

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (COMMERCIAL)

**JOHN JOSEPH CAVANAGH
As Liquidator of Meteor Controls (International) Ltd**

Plaintiff

and

**JOHN CONWAY
and
THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND
Defendants**

WEATHERUP J

[1] The Liquidator of Meteor Controls (International) Limited (“the company”) applied for directions under Article 98 of the Insolvency (Northern Ireland) Order 1989 (“the 1989 Order”). Proceedings have been issued by the company against the Bank of Ireland, the Allied Irish Bank and the First Trust Bank. The Liquidator seeks approval for a proposed settlement of the three actions. Opposing the Liquidator’s application, John Conway, a shareholder and Director of the company, seeks an assignment from the Liquidator of the three causes of action. The Bank of Ireland supports the Liquidator’s application. Mr Colmer appeared on behalf of the Liquidator, Mr Orr QC and Mr Shields on behalf of John Conway and Mr Dunford on behalf of the Bank of Ireland.

[2] An earlier dispute arose about the entitlement of the Liquidator to make any proposed assignment of the three causes of action to Mr Conway. By a decision dated 5 November 2014 I authorised the assignment of the proceedings in principle – Conway v Cavanagh and the Bank of Ireland [2014] NIQB. The Liquidator then considered the circumstances in which he would make any such assignment and

now seeks the sanction of the Court for his conclusion. The Liquidator has concluded that he should not assign any of the three choses in action to Mr Conway but should settle the proceedings.

[3] The application is made under Article 98 of the 1989 Order which provides that the Liquidator or any contributory or creditor may apply to the High Court to determine any question arising in the winding up of the company or to exercise as respect to the enforcing of calls or any other matter all or any of the powers which the Court might exercise if the company were being wound-up by the Court. Secondly, the High Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application, on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks fit.

[4] I propose to adopt the approach adopted by Lightman J in Re Edenmore Ltd [1997] 2 BCLC 89. The application concerned Tottenham Hotspur Football Club and competing bids for the club from Alan Sugar and Terry Venables. The Liquidator proposed to accept an offer made by one party and applied to the Court for an order sanctioning the proposed compromise of proceedings. The other party opposed the sanction on the basis that he had been prejudiced in the way the Liquidator had conducted the bidding. It was held that the Court was concerned only with the commercial interests of the company and therefore arguments addressed as to the prejudice to one bidder as a prospective purchaser were irrelevant. Nor was the application a contest between the two bidders. The Liquidator had substantial reasons for reaching his decision and the Court sanctioned his decision. Lightman J stated –

“Where a Liquidator seeks the sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary sense, where (as in this case) there is no suggestion of lack of good faith by the Liquidator or that he is partisan, the court will attach considerable weight to the Liquidator’s views unless the evidence reveals substantial reasons why it should not do so, or for some reason or other his view is flawed. It is, I think, clear that the Liquidator is not in funds to pursue the Queen’s Bench action and that the interests of the creditors require that he compromise the action or sell the cause of action.”

[5] Mr Conway made an offer to the Liquidator in respect of the proposed assignment. The Bank of Ireland has also made an offer to the Liquidator in relation to the proposed settlement of the proceedings against the Bank of Ireland. At the same time the Bank of Ireland has complained about the manner in which the Liquidator approached his task by engaging with Mr Conway initially before approaching the Bank of Ireland. I take note of that complaint and move to the position that has now been reached by each of the parties.

[6] By a position paper dated 26 March 2015 the Liquidator states, with regard to the Bank of Ireland action, that he has concluded there was merit in the claim and on that basis that there was something to assign to Mr Conway. He concluded that the level of the company's claim against the bank could outweigh the balance that was owed to the bank by the company and he therefore had reached the conclusion that the claim had a value that could be assigned. In relation to the company's claim against the Anglo Irish Bank the Liquidator noted that losses had been suffered by the company which were attributed to the AIB and according to a report received the losses were more than £250,000 greater than the AIB claim against the company. The Liquidator therefore concluded that there was value in the AIB action that could be assigned. As far as the First Trust action was concerned the Liquidator similarly reached the view that there was a value in the claim that could be assigned.

[7] The Liquidator considered the position of each of the banks in relation to the proceedings. The Bank of Ireland had made an offer to settle the case in the sum of £30,000. The Liquidator concluded that this offer had serious merit not least because it provided finality and certainty. In relation to the other two banks there had been no offers made and the Liquidator concluded that neither of the other banks intended to make an offer to settle the proceedings.

[8] The Liquidator considered Mr Conway's offer. Mr Conway had put forward an offer to acquire the three actions from the Liquidator for the cash sum of £40,966.65 plus VAT. The Liquidator required individual offers for each of the three actions which he was being requested to assign. He stated that to accept Mr Conway's offer for the three actions would necessarily require him to attribute a value to Mr Conway's offer for each of the three choses in action and compare this value with the offer made by each of the banks. As Mr Conway had to that date chosen not to itemise his offer in the required manner, the Liquidator was unable to accept Mr Conway's offer. The Liquidator proposed that Mr Conway be afforded the further opportunity to itemise the offer as between the three actions.

[9] Accordingly, under protest by Mr Conway, he subsequently set out in his position in relation to each of the three proceedings. As to the claim against the Bank of Ireland he was offering £30,001 plus 25% of the net proceeds of any successful claim against the bank. As to the claim against AIB the offer was £5,497 plus 25% of net proceeds of any successful claim. As against the IBRC, who are now responsible for any liabilities of First Trust Bank, the offer was the same namely £5,497 plus 25% of the net proceeds of any successful claim.

[10] I adopt a summary in the Bank of Ireland's position paper. The contemplated assignment, if that was the Liquidator's conclusion, was described by the bank as fundamentally flawed for a number of reasons. First of all because it was said there was nothing to assign as the bank's counterclaim against the company exceeded the company's claim. Secondly, that the claim was described as frivolous and vexatious and the Liquidator had stated that the claim was not strong. Thirdly, Mr Conway's

offers were described as derisory. Fourthly, Mr Conway was said to be arguably in breach of his fiduciary duties as a Director of the company and thereby arguably a cause of the company's insolvency. He was said to be personally insolvent and the provider of conflicting information about the status of the company. Fifthly, it was said that the assignment of Mr Conway would allow Mr Conway to sue for his own benefit in respect of conduct for which he was at least partially responsible and which led to the insolvency of the company.

[11] The Liquidator restated his position in May 2015 in the light of the responses from Mr Conway and the Bank of Ireland. He stated that subject to the sanction and direction of the Court, he was unable to accept Mr Conway's offer. The first reason was the uncertainty of the return on the offer, namely a fixed sum with 25% of the proceeds. He stated that he had been and remained unable to establish that the claims against any or all of the three banks were at a level that would result in any return to creditors. Furthermore, he did not have the funds in the liquidation to commission an expert to place an estimate on the liability or quantum of the claims. While a 25% share might be superficially attractive it was described as being in reality vague and uncertain.

[12] The second reason for not accepting Mr Conway's offer was the absence of finality. The Liquidator stated that any distribution of proceeds may be some years hence when the Liquidator would be required to revisit this liquidation.

[13] Thus the Liquidator concluded that the uncertainty and the lack of finality rendered Mr Conway's offer unacceptable. Further the Liquidator stated that the capital sums which Mr Conway ascribed to the AIB and the IBRC claims were not at an acceptable level. As to the AIB claim the offer of £5,497 for a claim said to be worth £1.9m was inadequate and the 25% share did not add anything of identifiable value. Similarly as to the claim against IBRC the company's cause of action would potentially be of greater value to Mr Conway than the £5,497 he has ascribed to it and similarly the 25% share did not add anything of identifiable value.

[14] Mr Conway raised a number of objections to the Liquidator's position. Mr Conway's view was that the Liquidator's stance was not in the best interests of the creditors of the company. First of all the Liquidator had never explained why the interests of the creditors drove him to refuse to consider a global offer for the three causes of action. I believe the Liquidator did state his desire to make a direct comparison of the offers available in respect of each of the actions. In any event the breakdown was provided and the decision was made on that basis. Secondly, the Liquidator had not explained why the interests of the creditors drove him to withdraw the proceedings against IBRC and AIB rather than accept valuable consideration for the claims. I believe the Liquidator has offered an explanation for his decision based on a lack of certainty and finality. Thirdly, Mr Conway says there is a valid public interest issue to be examined in that there is credible evidence that the Bank of Ireland had engaged in fraudulent activity in connection with the liquidation of the company and the Liquidator had not explained what steps he had

taken in respect of that evidence. Mr Conway is correct in that the Liquidator does not propose to arrange for the examination of this issue.

[15] At the hearing of the application, Mr Orr on behalf of Mr Conway added to the above objections the proposition that the offer made by Mr Conway did indeed provide certainty and finality for the Liquidator. The proposal on behalf of Mr Conway was stated to be that upon the assignment of the actions to Mr Conway the Liquidator could conclude the liquidation and be removed from his position as Liquidator. The result would be that Mr Conway would continue the actions against the three banks and in the event of the award of compensation Mr Conway would arrange the distribution among the creditors. Accordingly, the Liquidator would not be further involved in the liquidation or in the proceedings against the banks or in the distribution of any compensation recovered in those proceedings and the liquidation need not continue for a number of years.

[16] That approach had not been the understanding of the Liquidator or the Bank of Ireland as to the nature of Mr Conway's proposal and the application was adjourned for consideration of the implications of the proposed approach. Mr Conway produced correspondence on the basis that his proposed approach had been made clear to the other parties concerned although it was not evident to the Bank of Ireland or to the Liquidator. Nevertheless the outcome is that having considered the implications of Mr Conway's proposal as developed by Mr Orr, the Liquidator maintains the objection to Mr Conway's proposal. In this he retains the support of the Bank of Ireland.

[17] The Liquidator proposes to accept £30,000 from the Bank of Ireland and discontinue against the other banks. He is faced with a competing offer from Mr Conway to accept the sum of approximately £40,000 and 25% of any proceeds. The Liquidator's view is that there is uncertain value in the three claims and that there would be no finality to the scheme which relied upon a dividend for creditors as a percentage of success in the actions. Mr Conway proposes the Liquidator should accept the highest offer and that this would provide finality for the Liquidator and that Mr Conway would account to the creditors. The Liquidator's response is that there would not be finality because he would not be in a position to step out of the liquidation and that there are no terms of agreement in relation to the creditors.

[18] The 1989 Order sets out the steps that are required upon the conclusion of the liquidation. There are five stages under Article 92 and the succeeding articles. First of all there has to be an account by the Liquidator, secondly there has to be a general meeting of the company and of the creditors to consider the account that has been prepared by the Liquidator, thirdly, assuming approval, there has to be a return to the registrar of the account that has been prepared by the Liquidator and of the outcome of the meeting of the company and of the creditors, fourthly, when those steps are taken the Liquidator vacates his office and fifthly the Liquidator is released and discharged from all liability.

[19] A scheme that allows the Liquidator to take those steps but leave proceedings unresolved and for one of the creditors to deal with other creditors in a distribution of compensation received at the later date from extant proceedings is not contemplated by the statute. I am satisfied that it is contrary to the scheme of this legislation for the Liquidator to be discharged from all liability in his capacity as a Liquidator and yet to allow to remain in place an arrangement to place the creditors in a position to recover a potential dividend through proceedings by a company director who is also a creditor over which the Liquidator has ceased to have any management or control or responsibility. Accordingly, I am satisfied that the basis of Mr Conway's proposal is contrary to the scheme of the legislation.

[20] In any event, even if there was not conflict with the scheme of the legislation I am satisfied, as is the Liquidator, that Mr Conway's proposal is fraught with difficulties about the future outworking of any arrangements in relation to any success in the proceedings and the creditors who might benefit, without clear terms having been drawn up between the proposer and the creditors as to the arrangements for identifying the creditors who would benefit and to what extent and the management of the distribution of the proceeds.

[21] The Court attaches considerable weight to the views of the Liquidator unless the evidence reveals substantial reasons why it should not do so or for some reason the Liquidator's view of the matter is flawed. As in Re Edenmore the Liquidator does not have the funds to continue the three actions against the banks and the interests of the creditors require that the Liquidator compromise the actions or sells the causes of action. The only option for the sale of the causes of action is Mr Conway's offer. The Liquidator has reached the conclusion that the settlement with the Bank of Ireland and the discontinuance of the other actions is in the best interests of the creditors, rather than a sale of the causes of action to Mr Conway. I am satisfied that the Liquidator has substantial reasons for seeking the compromise of the actions on the terms proposed and for refusing to assign the actions to Mr Conway on the basis of his offer. I am satisfied that I should sanction the Liquidator's proposal to accept the offer from the Bank of Ireland and to discontinue the proceedings against AIB and IBRC.