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Judgment: approved by the Court for handing down | *Delivered:* **16/09/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (COMPANY INSOLVENCY)

IN THE MATTER OF
SHERIDAN MILLENNIUM LIMITED

AND IN THE MATTER OF
THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

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BETWEEN:

MARIAN ANNE CURISTAN

Plaintiff:

-and-

THOMAS MARTIN KEENAN

Defendant:

_____

McCLOSKEY J

Introduction:

[1] This judgment marks another chapter in the increasingly protracted litigation arising out of the affairs of Sheridan Millennium Limited (hereinafter "*the company*").

[2] The application which this judgment determines is brought by Marian Anne Curistan against Thomas Martin Keenan, statutory administrator of the company. The other protagonist in the broader litigation canvas is Anglo Irish Bank Resolution Company Limited (now in special liquidation), the successor to Anglo Irish Bank Corporation Limited. For convenience I shall describe both entities as "*IBRC*" in this judgment.

Brief Chronology and Protagonists:

[3] Much of the history is rehearsed in my judgment in Curistan – v – Keenan and Anglo Irish Bank Corporation Limited [2011] NICH 23 and the judgment of Deeny J in Marcus Ward Limited –v– Anglo Irish Bank Corporation Limited [2011] NICH 7. Bearing in mind the nature and context of the present application I record, in brief compass:

(a) The company was incorporated on 17th February 1998 and carried on business for approximately 12 years.

(b) Throughout this period, the company received substantial financing from IBRC.

(c) The financing/debt arrangements between the company and IBRC consistently had two main elements. The first was a debenture containing fixed and floating charge provisions and provision for the appointment of a receiver. The second was a succession of "facilities" letters. The main purpose of the finances advanced was the Odyssey Pavilion project. By 2004, the debt was around £50 million, increasing to some £80 million by 2009, in circumstances where the basic security, the Odyssey development, was an asset of diminishing value.

(d) By Writ of Summons issued on 23rd June 2010, the company, together with five other Plaintiffs, commenced proceedings against IBRC claiming unliquidated damages for alleged negligence and other torts. As of today, the extant Plaintiffs in the 2010 action are the company, Marcus Ward Limited (hereinafter "*Ward*"), which is one of Mr Curistan's companies and Mr and Mrs Curistan.

(e) On 24th August 2010, IBRC issued a statutory demand against Ward.

(f) On 14th April 2011, IBRC appointed Mr Keenan administrator of the company's affairs.

(g) By his judgment delivered on 15th April 2011, Deeny J acceded to Ward's application for an injunction restraining IBRC from pursuing a winding up petition against that company, holding that there was a genuine and substantial dispute between those two parties.

(h) By its judgment delivered on 10th November 2011, this court dismissed the company's challenge to the appointment of Mr Keenan.

The 2010 Action

[4] I have indicated above the parties to this Writ. The subject matter of this action is the sale of the Odyssey Pavilion in 2009. These Plaintiffs contend that there was a binding agreement that following the assignment by the company of the relevant leases to the entity known as OPL there would be a further sale thereof to another entity, PBN Holdings Limited ("*PBN*"). In the event, there was no such sale. It is alleged that IBRC is guilty of [*inter alia*] breach of contract, negligence, breach of fiduciary duty and misrepresentation in consequence. These Plaintiffs claim damages accordingly.

[5] As regards the claim for damages in the 2010 action, these Plaintiffs claim, *inter alia*, that:

(a) They were deprived of the opportunity to sell the Odyssey Pavilion and IMAX to "*other and better placed potential purchasers that BPN*", with resulting financial loss.

(b) There was overcharging of interest.

(c) There were losses in consequence of an allegedly unlawful "SWAP" transaction.

(d) There were also resulting legal costs.

The Statement of Claim does not differentiate amongst the several Plaintiffs in the claim for damages. The present application proceeded on the agreed basis that, in this respect, the company is the primary Plaintiff, with Mrs Curistan having a substantially more limited claim for damages.

[6] The 2010 action has not proceeded beyond service of the Statement of Claim. It remains in abeyance pending other events, in particular the court's determination of the present application.

The Present Application

[7] In response to Mrs Curistan's request that the 2010 action be assigned to her, Mr Keenan's solicitors stated, by letter dated 5th October 2012:

> "The Administrator will require an indemnity to his satisfaction in respect of any and all liability, including costs, that he or the company may incur on foot of the litigation. If your client is unable to provide a suitable indemnity our client will require

> your client to deposit a sum of money equal to the liability referred to above."

In due course, a draft assignment came into existence. In this context, Mr Keenan's solicitors proposed, per clause 4 of the amended draft, that Mrs Curistan pay a contingent costs indemnity £250,000 to Mr Keenan in consideration of the envisaged assignment (hereinafter "*the impugned decision*"). She refused to do so and the present application materialised in consequence. It is brought by originating summons, whereby Mrs Curistan seeks the following relief:

(a) A declaration that Mr Keenan has acted so as unfairly to harm her interests contrary to paragraph 75 of Schedule B1 of the Insolvency (NI) Order 1989.

(b) A direction pursuant to Article 75(4)(a) or (b) of Schedule B1 in appropriate terms.

Schedule B1 of the 1989 Order

[8] This was considered *in extenso* in Curistan – v – Keenan and Anglo Irish Bank Corporation Limited [2011] NICH 23: see paragraphs [4] – [12]. Paragraph 75 of Schedule B1 makes provision for a challenge by a creditor or member of a company in administration to the conduct of the administrator. It provides, in material part:

> "(1) A creditor or member of a company in administration may apply to the High Court claiming that:
>
> (a) the Administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors) …."

By paragraph 75(3), the court is given a wide discretion to grant relief, while paragraph 75(4) empowers the court to regulate by order the administrator's exercise of his functions and/or to require him to do, or refrain from doing, a specified thing.

[9] The effect of an assignment is governed by section 87(1) of the Judicature (NI) Act 1978, which provides:

> "Subject to subsections (2) and (3), any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any

> debt or other legal chose in action, of which express notice in writing is given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer, as from the date of the notice,—
>
> (a) the legal right to, and all legal and other remedies respecting, the debt or chose in action together with,
>
> (b) the power to give, without the concurrence of the assignor, a good discharge for the debt or chose in action".

Thus, if the assignment to Mrs Curistan of the 2010 action were to materialise she would acquire all of the Plaintiffs' causes of action, together with a correlative right to any recoverable remedies.

Consideration and conclusions:

[10] In her main affidavit, Mrs Curistan makes various averments concerning the 2010 action. She deposes to her belief that the alleged IBRC overcharging of the company "*may be as much as £2 million*" and that the alleged wrongful sale of a SWAP transaction may have resulted in loss to the company "*in the region of £4 million*". She also adverts to the company's claim for damages for alleged breach of fiduciary duty and deceit relating to the sale of the Odyssey Pavilion and IMAX. She asserts "*serious and fraudulent wrongdoing*" by IBRC in this respect. Specifically, she asserts the existence of an illegal share purchase scheme orchestrated by IBRC, giving rise to pending criminal proceedings against a former IBRC official, currently pending in the Republic of Ireland. In her second affidavit, Mrs Curistan deposes to the following belief:

> "My belief is that the Respondent's actions are directed to stifling [the company's] claim against [IBRC] because the issues raised from [IBRC's] perspective …. are very controversial."

I construe this as a suggestion of partisanship and improper motive on the part of Mr Keenan, both of which would be *prima facie* unlawful.

[11] The evidence includes an affidavit sworn by Mr Keenan. He avers that the impugned decision was stimulated by his assessment of what was in the best interests of the company's creditors as a whole. He claims to have taken into account the "*serious disputes of fact between the parties*" in the 2010 action and the

likelihood that those proceedings would be "*protracted and very expensive to pursue*". He further avers, in terms, that he took into account the judgment of the court in Ward – v – Anglo Irish Bank. He suggests that arising out of the special liquidation of IBRC, there is no prospect of unsecured creditors – a class which includes all of the Plaintiffs in the 2010 action – recovering a dividend from IBRC. He further deposes:

> "In circumstances where the Applicant would be conducting litigation which was assigned to her by me and where she is unable to provide any security at all, I am concerned that if and when her claim is dismissed IBRC or another creditor may seek to recover their costs against either myself personally or as an expense of the administration."

This is proffered by Mr Keenan as the justification for the impugned decision. The most recent of his reports to the court is dated 3rd September 2012. This confirms that on 29th March 2012 the court acceded to his request to extend the administration period by 12 months, to 14th April 2013, to enable him "*to further investigate the extent of the company's assets and progress with the realisation of the remaining assets*". This may be linked to his averment that there are no assets – and there is therefore no value – in the company. When he decided that he would not pursue the 2010 action *qua* administrator he did not have the benefit of legal advice.

[12] Mrs Curistan asserts no legal entitlement to assignment of the 2010 action. Rather, she pursues this benefit via a proposed elective choice by Mr Keenan in the exercise of his statutory powers and functions *qua* administrator. The thrust of her application to the court is that Mr Keenan is obliged by the provisions of Schedule B1 to make the assignment to her in the terms originally mooted viz the provision of a written indemnity (to be contrasted with a payment of £250,000). This Plaintiff asserts a corresponding right on her part to acquire the benefit.

[13] It is clear that the company is the main Plaintiff in the 2010 action. If this action were to succeed in whole or in part, any award of damages would be predominantly to the company. The acknowledgement that the Plaintiff's claim is a limited one has been correctly made. In the event of the assignment occurring and the action proceeding successfully, any damages awarded to the company would be discharged to secured creditors. As an unsecured creditor, this Plaintiff would have no realistic prospect of benefiting. The parties are agreed that the successful pursuit of one of the heads of claim would result in the payment of 50% of the damages thereunder to the company. This relates to an alleged contractual commitment by IBRC, undertaken in 2009, to pay the company £3 million for the purpose of satisfying certain creditors. There is a shortfall of £1.54 million which, if recovered in the 2010 action, would result in this Plaintiff paying 50% thereof (or of such smaller sum recovered) to Mr Keenan, in accordance with the unexecuted assignment agreement. With or without assignment of the 2010 action, this Plaintiff will be at

liberty to pursue her discrete claim *qua* sixth Plaintiff and her position before this court is that she will do so, whatever the outcome of this application.

[14] Schedule B1 mirrors its English counterpart, also labelled Schedule B1, which was inserted in the Insolvency Act 1986 by the Enterprise Act 2002 and came into operation on 15th September 2003 (per SI 2003 Number 2093). The statutory reform thereby made in both jurisdictions introduced an entirely new regime for the administration of companies. It makes provision for the appointment of an "*out of Court*" administrator, superseding the former office of "Administrative Receiver". Every administrator is an officer of the High Court (per paragraph 6). The administrator must perform his functions with the objective of rescuing the company as a going concern or achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or realising property in order to make a distribution to one or more secured or preferential creditors (per paragraph 4). The administrator is under a duty to perform his functions in the interests of the company's creditors as a whole: per paragraph 4(2). As a precondition of appointment, he must certify his opinion that the purpose of administration is reasonably likely to be achieved: per paragraph 19(3)(b). Following appointment, the administrator is subject to the range of duties specified in paragraphs 47 – 59. He is also endowed with a number of discretionary powers, per paragraphs 60 – 76. The discrete regime established by paragraphs 75 and 76 of Schedule B1 empower a creditor or member of a company in administration to complain to the High Court about the conduct of the administrator. Within this regime, it is possible for a complaint about misconduct or misfeasance on the part of the administrator to be made. I note that there is no such complaint in the present case.

[15] Schedule B1 contains no definition of either "harm" or "unfair harm". However, it is clear that these expressions must be construed in the context of the statutory regime as a whole and so as to promote and give effect to its underlying purposes. In short, these words and expressions take their meaning from the particular context in which they appear. In Bailey and Groves, Corporate Insolvency Law and Practice, one finds the following passage, in paragraph 7.19:

> "The new administration regime introduced a provision under which a creditor or member could challenge an administrator on the basis of satisfying the court that the administrator is acting, or has acted, or proposes to act, in a way which causes unfair harm to the applicant or the applicant and others even though the action complained of is within the administrator's powers. It is not sufficient to prove 'harm', which is presumably conduct prejudicial to the financial interests of the applicant or the applicant and others; rather, the 'harm' must be 'unfair', that is it prejudices the applicant or the applicant and others in

> a manner which is different from the remaining creditors or members, as the case may be. It is tempting to refer to authorities under the Companies Act 1985 dealing with the 'unfair prejudice' petition, but it would be dangerous to do so as they are different concepts". [my emphasis]

In Re Lehman Brothers International Europe [2008] EWHC 2869, Blackburne J emphasised the particular context of the statutory administration regime established by Schedule B1 and, in particular, the duty imposed on the administrator to perform his functions with the object of achieving the purpose of the administration and, in doing so, to act in the interests of the company's creditors as a whole. A detectable theme of the relevant passages in the judgment is that of even handed and equal treatment of all members of the class of creditors: see paragraphs [38] and [39]. This echoes the proposition formulated in Bailey and Groves. The same theme emerges in Re Coniston Hotel LLP [2013] EWHC 93 (CH), where Norris J stated, at paragraph [36]:

> "Paragraph 74 does not exist to enable individually disgruntled creditors to pursue administrators for compensation. Its focus is "unfair harm": and that, I think, will ordinarily mean unequal or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration. (The reference to an administrator acting unfairly to harm the interests of "all other members or creditors", so that unequal or differential treatment had not occurred, would (I think) only arise in relation to issues concerning the expenses of the administration, or where the administrator was also an office holder in another insolvency and acted unfairly prejudicially as regards the stakeholders in Company A in promoting the interests the stakeholders in Company B)".

I propose to adopt the approach formulated by Norris J in Re Coniston Hotel *(supra)*.

[16] In determining this application, I proceed on the following basis:

(a) Mrs Curistan is unable to make the payment of £250,000 required of her by Mr Keenan.

(b) Mr Keenan's estimate that the costs of the 2010 action could be as much as £250,000 is not, in the contemporary world of expensive and protracted multi-party commercial litigation, unreasonable.

(c) Taking into account, *inter alia*, the absence of any order/s under Order 18, Rule 19 of the Rules of the Court of Judicature, and bearing in mind the assessment of Deeny J in **Ward**, it is possible that the 2010 action could succeed, in whole or in part. Beyond this simple assessment this Court cannot realistically venture.

(d) In the event of the 2010 action proceeding in full, pursuant to an assignment to Mrs Curistan, the damages potentially recoverable are, on paper, substantially greater than those which she might receive if successful in her own right *qua* sixth Plaintiff.

(e) There is a theoretical possibility that in the event of the assignment occurring and the 2010 action proceeding, Mr Keenan could incur a liability in costs, having regard to the breadth of the discretion conferred on the court of trial by section 59 of the Judicature (NI) Act 1978 and absent any statutory bar or any authority to the contrary. Once again, I consider that beyond this limited assessment this Court cannot venture further.

(f) Mrs Curistan will pursue her personal claim in the 2010 action, *qua* sixth Plaintiff, in any event.

[17] I remind myself that there is no challenge to either the appointment of Mr Keenan as administrator or his decision not to pursue the 2010 action on behalf of the company. Furthermore, this court is not seized of any challenge to Mr Keenan's conduct of the administration. His last report to the court is of one year's vintage and has not stimulated any challenge under Schedule B1. Insofar as there are faint echoes in the present application of some collateral challenge to Mr Keenan's conduct of the administration generally, I consider this plainly impermissible. The contours and boundaries of this application are clearly shaped and constrained by the terms of the originating summons.

[18] The general rule which I propose to apply is that the "*harm*" contemplated in paragraph 75 of Schedule B1 is something of tangible detriment to an individual creditor or member of the company concerned vis-à-vis another creditor, or other creditors, or – as the case may be - another member, or other members. This is consonant with the duty imposed on the administrator to act in the interests of the creditors and members of the company and, in doing so, to act in a fair and even handed manner in his conduct of the administration. Taking Mrs Curistan's case at its zenith, there is a possibility that the non-pursuit of the 2010 action on the part of all extant Plaintiffs, which I accept is the probable consequence of the impugned decision, could inflict some detriment on her, as it extinguishes the possibility of a

better outcome in damages which might be financially advantageous to her as a creditor of the company. I measure this as a possibility and do not consider it appropriate to embark upon any further assessment of its strengths or weaknesses, given all of the vagaries and imponderables involved. I consider that this possible detriment does not constitute "*unfair harm*" to Mrs Curistan within the meaning of paragraph 75 of Schedule B1. While, if it were to eventuate, it would be "harmful" to her in the ordinary sense of the word, it would not inflict on her "harm" falling within the compass of paragraph 75. She will be no worse off than any other creditor or member of the company. The impugned decision does not discriminate against her. It entails no differential treatment of creditors or members of the company. Furthermore, her ability to pursue her personal claim in the 2010 action is unaffected. The effect of the impugned decision is that the "playing field" as between Mrs Curistan and other creditors and members of the company remains level and undisturbed. There are no resulting divots or ruts. While the impugned decision reflects extreme caution on the part of Mr Keenan, it is based on his assessment of a risk which I consider cannot be dismissed as frivolous or non-existent. Specifically, I find that it is not tainted by the partisanship or improper motive attributed to him, absent any evidential foundation therefor or a sufficient evidential basis for making this inference.

Disposal

[19] It follows from the above that this application is dismissed. I shall adjudicate on the issue of costs following receipt of representations from the parties.