

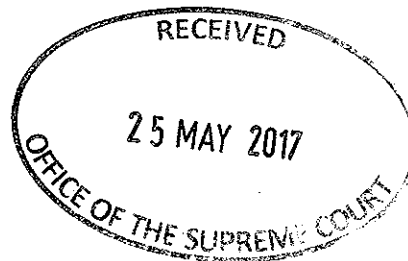
## Appendix FF

Order 58, rule 15

No. 1

## SUPREME COURT

## Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

The Revenue Commissioners	V	Anthony J. Fitzpatrick	
High Court Record Nr	2014/391 COS	Court of Appeal Record Nr	2015/394, 2015/443 & 2016/218
Date of filing	25 <sup>th</sup> May 2017		
Name(s) of Applicant(s)/Appellant(s)	Anthony J. Fitzpatrick		
Solicitors for Applicant(s)/Appellant(s)	Hunter & Company, Solicitors		
Name of Respondent(s)	The Revenue Commissioners		
Respondent's solicitors	Revenue Solicitors		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No		
If yes, give [Supreme Court] record number(s): S:AP:IE:2016:000107			

Are you applying for an extension of time to apply for leave to appeal?	Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

## 1. Decision that it is sought to appeal

Name(s) of Judge(s)	Ms. Justice Irvine, Ms. Justice Finlay Geoghegan and Mr. Justice Hogan
Date of order/ Judgment	Judgment of the 7 <sup>th</sup> day of April 2017 / Orders perfected on the 27 <sup>th</sup> day of April 2017

## 2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Anthony J. Fitzpatrick		
Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	
	<input type="checkbox"/> Applicant	<input checked="" type="checkbox"/> Respondent	

	<b>Prosecutor</b>
	<b>Petitioner</b>

<b>Notice Party</b>
---------------------

<b>Solicitor – Ms. Katherine Hunter</b>			
<b>Name of firm</b>	<b>Hunter &amp; Company</b>		
<b>Email</b>	<b>huntercosols@eircom.net</b>		
<b>Address</b>	<b>Olympia House 61-63 Dame Street Dublin 2</b>	<b>Telephone no.</b>	<b>01 677 3591</b>
		<b>Document Exchange no.</b>	<b>253002</b>
<b>Postcode</b>	<b>D02 K832</b>	<b>Ref.</b>	<b>KH/LW/4102</b>

**How would you prefer us to communicate with you?**

<input checked="" type="checkbox"/>	<b>Document Exchange</b>	<input checked="" type="checkbox"/>	<b>E-mail</b>
<input type="checkbox"/>	<b>Post</b>	<input type="checkbox"/>	<b>Other (please specify)</b>

<b>Counsel</b>			
<b>Name</b>	<b>Patrick O'Reilly S.C.</b>		
<b>Email</b>	<b>patrick@patrickoreillysc.ie</b>		
<b>Address</b>	<b>Law Library, Four Courts, Dublin 7</b>	<b>Telephone no.</b>	<b>086 814 7226</b>
		<b>Document Exchange no.</b>	<b>816004</b>
<b>Postcode</b>			

<b>Counsel</b>			
<b>Name</b>	<b>Ronnie Hudson B.L.</b>		
<b>Email</b>	<b>rhudsonbl@gmail.com</b>		
<b>Address</b>	<b>Law Library, Four Courts, Dublin 7 Bar Library, 91 Chichester Street, Belfast, BT1 3JQ</b>	<b>Telephone no.</b>	<b>086 843 9322</b>
		<b>Document Exchange no.</b>	<b>818270</b>
<b>Postcode</b>			

<b>Counsel</b>			
<b>Name</b>			
<b>Email</b>			
<b>Address</b>		<b>Telephone no.</b>	
		<b>Document Exchange no.</b>	
<b>Postcode</b>			

**If the Applicant / Appellant is not legally represented please complete the following**

<b>Current postal address</b>	
<b>e-mail address</b>	
<b>Telephone no.</b>	

<b>How would you prefer us to communicate with you?</b>			
<input checked="" type="checkbox"/>	<b>Document Exchange</b>	<input checked="" type="checkbox"/>	<b>E-mail</b>
<input type="checkbox"/>	<b>Post</b>	<input type="checkbox"/>	<b>Other (please specify)</b>

### 3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	The Revenue Commissioners
------------------------	---------------------------

Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		
	<input checked="" type="checkbox"/> Applicant				<input type="checkbox"/> Respondent
	<input type="checkbox"/> Prosecutor				<input type="checkbox"/> Notice Party
	<input type="checkbox"/> Petitioner				

Solicitor – Mr. Paul J. O'Connor			
Name of firm	Revenue Solicitor		
Email	paulocon@revenue.ie		
Address	Revenue House	Telephone no.	021-6027245
	Blackpool	Document Exchange no.	198
	Cork	Ref.	6495/12
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Kieran Binchy B.L.		
Email	Kieran.binchy@lawlibrary.ie		
Address	Law Library, Four Courts	Telephone no.	087 968 6786
	Dublin 7	Document Exchange no.	818044
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any

of the following means?

Document Exchange
Post

E-mail
Other (please specify)

#### 4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b), the specific part or parts of the decision concerned

##### Scope of the Appeal

The Appellant seeks to appeal against the Order of the Court of Appeal (Finlay Geoghegan, Irvine and Hogan JJ.) made on the 7<sup>th</sup> day of April 2017 and perfected on the 27<sup>th</sup> day of April 2017, whereby an award of costs was made against the Appellant personally for 50% of the costs incurred by the Respondent in respect of the High Court proceedings and no order as to costs was made on the appeal.

**2(a). A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)**

*Findings of fact made by the High Court (Murphy J.)*

In her decision of the 21<sup>st</sup> July 2015, removing the Appellant as liquidator of Ballyrider Ltd. for cause stated, the learned trial judge (Murphy J.) made the following findings of fact:

- (i) That the Appellant “*did not behave in the most cost effective manner in engaging a solicitor*” on a time basis and in failing to request a section 68 letter outlining the anticipated conveyancing fees regarding the sale of the Hazel Hotel, Monasterevin;
- (ii) That there had been a delay in the liquidation of Ballyrider Ltd. due to the decision by the Appellant to initiate proceedings for non-performance of the contract for the purchase of the Hazel Hotel, Monasterevin, against the original purchaser at auction;
- (iii) That the Appellant ought to have obtained written legal advice regarding the viability of the claim prior to initiating the aforementioned proceedings;
- (iv) That whilst the Appellant was not required as a matter of law to consult with the Committee of Inspection prior to issuing the proceedings, it would have been prudent for him to do so;
- (v) That there were concerns regarding the Appellant’s own remuneration.

No finding of negligence, misconduct or personal unfitness was made by the High Court in respect of the Appellant.

*Findings of fact made by the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.)*

In its decision of the 26<sup>th</sup> July 2016, rejecting the appeal of the Appellant against his removal as liquidator of Ballyrider Ltd., the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.) upheld the findings of fact made by the learned trial judge and concluded that the Appellant had failed to conduct the liquidation in an efficient and cost-effective manner.

The Court of Appeal recognised that there had been no negligence, misconduct, personal unfitness or lack of integrity on the part of the Appellant.

In determining the appeal as to costs on the 7<sup>th</sup> April 2017, the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.) found that, on the facts, the trial judge was entitled to determine that the liquidator had been acting “in his own interests” in resisting the application for his removal.

**2(b). In the case where it is ought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute.**

N/A.

**3. The relevant orders and findings made in the High Court and/or in the Court of Appeal**

*Relevant orders and findings made by the High Court (Murphy J.)*

By order dated the 25<sup>th</sup> July 2015, the High Court (Murphy J.) removed the Appellant as liquidator of Ballyrider Ltd. for cause shown, pursuant to s. 277 of the Companies Act 1963. In making this order, the trial judge concluded that the Appellant had failed to conduct the liquidation in an effective and cost-effective manner but made no finding of negligence, misconduct or personal unfitness on the part of the Appellant.

By way of further order, made on the 27<sup>th</sup> October 2015 and perfected on the 29<sup>th</sup> day of April 2016, the Respondent’s costs in respect of the High Court proceedings were awarded against the Appellant personally. In making this determination, the learned trial judge expressed the view that as the Respondent had succeeded in its application pursuant to s. 277 of the Companies Act 1963, the normal rule as to costs ought to apply and costs should follow the event. The learned trial judge further held that in defending the application for his removal, the Appellant was solely protecting his own interests and could not be characterised as acting as an agent of the company in so doing. The Court was, on that basis, satisfied to hold the Appellant personally liable for the costs of the application, concluding that these costs had not been properly incurred in the liquidation.

The matter was appealed to the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.) under Record No. 2015 IECA 443/394.

*Relevant orders and findings made by the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.)*

By decision dated the 26<sup>th</sup> July 2016, the Court of Appeal (Finlay Geoghegan, Irvine and Hogan JJ.) dismissed the appeal by the Appellant against his removal under s. 277 of the Companies Act 1963, upholding the finding by the trial judge that the Appellant had failed to conduct the liquidation in an “efficient and cost-effective manner”. The Court of Appeal allowed the appeal by the Appellant against the consequential order of Murphy J. By decision dated the 7<sup>th</sup> April 2017, the Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.) varied the order of the High Court and directed that the Appellant pay to the Respondent 50% of the costs of the proceedings.

In making this order as to costs, the Court of Appeal held that, in the context of an application for the removal of a liquidator, the starting point for exercising discretion as to costs remained the principle that costs follow the event. The Court held that there was no basis upon which to exempt a liquidator from the decision to accede to or resist an application for his removal and risk an order as to costs, as the liquidator had accepted the appointment subject to the relevant legislation in force, including s. 277 of the Companies Act 1963. The Court of Appeal concluded that, on the facts, the trial judge was entitled to determine that the liquidator had been acting in his own interest in resisting the application.

The Court of Appeal further held that the fact that no finding of negligence, misconduct, personal unfitness or lack of integrity had been made against the Appellant did not mean that costs should not follow the event. The finding that the Appellant had not conducted the liquidation in an efficient and cost effective manner was deemed to provide “*good grounds for removal pursuant to s. 277 of the 1963 Act.*”

The Court of Appeal differentiated the instant case from those in which costs were sought in the context of proceedings brought by the liquidator whilst acting as agent for the company. The Court held that, in the instant case, it was the liquidator personally, as distinct from the company being sued through the agency of the liquidator, who was the party to the proceedings, and that a different approach to costs was accordingly warranted from that adopted in the latter context, whereby the costs are ordinarily paid out of the assets of the company.

The Court of Appeal determined that the Respondent had been successful in part insofar as the order to remove Mr. Fitzpatrick as liquidator had been upheld.

As a consequence, the Court of Appeal ordered the Appellant herein to pay 50% of the Respondent’s costs of the appeal record no. 2016 IECA 228. The court did not make any further costs orders.

## 5. Reasons why the Supreme Court should grant leave to appeal

*In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—*

**Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court**

1. The Appellant contends that the decision of the Court of Appeal gives rise to an absence of legal certainty for liquidators as to the circumstances in which they may incur personal liability for costs upon being removed for cause. In deeming a want of efficiency in the management of a liquidation sufficient to warrant removal, the Court of Appeal appeared to contemplate that an indeterminate range of conduct, falling short of acts undertaken in bad faith or personal misconduct, may suffice for this purpose. In the premises, the Appellant

contends that it is impossible for a liquidator to adequately assess his prospects of successfully resisting an application for removal as it is unclear what precise grounds may warrant this outcome. In these circumstances, the Appellant contends that it is inappropriate to adhere to the ordinary rule that costs follow the event. In resisting an application for removal, and thereby seeking to defend his good name, a liquidator cannot be certain of the grounds which may result in the application succeeding, and thus incurs a risk as to costs which he will not be in a position to evaluate in advance. The Appellant contends that, in this statutory context, this prospect leaves the law in a fundamentally unfair and unpredictable state and that it is in the interests of justice that the Supreme Court address this imbalance. The Appellant submits that, as a matter of fairness, it is necessary to delineate the types of conduct which may, upon leading to the removal of a liquidator, warrant an order for costs being made against the liquidator personally. It is the contention of the Appellant that, in the absence of legal certainty on this point, there is apt to be a chilling effect on those who may otherwise assume the statutory office of liquidator. In this regard, the proposed appeal gives rise to a matter of public importance with broader implications beyond the immediate proceedings.

2. The Appellant further contends that there are strong policy reasons why a voluntary liquidator ought not to be subjected to an order for costs, absent a finding of misfeasance or personal misconduct. These reasons have been outlined in detail by the Chancery Division of the High Court of England and Wales in *Re Wilson Lovatt & Sons Ltd* [1977] 1 All E.R. 274 at page 286. The Appellant contends that application of the ordinary principle, whereby costs follow the event, is disproportionate, in circumstances where, as noted in *Re Wilson*, the assumption of the role of liquidator entails “heavy responsibility.” The award of costs on the basis of this threshold is apt to have a detrimental, chilling effect on potential liquidators. The Appellant contends that, in this respect, the instant proceedings give rise to a policy question of particular public importance. Correlatively, it is contended that it runs contrary to the interests of justice to render statutory office holders, carrying out their duties in good faith, personally liable for legal costs in the absence of misfeasance or personal misconduct.
3. The Appellant submits that there is an absence of Irish judicial precedent specific to the question of when costs ought to be granted personally against a voluntary liquidator removed for cause. In light of the general public importance of this issue from a policy perspective, as outlined above, it is in the interests of justice that the matter be addressed for the first time, and conclusively, by the Supreme Court.

## **6. Ground(s) of appeal which will be relied on if leave to appeal is granted**

**Please list (as 1, 2, 3, etc) concisely:**

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

**The Court of Appeal erred in law in:-**

1. Determining as the appropriate starting point, when considering the costs of an application to remove a liquidator for cause, the principle that costs follow the event, in accordance with Order 99 of the Rules of the Superior Courts 1986.
2. Failing to take cognisance, or adequate cognisance, of the absence of legal certainty which would result from adherence to the principle that costs follow the event upon an application for removal of a liquidator for cause.
3. Failing to take cognisance, or adequate cognisance, of the status of a liquidator as a voluntary statutory office-holder, and the public policy considerations which arise as to when an award of costs should be made against a liquidator personally.
  - (i) The court failed to have sufficient regard to the concept of special circumstances ref *Re Mahon Tribunal v. Kenna No. 2* [2010] 1 IR 33 which could apply in the circumstances herein and which the court of appeal could have relied upon.

**Name of solicitor or (if counsel retained) counsel or applicant/appellant in person: Ronnie Hudson B.L.**

**7. Other relevant information**

**Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608**

**Court of Appeal [2017] IECA 115**

**References to Law Report in which any relevant judgment is reported**

N/A



**8. Order(s) sought**

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An appeal against the entire costs Order of the Court of Appeal delivered on 7<sup>th</sup> April 2017.

An Order to set aside the Order of the Court of Appeal whereby the Court ordered the Appellant to pay 50% of the Revenue Commissioner's costs of appeal record no. 2015/443/394 and Appeal Record no. 2016/218 and the order directing the Appellant to pay 50% of the Respondent's High Court costs.

What order are you seeking if successful?

Orders being appealed:                      set aside                       vary/substitute

Original order:                      set aside                       restore                       vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is / are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is / are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?                       Yes                       No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?                       Yes                       No

If Yes, please give details below:

Will you request a priority hearing?                       Yes                       No

If Yes, please give reasons below:

Signed: \_\_\_\_\_

Katherine Hunter,  
Hunter & Company,  
Solicitors for the Appellant,  
Olympia House,  
61-63 Dame Street,  
Dublin 2.

**Please submit your completed form to:**

**The Office of the Registrar of the Supreme Court,  
The Four Courts,  
Inns Quay,  
Dublin 7.**

**together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.**

**This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.**