THE HIGH COURT

[2022] IEHC 639

[Record No. 2021/122 SP]

IN THE MATTER OF JOE MILEY AND PARTNERS (DUBLIN) LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF SECTIONS 25 AND 26 OF THE TRUSTEE ACT, 1893

AIDAN GARCIA DIAZ (LIQUIDATOR OF JOE MILEY AND PARTNERS (DUBLIN) LIMITED (IN LIQUIDATION)

Applicant

-and-

JOHN BRETT, EAMONN BRETT, JOSEPH MILEY

Respondents

JUDGMENT of Ms. Justice Butler delivered on the 15th day of November 2022

Introduction

1. This is an application brought by the liquidator of Joe Miley and Partners (Dublin) Ltd. (*"the company"*) to secure the transfer to the company of certain premises at Nos. 4 – 6 Barrett Street, Ballina, County Mayo (*"the property"*). Those premises are currently held in the names of three individuals, namely John Brett, Eamon Brett and Joseph Miley, who together comprise the Brett Miley Partnership (*"the partnership"*). Proceedings were originally instituted on 24 February 2020 by way of an originating notice of motion (record number 2020/81 COS) seeking orders and/or declarations under ss. 596, 608 and 627 of the Companies Act 2014. When that application came on for hearing on 12 July 2020, O'Regan J. indicated that, whilst

she was prepared to grant relief vesting the property in the company's name, the proceedings should be reissued under the Trustees Acts so that an appropriate order could be made. Consequently, a special summons was issued by the liquidator on 22 July 2021 seeking orders under ss. 25 and 26 of the Trustees Act 1893.

2. It is a striking feature of this case that from the point in time when the liquidator was appointed, through the bringing of both sets of proceedings and up until November 2021, the first and second respondents, John and Eamonn Brett, agreed that the property had been transferred by the partnership to the company and did not oppose the relief sought by the liquidator. The relief sought was, at that time, opposed by Mr. Miley. On 4 November 2021, the liquidator received an email from Mr. Miley's daughter confirming that her father was now prepared to sign the deed of transfer of the property to the company. Mr. Miley has since confirmed this in an affidavit sworn in these proceedings.

3. However, on the very next day, 5 November 2021, Eamon Brett and John Brett swore affidavits in which they completely reversed the position they had previously adopted. Both acknowledged that they had previously agreed to the transfer of the lands to the liquidator but stated categorically that this was no longer their position. Instead, they made their consent to the transfer subject to an *"independent"* investigation into the reconciliation of the trading account between the company and the partnership – the outcome of which would have to be *"agreed"* – and if this showed a debt due to the company equating to the value of the subject lands, they would then consent to the transfer of the lands to the company. They say that their initial agreement to the transfer of the lands to the company in 2009 was based on the fact that they had been erroneously advised by the company's then-auditors that there were significant monies owing by the partnership to the company. They claim that their subsequent investigations show that this was not correct hence *"the transfer of the lands to the company ought not to have taken place"*.

4. The liquidator's position remains that he is seeking the orders necessary to vest the property in the company for the benefit of the company's creditors in the liquidation. As liquidator, his function is to collect in the assets of the company and he cannot make the exercise of that function subject to the findings of any third-party investigation. The liquidator maintains that the Bretts are attempting to achieve a position whereby the partnership, which is not a secured creditor of the company, would acquire or retain an asset that belongs to the company, to the detriment of the company's preferential creditors which, in this case include the Revenue Commissioners and a number of employees who did not receive their employment entitlements prior to the liquidation. The liquidator objects to the late change in position by the Bretts and argues that they should, in effect, be estopped from denying the admissions that they had previously made that the property had been transferred by the partnership to the company, albeit that this transfer was never formally registered. He points to the fact that the Bretts, as the only *de jure* directors of the company, had signed company accounts from 2012 to 2016 which showed the property as an asset of the company and had signed returns to the Revenue Commissioners in which the company claimed a corporation tax deduction based on a depreciation in value of the property as a company asset. In parallel, the partnership accounts from 2012 onwards do not show the property as an asset of the partnership.

5. Because of the extensive exchange of affidavits between the Bretts and the liquidator dealing with various aspects of the relationship between the company and the partnership, between Mr. Miley and the company, and as regards the conduct of the liquidation, very little of the argument before the court focused on the particular relief sought and whether it would be more appropriately granted under the Companies Act or the Trustees Act, or both. Because of that, I propose to look initially at the factual history, then to consider whether a case has been made out as to why the relief sought should or should not be granted, and, if not, then to look at the statutory provisions under which relief is sought, and finally, to consider the

appropriate form of relief. I appreciate that the onus of proof is and remains on the liquidator as the moving party to establish an entitlement to relief. However, I also note that my colleague, O'Regan J., indicated on 12 July 2020 (at which time the Bretts were not objecting to the application) that she would, in principle, grant relief vesting the property in the company's name. The only remaining issue of concern to her was the form that that relief should take. I will, of course, consider the arguments now made by the Bretts in opposing this application as those arguments had not been made to O'Regan J. when she indicated her willingness to grant relief. I will also address the issue raised by the liquidator as to the entitlement of the Bretts to oppose this application given their previous stance.

Factual Background

6. In looking at the events which have led to this application, I propose to give only a brief summary of the contents of the various affidavits which are detailed and repetitive and, at times, contradictory. It is apparent from the affidavits that the particular issue before the court represents only part of a complex set of relationships between not just the company and the partnership but also between both of those entities and a number of related companies, individuals, businesses and institutions with which they did business. By way of example, the liquidator was appointed on 10 April 2017 when the company went into a creditor's voluntary liquidation. He was subsequently appointed by the High Court as the liquidator of a related company of which the Bretts are also directors, DBO Environmental Services Ltd (*"DBO"*) on 15 September 2017. On 13 November 2017, at the request of the liquidator the High Court made a pooling order under s. 600 of the Companies Act 2014 directing that the company and DBO be wound up together as if they were one company.

7. Although the affidavits in this case are very detailed, much of the background remains unclear. It seems that Mr. Eamonn Brett (a site manager and an engineer/surveyor) and Mr.

Miley (a *"labour only"* subcontractor in the construction business) did business together for some time from at least the early 1980s and possibly even earlier. The Brett Miley partnership was formed between these two men in 1981, with Mr. John Brett joining at a later stage. The core business was incorporated as the company in 1987. Separately, DBO was incorporated in 1984 to meet certain regulatory requirements in relation to sewage schemes but later became an integral part of the overall business. There were, in addition, a number of related companies formed to progress particular developments or particular types of development and a number of companies formed by members of the Miley family which did not involve the Bretts and possibly also *vica versa*. It seems that the interaction between these various entities was frequent and informal without, perhaps, corporate governance being to the forefront of any of the participants' minds.

8. One matter on which the papers are surprisingly silent is the exact role played by Mr. Miley in the company. It is clear from the company's accounts which have been exhibited from 2012 to 2016 that Mr. Miley was not a director of the company during that period. Both of the Bretts were directors and I understand have been directors throughout the entire of the company's existence. There is some suggestion that Mr. Miley was a director at an earlier stage but, if so, it is unclear when and in what circumstances his directorship ended. It is unclear if he is or was a shareholder. I mention this because it is difficult to see how Mr. Miley could have perpetrated a large-scale misappropriation of company funds without having some defined role in the company. Even if he was a director prior to 2008 or 2009, the Bretts allege that the misappropriation continued until 2016 which of itself raises significant issues as to the governance of the company up to the time it went into liquidation in early 2017. Indeed, the liquidator expresses a concern, which must be taken seriously, as to the ignorance claimed by the Bretts of the mismanagement of the company at a time when they were its directors and thus responsible for its management.

9. It is evident from the affidavits and accepted by the liquidator that there has been a substantial dissipation of the company's assets which remains under investigation by the liquidator. The Bretts put matters more bluntly and allege that their former partner, Mr. Miley, defrauded the company of somewhere between €5 million and €7 million. The exact basis of the alleged fraud is somewhat unclear but it seems to involve the diversion of company funds into Mr. Miley's personal accounts or those of his related businesses, and the misappropriation of valuable company assets (such as plant and machinery) either by the companies controlled by Mr. Miley and/or members of his family or by companies doing business with Mr. Miley's companies and to whom Mr. Miley owned money. It seems that most of these alleged actions took place before 2012. By 2007, Eamonn Brett began to raise concerns with the company's then-solicitor. By 2009, Eamonn Brett had confronted the company's then-auditors whom I will refer to as MQ (the name of that firm has since changed) over what he characterises as *"unauthorised and unapproved payments"* made to Mr. Miley. Eamonn Brett believed, and indeed still believes, that the auditors were aware of these payments but failed to disclose them to the directors. He attempted to remove the auditors, but this attempt was unsuccessful being opposed, *inter alia*, by John Brett.

10. Another unusual feature of this case is that, notwithstanding the concerns raised by Eamonn Brett between 2007 and 2009, the parties continued actively in business together. The papers include partnership accounts (admittedly showing a loss) for 2013 and 2015. It seems extraordinary that Eamonn Brett continued to trade in a partnership with someone whom he had accused of being in receipt of funds unlawfully diverted from a company of which he, Mr. Brett, remained a director, for at least six years after those allegations were first made. This may have occurred because the business itself was undoubtedly successful and, as the economy flourished in the early 2000s, the company achieved a multi-million euro turnover. While

things became more difficult after the recession, the company continued to tender for and to win lucrative construction contracts including State contracts.

11. Much of the factual argument in the case centred on the correctness or otherwise of a *"reconciliation"* of the trading account between the company and the partnership. This was initially prepared by the company's auditors, MQ, in 2009 when Eamonn Brett raised concerns about unauthorised payment being made by the company to Mr. Miley. There are two versions of this reconciliation in the papers. The first was sent by the accountant to the Bretts under cover of an email dated 2 December 2009 and covers the years 2005 to 2008. It appears to show a credit of €2.1 million in the company's favour.

12. The second is a copy of a letter sent by the accountant to Mr. Miley, forwarded to the Bretts under cover of an email dated 24 February 2010. The exhibited document has *"reconciliation of missing monies 2010"* written on it handwriting, presumably Mr. Eamonn Brett's as it is exhibited in his affidavit. Although the pagination at the top of the exhibit suggests that the document as printed was five pages long, only three pages are exhibited with the first and last pages missing. It is not clear that this document is intended to be a reconciliation of the trading account between the company and the partnership. The contents suggest it was more likely a reconciliation of Mr. Miley's interactions with the company or, perhaps, with both the company and the partnership. It also refers to a summary which seems to have been provided by Mr. Miley to the accountant at an earlier meeting on 9 February 2010. This summary is not included in the papers as a result of which it is difficult, if not impossible, to interpret the extract available.

13. One thing that is clear is that much of Mr. Miley's summary was not accepted by the accountant. His letter refers to certain items of Mr. Miley's list as being items that *"did not apply"* as they were the repayment of monies which Mr. Miley had taken from the company. The accountant did not accept that other amounts were chargeable to the company, he had not

seen backup documents in respect of the amounts claimed and indicated that he would need agreement from the Bretts that the amounts were in order. Yet other amounts were identified as not having been accounted for in Mr. Miley's summary and certain payments actually made are identified as not being recorded in Mr. Miley's summary. As the end of the document is missing, the court does not know what steps, if any, the accountant proposed to take to progress matters at that point. Notwithstanding these evidential deficits, it is clear that by 2010 significant irregularities in Mr. Miley's dealings with the company (and, perhaps, the partnership) had been identified and were being teased out with the company's auditor. It is not clear of the extent, if any, to which this impacted on the trading account between the company and the partnership, and the papers do not include a revised version of the 2009 reconciliation.

14. A central plank in the Bretts' opposition to this application is the contention that the 2009 reconciliation is incorrect. Notwithstanding the fact that MQ was subsequently replaced as the company's auditors by an accountant of the Bretts' choice, AK, the reconciliation provided by AK to the liquidator in 2017 is that which was prepared by MQ in 2009. Consequently, the Bretts maintain that in looking at the relationship between the company and the partnership, the liquidator has based his analysis on a false reconciliation. The liquidator makes the point that AK reviewed all of the accounts and documentation before providing the reconciliation to him and that he has also reviewed the available material and is satisfied with the accuracy of the 2009 reconciliation.

15. In any event, at some stage in 2017 or later, Eamonn Brett prepared what he describes as a *"clear reconciliation of the inter trading account between the company and the partnership"*. This appears to have been prepared without professional assistance. This reconciliation states initially that full details of the alleged fraud had been provided to the Gardaí and to the liquidator. It is alleged that the fraud continued to 2016 and amounted in total

to a sum of €7,870,646. Instead of showing a sum due from the partnership to the company, this reconciliation shows a sum of €3.3 million due from the company to the partnership – i.e. a difference of about €5 million. As previously noted, the Bretts' position is that they will only agree to the transfer of the property from the partnership to the company if an independent review of this reconciliation shows that there is (or perhaps was) a sum due from the partnership to the company. A very brief examination of this document, which I will call the "*Brett reconciliation*", shows that it is not simply a *"corrected"* version of the 2009 reconciliation. This is not least because it covers a far greater period and includes a significant number of items dating from 2009 and 2010 which post-date the 2009 reconciliation, as well as wages supposedly due to the Bretts over a period from 2010 to 2017. This is problematic for the case the Bretts now make as an agreement to transfer property in 2009 based on amounts due from the partnership to the company at that time, cannot be treated as retrospectively invalidated because subsequently the company came to owe the partnership money (if in fact this were so).

16. Eamonn Brett claims that the liquidator has failed to engage with the Brett reconciliation. In my view, this accusation is neither fair nor accurate. It is unclear from the papers when the Brett reconciliation was prepared or when it was first sent to the liquidator. However, there is an email from the liquidator to Eamonn Brett (copied to his then accountants) dated 16 May 2021, in which the liquidator raises a number of serious queries regarding this reconciliation. He states that he was unable to accept the position that the company owed in excess of €3 million to the partnership and noted that it was a position contrary to the statement of affairs which had been prepared by the directors of the company (i.e. the Bretts) for the purposes of the liquidation. One of the main allegations made by the Bretts concerns a loan taken out in 2006 in the name of the partnership and lodged to the company's overdraft account as a result of which the Bretts claim that the sum of €3,215,816 is now due by the company to the partnership. The liquidator sought evidence to support the contention that this payment was

a loan from the partnership to the company and details as to the repayment of the loan. Similar queries were raised regarding allegations that the company transferred €1 million to the partnership for the purchase of the property in Ballina that is the subject of this application. There are repeated requests for evidence and supporting documentation in respect of other payments and amounts which the Bretts now claim are owed by the company to the partnership.

17. Finally, two items are identified by the liquidator as being completely irrelevant to the trading relationship between the partnership and the company. The first is a claim that the company owes a sum of just under €200,000 to the shareholders of a third company, Howberry Homes. The second is a claim for €1 million in unpaid salaries being an amount of €500,000 each for both Eamonn and John Brett to cover a period from 2010 to 2017. Even if the sums were due (and the liquidator points out that directors' salaries are within the charge to PAYE) the basis upon which it has been claimed that they are owing to the partnership is queried by the liquidator. These two items alone account for €1.2 million of the sum the Bretts claim is due by the company to the partnership. At the hearing of this application, counsel for the Bretts acknowledged that the claim in respect of the Howberry Homes shareholders had been included in error. Apparently, the claim for directors' salaries is still being maintained. The liquidator suggested that the Bretts might seek professional assistance in order to outline *"the legal basis for the treatment of various items"* as suggested by them.

18. Although Eamonn Brett replied to this email a number of days later addressing some of the issues, he was, by and large, unable to provide the evidence or supporting documents requested by the liquidator. There also appear to have been meetings between the liquidator and the Bretts at which the Brett reconciliation was discussed. Although the liquidator declined to meet the Bretts' accountants, UR, at this time, he pointed out UR had been present at a series of earlier meetings. In any event the Brett reconciliation was not prepared by UR.

The Property

19. The property the subject of this application is two separate but adjoining units comprising a residential premises and a lockup at a central location in Ballina. At the time of purchase it was envisaged that a small block of apartments could be built on the site, but this did not prove possible for planning reasons. Although the property was purchased as a development site, other development proposals did not proceed either and the property remains undeveloped.

20. There is considerable confusion surrounding the circumstances in which the property was purchased. It seems that agreement to purchase the property from the original vendor for the sum of €1.1 million was reached in 2006. Contracts were issued by the vendor in the name of the company but returned in June 2006 in the name of the partnership. A deposit and a significant initial payment were made in 2006 before the transaction became delayed because of a title issue. The balance of the monies due were paid in a series of tranches over 2007. These payments were apparently made from a partnership account although at various times Mr. Eamonn Brett suggests that payments were made by the partners personally. The Brett reconciliation suggests that €1 million was transferred by Mr. Miley from the company to the partnership *"to facilitate the Barrett Street, Ballina purchase monies"*.

21. According to the liquidator and based on information received by him from the vendor's solicitor, notwithstanding the fact that payment had been made, the vendor experienced difficulty in obtaining closing documents from the purchaser's solicitor such that, by January 2008, they had instituted proceedings calling on the purchaser to close the sale. These proceedings were subsequently compromised but there was further delay on the purchaser's part. The papers before the court include a letter dated 31 October 2013 from the vendor's solicitor, indicating that the sale had only been finalised that year. One of the reasons for the continued delay was that the purchaser's solicitor had prepared draft transfer documentation in

the name of the company rather than the partnership, which required the preparation of new conveyancing documents showing the partnership as the purchaser.

22. Whilst the conveyance was still outstanding, there was agreement between the partnership and the company regarding the transfer of the property to the company. Both sides are *ad idem* on the fact of such agreement and on the fact that the transfer was never formally completed, but there is much confusion as to precisely when and why the agreement was made. By way of background, it seems to be common case that the company did work for the partnership on an ongoing basis and that, as of 2005, it had been agreed that the partnership would pay the company for this work at market rates.

23. Eamonn Brett says that the agreement to transfer the property to the company was made in 2009 as a result of the auditor's 2009 reconciliation which showed some €2.1 million owing from the partnership to the company. The Brett case is that this reconciliation is incorrect as it did not take account of Mr. Miley's misappropriation from the company and the fact that a loan taken out in the name of the partnership was used to reduce the company's overdraft. The Brett reconciliation states that the transfer of the property (at a value of €1.5 million) was agreed in 2009 and is shown transferred in both the partnership and company accounts for 2010. The 2010 accounts are not before the court. It is not clear why the value of the property had increased by €400,000 between 2006 and 2009 at a time when property values generally were falling and when the proposed development had not materialised. At this time the vendor was still the registered owner of the property but as the purchase monies had been paid the vendor held the property on trust for the partnership which was the beneficial owner. As beneficial owner, the partnership was legally entitled to transfer its interest to the company although the fact that the original sale had not been completed may explain why the formal accounts relied on date from 2012.

24. The liquidator's account is materially different. He states that monies were due to the company from the partnership for building works carried out by the company for which the partnership could not pay. Significantly, the liquidator states that, having reviewed the company accounts and the records surrounding the transfer of the property, the value of the works for which the partnership owed the company money stood in excess of 10% of the company's net assets, thereby placing the company in breach of s. 31 of the Companies Act 1990. This provision prohibited loans and credit transactions – the definition of which included the provision of goods or services for which payment was deferred – by a company to directors and connected persons subject to a permitted 10% threshold provided for under s. 32. In order to remedy this breach, the partners agreed to *"reverse out"* the loan by transferring the property to the company. This transaction is reflected in the company's accounts and in the partnership accounts. Further, despite the fact that the transfer of legal title to the property to the company was never formally completed, the company acted as the beneficial owner of the property from at least 2012. For example, the company claimed a deduction in corporation tax between 2012 and 2016 based on a decrease in the value of the property. The company's accounts and the preparatory material for those accounts for the same period showed the property as an asset of the company. These accounts were prepared by AK, i.e. the auditor of Eamonn Brett's choosing. Both the company's accounts and its tax returns were signed by the Bretts as directors of the company. In parallel, the partnership accounts for 2013 which appear to have been prepared by MQ and which are before the court do not include the Ballina lands in the list headed *"Land Stocks Valuation Summary"*.

25. I do not think the court is required to make a definitive determination as to the source of the funds used to purchase the property in the name of the partnership. At the height of the Brett case, the funds came exclusively from the partnership or from the partners. The suggestion that €1 million was transferred by the company to the partnership to facilitate the

purchase of the property (a suggestion made in the Brett reconciliation) would support the view that the partnership was indebted to the company at the time of the subsequent transfer of the property to the company. However, the application made by the liquidator is not based on the company having beneficial ownership of the property by reason of having provided some or all of the purchase funds. Rather, it is based on a deliberate decision subsequently made by the partnership (of which the Bretts were members) to transfer the property to the company (of which the Bretts were directors), *inter alia*, to meet an existing debt and to ensure compliance with the regulatory requirements of the Companies Act 1990, and the subsequent treatment of the property as a company asset for accounting and tax purposes. The Bretts accept that the partnership decided to transfer the property to the company and that both the partnership and the company thereafter treated the property as a company asset but say now that the transaction was based on an erroneous premise. They do not respond to the liquidator's point about s.31 of the 1990 Act but equally do not deny that this was a live issue at the time of the agreement to transfer the property. The liquidator's case is also supported by the conduct of the Bretts in the context of the liquidation to which I will now turn.

The Liquidation

26. Eamonn Brett states that, in the period leading up to 2017, considerable efforts were made by the company to recover property which had been misappropriated from it, including through the issuing of multiple sets of proceedings. Certainly, there was extensive litigation regarding plant and machinery in the possession of third parties. It is not clear from the papers before the court the extent to which, if at all, the company took action against Mr. Miley personally. As previously noted, the Brett Miley partnership continued in existence throughout this period. It too is in financial difficulties and a receiver has been appointed over certain of its assets but apparently not the property. The liquidator believes the Bretts' change of position

has come about in part because they wish to secure ownership of the property in order to have it available to meet their personal indebtedness. Even if this were so, it does not really alter the legal issues which the court has to decide.

27. The company went into a creditors' voluntary liquidation with the support of the directors on 10 April 2017. Eamonn Brett appears to have believed that the liquidator would continue with the investigations that he had been conducting on behalf of the company into the allegations against Mr. Miley. At that stage, the company's original auditors, MQ, had been replaced by AK (although I note MQ continued to act as the accountant to the partnership). Separately, Eamon Brett had engaged a third firm accountants, UR, to investigate the alleged misappropriation by Mr. Miley. At various times, he seems to also have engaged a fourth firm, Mazars, to do a forensic analysis, a fifth firm to do due diligence for a period between 1993 and 2009 and a sixth firm to prepare a forensic report. I mention this because, despite the large number of accountants who have been engaged over time by Eamonn Brett in connection with these matters, the Brett reconciliation appears to be prepared by Mr. Brett personally rather than by a relevant professional - a point made with some force by the liquidator. In my view, the appointment of yet another accountant to conduct an independent investigation would be a futile exercise in light of the fact that some six firms of accountants, and indeed the liquidator himself, have already examined the company's affairs for various purposes.

28. At the time the company went into liquidation, its statement of assets included the Ballina lands. On the date the liquidator was appointed, John Brett physically handed to him the title deeds to the Ballina lands which were in the possession of the company. Eamon Brett disputes the liquidator's recollection that he also was in attendance when this occurred. In my view nothing turns on this as there is no dispute that, as of April 2017, the company was in possession of the title deeds to the property which a director of the company then provided to the liquidator on the basis that the property was a company asset.

29. The liquidator's affidavit includes minutes of a series of meetings in the early stages of the liquidation, at which the Bretts (on one occasion Eamonn Brett alone) were in attendance accompanied by accountants from UR, the firm then engaged by the Bretts in connection with these matters. The first of these meetings was on 13 of July 2017 and the minutes record an accountant from UR confirming that the property had been transferred to the company *"as the partnership had owed the company €2.1 million, this arose from monies due to the company for works carried out building houses on sites owned by the partnership"*. The liquidator indicated that he would have to reconstruct the partnership loan accounts with the company, not because anyone present at the meeting took issue with the fact or the amount of this debt but because, in circumstances where the property was valued at some €800,000 to €900,000, he needed to ascertain how the balance of the monies owed (approximately €1.1 million) had been paid. On 15 March 2018, a meeting was held at with a representative of the Revenue in attendance. The property was discussed and the minutes record both Bretts as being happy to transfer back their share against shareholder loans. At that stage, it seems that the liquidator's solicitors were of the view that the company paid for the site, although it had been conveyed to the partners. This is not the basis of the current application.

30. Finally, the minutes of a further meeting on 22 February 2019 note the liquidator's position as being that the land was to have been transferred from the partnership to the company to partially reverse out a loan balance in excess of €2 million owed by the partnership to the company. The minutes then go on to record the Bretts' position as follows:-

> *"John and Eamon Brett had been unequivocal that the site was the Company's and JB had delivered up the title deeds at the date of liquidation. JB and EB were advised that they should seek independent legal advice as we would be requesting that they transfer whatever their interest was in the site into the company. Again both JB and EB stated that they had no problem doing so."*

31. The minutes also note that AIB were suing the partnership and might object to the transfer of the lands from the partnership to the company. The liquidator's solicitors wrote to the Bretts in September and October 2019 seeking confirmation that their interest in the property would be transferred to the company and wrote to Mr. Miley in December 2019 to the same effect. Although not directly relevant to this correspondence, I note that the Bretts now claim that the transfer of the property to the company in 2009 was on an *"interim"* basis. Apart from the legal basis for an interim transfer of property being unclear, it seems that at no stage during any of these engagements did the Bretts suggest that the property had only been transferred on an interim basis or suggest that it no longer belonged to the company because the rationale (whatever it might have been) for this "*interim*" transfer had ceased to apply.

32. The liquidator also relies on a letter dated 11 March 2021 sent by Eamon Brett to the liquidator's solicitor. Although that letter undoubtedly expresses concern at the failure of the liquidator to complete a forensic report, it continues, specifically as regards the property, to state the following:-

> *"The transfer to JMP was agreed back in 2008/2009 to repay the JMP immediately monies due at that time. I was unaware the previous agreements to pay these due monies as they fell due was outstanding. The main reason for this was the concealed fraud of Joe Miley of company funds and the collusion of AIB Newbridge with him. I have provided all the relevant documentation and information on this to the Liquidator's office. The transfer of this site to JMP is shown in the company accounts. I was not aware that the deed was not transferred until the matter was raised at a Committee of Inspection meeting and expressed to total disbelief that this was the case at this time.*

I have confirmed previously and John Brett has confirmed – in response to your letter in July 2019 – that we both have no issue signing any transfer documentation to JMP that may now be required. I confirm now again."

33. The liquidator has suggested that the court should treat the Bretts as being estopped from changing their position and opposing this application by reason of the actions, statements and correspondence set out above along with the fact that they had not filed any opposition to the original application which came before O'Regan J. Although there is a strong factual rationale for saying that they should not be permitted to simply change their position at the very last minute, the liquidator has not expanded on the legal basis on which they might be held to be estopped from doing so. Consequently, I am not prepared to decide this application on the basis that the Bretts should not be permitted to oppose it. Nonetheless their conduct, not merely in not opposing the original application, but in positively affirming the company's ownership of the property both before and during the liquidation and in agreeing to complete the formal transfer, is something to which the court should and will have regard.

Analysis

34. I have no doubt that this was a difficult liquidation and that matters progressed more slowly than the parties originally anticipated and, indeed, desired. The Bretts' affidavits are replete with complaints against the liquidator. Central to these complaints is the view that the liquidator should have prepared or commissioned a forensic report into the allegations of misappropriation from the company but failed to do this. Eamon Brett, in particular, seems to believe that a garda prosecution (presumably of Mr. Miley) has been frustrated by the liquidator's failure to prepare such a report. He is critical of the liquidator for having terminated the appointment of a sixth firm of accountants engaged by the Bretts for the purpose of producing a forensic report. He criticises the failure of the liquidator to reconstruct the

partnership account with the company, something he believes was promised by the liquidator at the meeting in July 2017.

35. In response, the liquidator points to his principal statutory obligation being to collect in the company's assets and to make a distribution to the company's creditors. The liquidator cannot conduct a roving inquiry into the allegations made against Mr. Miley nor seek to recover monies for anyone except the company or its creditors. In exercising his functions, the liquidator has to be mindful that the cost of the liquidation will ultimately be borne by the creditors. In reality, what the Bretts want is for the company's creditors to bear the cost of their continued investigation into Mr. Miley regardless of the extent to which this might benefit the company or its creditors. The liquidator points to the fact that, at this stage, the Bretts are making allegations not just against Mr. Miley but also against the company's former accountants, its former solicitor, its bankers and now the liquidator himself. He expresses concern at the lack of oversight of the company's affairs by the Bretts who were directors during the entire of the period when the misappropriation allegedly occurred. As directors, the Bretts cannot simply disassociate themselves from the company accounts which they signed in that capacity. He also points to the particular statutory and regulatory status such accounts have once filed in the CRO and the legal duties on the accountants who prepare them. Consequently, as liquidator he is entitled to place some reliance on the accuracy and veracity of those documents.

36. The court has considerable sympathy with the Bretts if, as they claim, substantial amounts of money have been misappropriated from the company. I note that the liquidator agrees that there has been a significant dissipation of the company's assets so there seems to be a real basis for the Bretts' complaints. However, it does not follow from the fact that some of the company's assets may have been misappropriated, either that the liquidator has a duty

to conduct the type of investigation that the Bretts wish to see nor that the property the subject of this application should remain in the ownership of the partnership.

37. In the course of argument, counsel for the liquidator queried exactly what the Bretts want the court to do. I have to confess that the answer to this query is not entirely clear to me. In a series of hypotheticals, counsel for the liquidator asked how the substance of the Bretts' allegations affects this particular transaction and he mused that their object seems to be that the asset should stay in abeyance whilst the court conducts enquiries into Mr. Miley, the auditors and the bank. Clearly, there is not – and was not intended to be - any reality to this suggestion.

38. There is also no reality to the suggestion made on behalf of the Bretts that there should be an *"independent"* investigation into and reconciliation of the debts due to and from the company which would be subject to agreement by the Bretts. Leaving aside the fact that the issues surrounding ownership of the property relate only debts due as between the company and the partnership and not the debts due to and from the company generally, the offer to consent to the transfer of the property to the company if this exercise showed a debt due to the company is meaningless as it is subject to the Bretts agreeing the outcome of any such investigation before their obligation to consent to the transfer would arise. It also goes without saying that the validity of the transfer could never be assessed by reference to debts allegedly accruing after the date of the transfer.

39. I accept the liquidator's contention that he is, in effect, an independent person who is examining all of the company's financial affairs including its dealings with the partnership. Notwithstanding the view the Bretts may have taken in supporting the creditors' voluntary liquidation in 2017 and their belief that the liquidator would continue their investigation into Mr. Miley, they do not have the right to direct the liquidator in the exercise of his statutory functions. The performance of the liquidator's functions cannot be made subject to the outcome of any third party investigation, and certainly not one in respect of which the Bretts would

maintain a right of veto through the withholding of their agreement. The liquidator has indicated that he will take account of any report or analysis presented to him but without committing himself to being bound by the contents thereof. In my view, this is an entirely appropriate stance for the liquidator to take.

40. In addition, it is difficult for the court to avoid the uncomfortable fact that any misappropriation of company funds occurred on the Bretts' watch as they were directors of the company throughout the period of concern. Equally uncomfortable is the fact that subsequent to these matters being raised by Eamon Brett in 2007/2009, the alleged fraud was allowed to continue such that another €2.5 million was apparently misappropriated between 2008 and 2016. No explanation has been offered by the Bretts as to how Mr. Miley managed to defraud a company of which he was neither an officer nor an employee (certainly during the latter period) nor has any explanation been offered as to why the Bretts continued in business and in partnership with Mr. Miley despite having made such serious allegations against him.

41. The other matter that is not adequately explained by the Bretts is their change of heart regarding this transaction in the Autumn of 2021. Eamon Brett had been investigating Mr. Miley since 2009 and was in a position to furnish significant material regarding the alleged misappropriation to the liquidator on his appointment in 2017. Little or nothing said by the Bretts on this application appears to be based on any new material emerging since that date. Insofar as it is suggested that the 2009 reconciliation is incorrect, issues as to Mr. Miley's financial interaction with the company were set out in the then-auditor's letter which was cc'd to the Bretts in 2010. Those facts were known to the Bretts when they informed the liquidator that the property was a company asset in 2017. What changed over the summer of 2021? In the absence of an explanation from the Bretts as to this change of heart, it is difficult not to have regard to the liquidator's suggestion that it was prompted by issues raised by him against the Bretts and their potential personal liability in respect of certain debts.

42. In summary, the formal evidence of the company's accounts and tax returns establishes that the beneficial ownership of the property was transferred by the partnership to the company by 2012 at the latest and that the property was treated by both the partnership and the company as belonging to the company since at least that date. Nothing said by the Bretts on this application provides a basis for looking behind the company's accounts nor the tax returns for which they were responsible as directors of the company. I am satisfied that the evidence before the court establishes that the company is the full beneficial owner of the property. This means that the registered title which the partners continue to hold is title to the bare legal estate and, in light of the company's full beneficial interest, it is held by them on trust for the company.

43. Whilst there appears to have been a misappropriation of company funds which is a matter of relevance to the liquidation, the liquidator is not under an obligation to conduct an investigation of the type required by the Bretts nor to allow the Bretts direct the performance of his statutory duties. It may well be that the Bretts or the partnership or both are *bona fide* creditors of the company. If so, they must rank for the purposes of any distribution in accordance with the statutory priority that their debt affords them. They cannot secure payment of such sums as may be due to them by withholding from the liquidator an asset that they have previously accepted without qualification was a company asset. For these reasons, like my colleague, O'Regan J., I am prepared to grant relief that will vest the property in the company's name. The outstanding issue is how best this should be achieved.

Relevant legislation

44. The initial application to court was made by of originating notice of motion under the Companies Act 2014 and sought relief under ss. 596, 608 and 627 of that Act. Section 596 is not a provision which envisages the making of an order by the court. Rather, it confers upon a liquidator the entitlement to take all of the company's books, records and property into his

custody and control upon his appointment. It also requires any person holding company property without lawful entitlement to surrender it immediately to the liquidator. The relevant parts provide as follows:-

> *"(1) Upon the appointment of a liquidator to a company, the liquidator shall take into his or her custody or under his or her control the seal, books and records of the company, and all the property to which the company is or appears to be entitled.*
>
> *(2) A person who, without lawful entitlement or authority, has—*
>
> *(a) at the date of the appointment of a liquidator to a company, possession or control of the books, records or other property of the company, or*
>
> *(b) subsequent to such date comes into such possession or control,*
>
> *shall surrender immediately to the liquidator such books, records or other property, as the case may be."*

45. The relevant parts of s. 608 provide 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.

…

(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."

In order to come within s. 608, the liquidator has to establish both that company property was disposed of and that the effect of such disposal was to perpetrate a fraud on the company. Although the use of the word *"disposal"* suggests the positive removal of property from the ownership of the company, s. 608(1)(a) acknowledges that such a disposal may take place through an omission as well as an act and that it may be indirect as well as direct. The issue in this case concerns the failure to formally transfer legal title to the property to the company in circumstances where beneficial title had already been transferred. It seems to me that if the legal effect of this failure were to enable the partnership to retain ownership of the property, then it could potentially constitute an indirect disposal by way of omission. However, the liquidator must also establish that the effect of the disposal is to perpetrate a fraud on the company. The original failure to formally transfer the legal title of the property to the company does not appear to have been intended to nor to have had the effect of defrauding the company. It is only the continued refusal to do so subsequent to the appointment of the liquidator which, arguably, has that effect. The notion of a continuing action becoming fraudulent long after it commenced is complex and if I were minded to make an order under this section is something upon which I would require further elaboration in the submissions to the court.

46. The third provision of the Companies Act under which relief is sought is s. 627. That is an extensive provision conferring a range of powers on the liquidator. I do not propose to set

the provision out in full. The relevant parts would appear to be para. 1, under which the liquidator has power to bring any action or other legal proceedings in the name and on behalf of the company, and para. 9, under which a liquidator has power to take into his custody and control all of the property to which the company is or appears to be entitled. The orders sought under ss. 608 and 627 require the respondents to deliver the property up to the liquidator or, alternatively, allow the liquidator to take the property currently held by the respondents into his custody. The order sought under s. 596 is a declaration to the effect that the lands are company property.

47. The proceedings issued by way of special summons in July 2021 seek additional relief pursuant to ss. 25 and 26 of the Trustees Act 1893. Section 25(1) of the 1893 Act provides as follows:-

> *"(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt."*

The mechanism envisaged in the making of an order under s. 25 in this case would be the appointment of a trustee to the property in lieu of the members of the partnership for the purpose of that trustee executing the transfer necessary to transfer the property into the name of the company.

48. Section 26 of the same Act allows the court to make a vesting order in relation to land. The drafting of this section is slightly unusual in that each subparagraph ends with the words

"and" rather than the word *"or"*. The use of *"and"* generally indicates conjunctive or cumulative requirements, all of which must be satisfied in order for the section to apply. In contrast, the use of the word *"or"* generally indicates disjunctive requirements, the satisfaction of any one of which would allow an application to be brought under the section. However, read as a whole, it is clear that s. 26 allows an application to be made in any of the cases listed in paras. (i) to (vi) of the section. For present purposes, the following appear to be relevant:-

"In any of the following cases, namely:—

(i) Where the High Court appoints or has appointed a new trustee; and

(ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found; and

...

(vi) Where a trustee jointly or solely entitled to or possessed of any land…has been required by or on behalf of a person entitled to require a conveyance of the land…to convey the land…and has wilfully refused or neglected to convey the land…for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct. Provided that—

(a) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person."

49. No submission was made on behalf of the Bretts as to the preferable form of order to be made in the event the court acceded to the liquidator's application. Consequently, the following discussion considers only the submission made on behalf of the liquidator in both formal written submissions and in argument before the court.

Analysis of Relief Sought

50. As noted at the beginning of this judgment, the relief now sought by the liquidator in the special summons comprises orders under ss. 596, 608 and/or 627 of the Companies Act 2014 and/or ss. 25 and 26 of the Trustees Act 1893. At the hearing of this application, counsel for the liquidator also sought relief under ss. 614 and 673 of the Companies Act, 2014 although these sections were not formally relied on in the pleadings. Section 673 is addressed in the written legal submissions filed on behalf of the liquidator as is s. 614 but no oral argument was advanced under s. 614 at the hearing of the application.

51. Section 614 allows the court, on the application of the liquidator, to direct that all or any part of property belonging to the company or held on its behalf by trustees shall vest in the liquidator in his official name, and then allows the liquidator (after giving such indemnity as the court directs) to bring proceedings in his official name or other legal proceedings in respect of the property for the purposes of effectually winding up the company and recovering its

property. On the basis of the language used in s. 614(1), it appears that this is a power which is only exercisable by the court on foot of an application being made in that regard by the liquidator. As no application has been formally made to the court under s. 614, an essential pre-requisite to the exercise of the court's jurisdiction has not been satisfied. In any event, it seems to me that an order under s. 614 would only partially achieve that which is sought by the liquidator on this application. Any order under s. 614 would operate to vest the property in the liquidator, not in the company, and thus would require a further step in order to vest the property in the company.

52. Section 673 allows a liquidator to serve written notice on certain persons including agents and officers of the company (s. 673(1)(e)) requiring them to deliver up to the liquidator property which happens to be in their hands "*for the time being and to which the company is prima facie entitled*". Subsections (2) and (3) of the same section confer upon the court a power to require the same categories of persons to deliver up to the liquidator property to which the company is *prima facie* entitled within a time period to be directed by the court. It does not appear that the exercise by the court of power under subs. (2) and (3) is conditional upon the liquidator having served a notice under subs. (1) but obviously the service of a notice affords the persons holding such property the opportunity of delivering it up to the liquidator without the need for an application to court.

53. As directors of the company, the Bretts are clearly *"officers"* within the meaning of s. 673(1)(e). However, it is not clear that Mr. Miley, who is also a registered owner of the property, falls within any of the categories listed in s. 673(1). Certainly no evidence has been adduced which would enable the court to be satisfied that he felt within the scope of s. 673. This may be why s. 673 was not invoked by the liquidator at the time when the originating notice of motion was issued - when of course the Bretts were not objecting to the application but Mr. Miley was opposing it. At this stage, Mr. Miley is consenting to the application and

the Bretts are opposing it. The court could, in principle, make orders against two of the three registered owners where the third was formally on record as consenting to the liquidator's application. However, as the evidence before me would not allow an order to be made against Mr. Miley under this section, it would in any event be necessary to make an order under some other section to which his consent could apply.

54. Strictly speaking, it is not formally necessary for a liquidator to have expressly sought relief under s. 673 as the court may exercise power under that section *"of its own motion"*. However, in a contested application, it is always preferable that the formal pleadings should alert the opposing parties to the sections under which and the basis upon which relief will be sought. Whilst I have considered ss. 614 and 673, in circumstances where no argument at all was made by the Bretts as to the appropriate form that any order might take it would, in my view, be less than optimal to make orders under sections which are not addressed in the pleadings nor the extensive affidavits based on those pleadings and only addressed partially in the written legal submissions filed prior to the application being heard in court.

55. It is clear that O'Regan J. was of the view that the original application made solely under the Companies Act did not provide her with an appropriate basis for making orders that would achieve the liquidator's objective of securing the company's title to the property. Having examined the provisions of the 2014 Act invoked by the liquidator, I share her views and understand why she suggested that an application under the 1893 Act would be more efficacious. Notwithstanding that fresh proceedings were instituted to include an application under the 1893 Act, this element of the application was not really teased out on behalf of the liquidator. In particular, I have had some difficulty in understanding the basis for the only argument made to me under s. 26 which focused on s. 26(2)(c) of that Act.

56. Looking firstly at the pleaded sections of the Companies Act, it seems that, for the most part, the sections relied on do not really provide a satisfactory mechanism through which the

real problem facing the liquidator can be resolved. That problem is that the property – of which I have found the company to be the full beneficial owner – remains registered in the name of the three individuals who are the partners in the partnership. To date, those individuals have never all been prepared at the same time to execute the necessary documents to transfer ownership to the company.

57. Section 596 of the Companies Act places the liquidator on his appointment under a duty to take into his custody and control the assets of the company and places persons holding company assets under a corresponding obligation to surrender them to the liquidator. This is clearly what the liquidator is trying to do in this case and he has been met with a belated refusal on the part of the Bretts to co-operate and surrender the property to him. Section 569 does not establish any particular mechanism through which the liquidator can enforce the obligation on persons holding company property to surrender it to him nor does it confer any specific power on the courts in this regard. Similarly, s. 627 confers various powers on a liquidator which allow him, *inter alia*, to bring court proceedings on behalf of the company – which he has done – and to take all of the company's property into his custody and control – which he is attempting to do. The object of these proceedings is for the liquidator to acquire custody and control of the property but, again, although it provides the power necessary to take legal action, s. 627 does not provide the mechanism through which custody and control can be formally achieved.

58. Section 608 is somewhat different in that it does provide the court with an express power to make orders requiring persons who have the use, control or possession of company property to deliver it to the liquidator on such terms as the court thinks (s. 608(2)). However, s. 608(1) limits the circumstances in which the power under s. 608(2) can be exercised to cases where two conditions are cumulatively satisfied. These conditions are, firstly, that the property was disposed of by the company and, secondly, that the effect of the disposal was to perpetrate a fraud on the company.

59. My reading of s. 608 is that it is primarily directed at circumstances where property has been disposed of by a company, i.e. transferred out of company ownership, prior to the liquidation. It does not, on its face, cover circumstances where the transfer of an asset into company ownership is incomplete or contested although, as previously considered, this could be characterised as an indirect disposal through omission. In the course of argument, counsel for the liquidator suggested that the failure or omission of the partners to sign the documents necessary to effect the transfer of the property to the company perpetrated a fraud on the company. No authority was offered for this proposition nor, indeed, for the underlying assumption (albeit that it is probably correct) that the failure to transfer property to the company is a disposal of the company's property. These are important issues and I would be reluctant to make an order under this section, particularly when this aspect of the application is effectively unopposed, without having had them teased out before me in greater and more rigorous detail. This is not to say that the basic proposition is necessarily incorrect but, in circumstances where the application does not squarely fall within s. 608, the liquidator would have to go to some greater length to persuade me that the court has jurisdiction under this section on the particular facts.

60. Although very little argument was directed to the provisions of the Trustee Act, I think that O'Regan J.'s view that this provides a more appropriate mechanism through which the property can be vested in the company is correct. The starting proposition is, as I have found, that the company is the full beneficial owner of the property. Notwithstanding that title to the property is registered, the courts have frequently acknowledged that the register is not and was never intended to be evidence of beneficial ownership and that beneficial ownership may differ from the registered title (paraphrasing Baker J. in *Tanager DAC v. Kane* [2019] 1 IR 385). This means that although the partners are the registered owners of the property, they own only the legal estate which they hold on trust for the beneficial owner, namely the company.

61. This in turn begs the question as to how the legal title to the property held on trust for a company can be transferred to the company so as to complete its title. As the property is a trust property by virtue of the matters set out in the preceding paragraph, the simplest and most direct way of achieving this is through the 1893 Act. Two sections have been invoked, i.e. s. 25 which allows the court to appoint a new trustee either in substitution for or in addition to any existing trustees and s. 26 which allows the court to make an order vesting property held by a trust in any person. Ultimately, the most pragmatic order for the court to make is a vesting order under s. 26 of the 1893 Act. However, in order to make a vesting order, the case must come within one of the scenarios identified in sub-paras. (i) to (vi).

62. The only argument addressed to me on this point by the liquidator invoked s. 26(ii)(c) where a trustee entitled to or possessed of land either solely or jointly cannot be found. Reliance was placed on the recent decision of Barniville J. in *Clariant AG* [2020] IEHC 211, in turn relying on the earlier decision of Costello J. to the same effect in *Re Kavanagh and Cantwell* (Unreported, High Court, 23 November 1984). In *Clariant AG*, the registered owner of the property in issue was a dissolved company within the same group as the applicants. The court accepted that agreement had been reached between the liquidator of the dissolved company and the applicants for the transfer of all of the dissolved company's assets to the applicants but, through inadvertence, the registered property had not been expressly transferred. Consequently, the land remained in the name of the dissolved company but held in trust for the benefit of the applicants. The point on which the liquidator relied was Barniville J.'s finding that the dissolved company could be treated as one which could not be found so as to bring the case within s. 26(ii)(c) of the 1893 Act. Consequently, on the basis that it would be more convenient and would cut out unnecessary conveyancing steps, Barniville J made an order vesting the land directly in the intended new owner rather than appointing a trustee to the land for the purpose of effecting the conveyance.

63. I note that Barniville J. was, in effect, dealing with the opposite scenario to that before the court in this case. Here, the purpose of the application is to enable the transfer of the property into the name of a company which is in liquidation rather than out of the name of a company which has been dissolved. Counsel for the liquidator suggested that the analogy – which requires an extension of the *Clariant AG* rationale – is between a dissolved company and a partnership in receivership. In my view, the evidence before the court does not enable me to conclude that either the partnership or the individual partners *"cannot be found"*. I was informed (although no evidence adduced on the point) that a receiver had been appointed over certain of the partnership assets, but I was not informed and no evidence was adduced to the effect that the partnership itself had been dissolved. I am not convinced that the appointment of a receiver over partnership assets is analogous to the dissolution of a company. More importantly, the property is not owned by the partnership as an entity (for obvious reasons) but by the individual partners. Clearly, the individual members of the partnership are all still alive, apparently all are within the jurisdiction and have, in various ways, engaged with this application. Therefore, there is neither a legal nor a factual basis on which the court could hold that the trustees of the property (i.e. the partners) cannot be found.

64. Although no argument was directed to the point, it seemed to me that there are two other provisions of s. 26 which were potentially relevant. The first of these is sub-para. (i) where the High Court appoints or has appointed a new trustee – and there is an application under s. 25 to that effect – and the second is under sub-para. (vi) where a trustee has been required by or on behalf of the person entitled to require a conveyance of the land and has wilfully refused or neglected to convey the land for 28 days after the date of the requirement.

65. Because no argument was directed to me on these issues, the liquidator did not specifically identify a demand made by him of the partners *qua* trustees requiring the transfer of the land to the company. There clearly has been a very significant amount of correspondence

in the course of the liquidation, not all of which was exhibited before the court. In circumstances where no application was initially made under the 1893 Act, it is possibly unlikely that a demand was formally made for the transfer of the land pursuant to its provisions. It may be that a demand was made which would nonetheless comply with the requirements of s. 26(vi) but that does not appear to be in evidence before me. Consequently, I am not prepared to exercise jurisdiction pursuant to that provision.

66. That leaves s. 26(i). There is an application before the court to appoint Daire Murphy, solicitor, as a trustee of the property in substitution for the respondents. I am, in principle, minded to accede to that application. The question which arises is whether making that order is then sufficient to allow the court to vest property directly in the company or whether the appointment of Mr. Murphy as a trustee should be for the purposes of enabling him to complete the necessary transfer of the property to the company. Either should achieve the desired outcome of securing the transfer of the property to the company. A vesting order under s. 26 is undoubtedly, as Barniville J. noted, a more direct method and one which eliminates the intervening conveyancing steps which will be required of Mr. Murphy if he is appointed trustee.

67. I note that s. 26 is subject to a proviso which, at sub-para. (a) provides that where a vesting order is consequential on the appointment of a new trustee, *"the land shall be vested for such an estate as the court may direct in the persons who on the appointment are the trustees"*. This would suggest that the section envisages where a vesting order is made consequential on the appointment of a new trustee, that the land will be vested in that trustee – together with any other trustees who are not being replaced by the appointment of a new trustee. In those circumstances, I would be reluctant to make an order under s.25 appointing Mr. Murphy as a new trustee solely for the purposes of the court then gaining access to the power under s. 26 to make an order vesting the property directly in the company and by-passing Mr

Murphy in his role as trustee. It may be that I am being overly cautious in my approach to s. 26, but in circumstances where no submissions have been made as to the extent of the court's jurisdiction under s. 26 consequent on the appointment of a new trustee under s. 25, I would prefer to leave over the determination of that question to a case in which the matters are fully argued.

68. Consequently, I will make an order under s. 25 of the Trustee Act 1893 appointing Daire Murphy, solicitor, as a trustee of the property at 4-6 Barrett Street, Ballina, County Mayo in substitution for Mr. Joseph Miley, Mr. John Brett and Mr. Eamon Brett. I will not make an order directly vesting that property in the company under s. 26 but I will direct that Mr. Murphy execute the transfer and all consequential documents necessary to give effect to the transfer of the property into the name of the company and the registration of the company's legal title thereto. For the avoidance of any doubt, I will also make the order requested under s. 596 of the Companies Act 2014 declaring that the lands are company property. I think that the making of these orders should suffice to ensure that the liquidator can take custody and control of the property, but will grant the liquidator liberty to apply lest any further difficulties arise.