*any claim for principal or interest in respect of the debentures'*. However, not merely *Woods v. Winskill*, but also the judgement of Goff J. in *Inland Revenue Commissioners v. Goldblatt* makes it clear that this is not correct. The proposition approved in the former was that a receiver and manager with notice of a preferential claim is liable for damages in tort for exhausting the then assets of the company in making payments to ordinary creditors without first applying the same or a sufficient part thereof in satisfying such preferential claim. The latter is, as I have noted, authority

[1] Although it should be observed that the Institute of Chartered Accountants in Ireland '*Statement of Insolvency Practice S14B, A Receivers Responsibility to Preferential Creditors – Republic of Ireland'* (which is cited in at least one of the insolvency texts) specifically observes that a failure by a receiver to pay preferential creditors out of available assets is not only a breach of statutory duty '*but can also give rise to a claim for damages against the receiver by those who have been wrongly deprived of monies to which they were entitled'*.

for the proposition that s. 440 captures the disposal of all assets potentially within the scope of the floating charge.

75. Third, the point is forcefully made that the purpose of s. 98 is to align the position of preferential creditors of a company in liquidation with that of one in receivership. Emphasis was placed on the comments of Murphy J. in *In re United Bars Ltd.* where he observed that to accede to Revenue's argument in that case that it should have priority over a fixed charge would provide it with an inexplicable and unwarranted benefit, and that the only purpose of s. 98 would be to equate the rights of preferential creditors in a receivership with those of a liquidation, not to improve on those rights. This would arise, it was argued, because either under the regime applicable to the 2014 Act, or the pre-existing statutory framework, on any view a cost and expense in the winding up ranks ahead of any other claim, including the preferential entitlements of Revenue. This, of course, is correct, and it will be recalled that similar considerations were prayed in aid by Tomlin J. in *Re Glyncorrwg Colliery Co.*

76. However, in my view the argument pushes the proposition too far. There are critical differences between receivership and liquidation. Liquidation is a collective insolvency procedure, and it makes sense that the costs of the liquidator are borne by the various different categories of creditor. Receivership is a method of enforcement by a secured creditor (and indeed s. 440 applies not only to that process but also to cases in which a debenture holder takes possession of assets secured by a floating charge). There might be every reason why the Oireachtas would wish to ensure that preferential creditors' claims are not diminished by the decision of the receiver and/or secured creditor to continue to trade to the benefit of the latter.

Conclusion

77. This application came before the Court on foot of an application for directions in the receivership. The directions sought a declaration that the Receivers '*failed to comply with the provisions of Section 440 of the Companies Act 2014 in that they discharged certain claims made by the holder of the debenture pursuant to which the Joint Receivers were appointed, the claims having been discharged in part from assets secured by a floating charge, and in priority to the claims of the preferential creditors of the Company.*' An order was sought that the Receivers in failing to pay any dividend to the preferential creditors of the Company, have failed to discharge the duty imposed by the provisions of s. 440, and an order was also sought directing the Receivers to '*discharge any losses suffered by the preferential creditors of the Company by virtue of their failure to comply with'* that provision. Finally, the Court was requested to determine the sum of monies which ought to have been made available pursuant to s. 440 CA14 for the preferential creditors of the company.

78. While the directions were also sought pursuant to s. 440, I think it clear that the jurisdiction of the Court to make any of the orders sought must, if Revenue is to succeed, derive from s. 438 CA14, which allows *inter alia* any creditor of a company to whose property a receiver has been appointed to seek '*directions in relation to any matter in connection with the performance or otherwise, by the receiver of his or her functions'*. On such application, the Court may:

> '*give such directions, or make such order declaring the rights of persons before the Court or otherwise, as the Court thinks fit'*.

79. In this judgment I have made two findings of law. One relates to the proper order of priorities when a receiver is appointed over assets the subject of a floating charge. The

other arises from the statutory duty imposed by s. 440 CA14. While these are related to the extent that breach by a receiver of the statutory duty may expose him to a claim in damages that might negate costs and expenses to which he is otherwise entitled, it is important to keep them distinct.

80. As to the first, a receiver is entitled to be paid, in priority to the claims of preferential creditors or the debenture holder, the costs of realisation of assets subject to a floating charge, and the costs and expenses of the receivership. To that extent, the Receivers are correct when they say that s. 440 affords priority to preferential debts only over assets to which the debenture holders would otherwise be entitled to have recourse, and that this does not include the costs and expenses of the receivership. This is precisely what was decided in *In re Glyncorrwg Colliery Company*. That decision remains good law in England, and I am of the view that it reflects the correct interpretation of what is now s. 440 CA14.

81. Second, however, this analysis only resolves the issue of *priorities.* One of the effects of s. 440 CA14 is to impose on a receiver a duty to preferential creditors, breach of which sounds in damages in tort. That duty is triggered at any point when the receiver, after taking the costs of realisation and the amounts then due to the receiver in respect of the costs and expenses of the receivership and his remuneration into consideration, has in his hands sufficient assets to enable him to discharge the preferential debts either in whole or in part. The effect of the duty is that if, in that event, the receiver determines to continue to trade, he does so at his own risk, and if he loses those moneys in the course of trading, he will be personally liable to the extent that preferential creditors

have lost moneys they would otherwise have received had the receiver not embarked on that course of action.

82. It may well be that the fact of that duty will, where it is breached and where a preferential creditor proceeds to bring a claim against the receiver who has thus acted tortiously, have the consequence that, in practical terms, the receivers do not obtain their costs and expenses. However, it seems to me important that the analysis keeps the distinction between priorities and breach of duty clear.

83. In the course of oral submissions, counsel said that the Court was solely concerned to make a determination under s. 440 with any issue as to damages thus arising to be left over. It follows from the two conclusions as I have formulated them that the question of whether the Receivers have any liability to Revenue will depend *inter alia* on the assets available to them at given points in time having regard to the costs and expenses then deductible. Certainly in this case, the evidence discloses that at the date of their appointment there was cash in hand in excess of €70,000 and it is not clear that any costs would have been involved in realising this. However, the conclusions I have reached on the legal issues do not follow precisely the trajectory urged by Revenue and in those circumstances the Court will give the parties an opportunity to consider their positions in the light of this judgment before listing the matter for a further hearing, if required. Costs will be dealt with thereafter.

84. Barniville P. and Haughton J. are in agreement with this judgment and the course of action I propose.