Company -administration – insolvency – assignment of cause of action vested in company – whether administrator entitled to demand costs indemnity - whether administrator's actions unfairly harmed interests of member creditor of company

Neutral Citation No. [2014] NICA 29

Ref: **GIR9222**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: **07/04/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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

BETWEEN:

MARION ANNE CURISTAN

Plaintiff/Appellant;

and

THOMAS MARTIN KEENAN

Defendant/Respondent.

Before: MORGAN LCJ, GIRVAN LJ and O'HARA J

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by the plaintiff/appellant Marion Anne Curistan ("the appellant") from the judgment of McCloskey J who dismissed an application brought by the appellant against the respondent to the appeal, Thomas Martin Keenan ("the administrator") who is the administrator of Sheridan Millennium Ltd ("SML") having been so appointed on 14 April 2011. In her application the appellant sought a declaration that the administrator was acting so as unfairly to harm her

interests, whether alone or in common with some or all other creditors of SML, contrary to paragraph 75 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989. McCloskey J in a judgment dated 16 September 2013 dismissed her application.

[2] Mr Orr QC appeared with Mr Shields on behalf of the appellant. Mr David Dunlop appeared on behalf of the administrator. The court is indebted to counsel for their helpful written and oral submissions.

Factual Context

[3] SML was incorporated on 17 February 1999 and carried on business for approximately 12 years. Throughout this period the company received substantial financing from Anglo Irish Bank Corporation Ltd whose successor in title is the Anglo Irish Bank Resolution Company Ltd (in special liquidation). We shall refer to the banking organisation as IBRC. The financing/debt arrangements between the company and IBRC consisted of two main elements. The first was a debenture containing fixed and floating charge provisions making provision for the appointment of a receiver. The second was a succession of facilities letters. The main purpose of the finances advanced was the construction of the Odyssey Pavilion project and its operation. By 2004 the debt was around £50M increasing to some £80M by 2009 in circumstances where the basic security, the Odyssey development, was an asset of diminishing value.

[4] By Writ of Summons issued on 23 June 2010 SML together with five other plaintiffs commenced proceedings against IBRC claiming unliquidated damages for alleged negligence and other torts. SML is the primary plaintiff in the proceedings and the appellant is the sixth plaintiff in the same action. The action relates to the sale of the Odyssey Pavilion in 2009. The plaintiffs in the action, which included Marcus Ward Ltd, contend that there was a binding agreement following the assignment by the company of the relevant leases to the entity known as OPL and that there would be a further sale thereof to PBN Holdings Ltd. The sale did not take place. It was alleged that IBRC was guilty of (inter alia) breach of contract, negligence, breach of fiduciary duty and misrepresentation. The extant plaintiffs in the 2010 proceedings are SML, Marcus Ward Ltd and Mr and Mrs Curistan.

[5] On 24 August 2010 IBRC issued a statutory demand against Marcus Ward Ltd. On 14 April 2011 IBRC appointed Mr Keenan administrator of SML's affairs. On 15 April 2011 Deeny J acceded to an application by Marcus Ward Ltd for an injunction restraining IBRC from pursuing a Winding Up Petition against that company holding that there was a genuine and substantial dispute between the parties. By judgment delivered on 10 November 2011 an application to challenge the appointment of Mr Keenan as administrator of SML was dismissed.

[6] It is the administrator's case that SML is substantially indebted to IBRC. At the date of the administrator's report of 3 March 2014 it was confirmed that the debt owed to IBRC was £11M at the time of the administrator's appointment. The administrator asserts that there are currently no assets in SML and even if assets were recovered or realised these would have to be paid to IBRC, the secured creditor. After the appointment of the administrator he did not take any steps to pursue the 2010 action and on 25 September 2012 he informed the appellant that he did not intend to proceed with the action.

[7] The appellant then sought an assignment of the right of action. The administrator's solicitors responded in a letter of 5 October 2012 seeking an indemnity from the appellant. This would have to be an indemnity to the satisfaction of the administrator in respect of any and all liability including costs that he or the company might incur on foot of the litigation. If a suitable indemnity could not be provided, the administrator would require the appellant to deposit a sum of money equal to the potential liability, which was estimated in the sum of £250,000.

[8] The administrator's solicitor prepared a draft assignment. Clause 4 thereof proposed that the appellant pay a contingent costs indemnity of £250,000 to the respondent in consideration of the envisaged assignment. Recital 4 of the draft stated that one of the heads of claim made by SML against the defendant in the action alleged that, by virtue of an agreement made between representatives of SML and the representatives of the defendant in or about January 2009 and revised in or about September 2009, the defendant agreed to provide to the company a sum of £3M for the purpose of paying creditors of the company and creditors of other companies associated with the directors and shareholders of the company. In breach of that contract the defendant paid only £1,456,000 to the creditors leaving a shortfall of £1,544,000. Recital 5(iii) (sic) (misnumbered as it should be (iv)) provided that the appellant as assignee would pay to the assignor (which was defined as SML), within 21 days of receipt of payment of same from the defendant, 50% of any damages awarded by the court to the assignor in relation to that head of claim referred to at Recital 4, or 50% of any such sum recovered by the company from the defendant under that head of claim by way of negotiated settlement of the action.

[9] Where there is an outright assignment of a chose in action the assignee can in fact keep all the proceeds of the claim even if these exceeded his loss (Companhia Colombiana de Seguros v Pacific Steam Navigation Company [1965] 1 QB 101). An assignee, however, takes subject to equities having priority over the rights of the assignee, who takes it subject to all the equities affecting it in the hands of the assignor which were in existence at the time of the assignment. Since there was a floating charge over assets of the company it may well be that, as McCloskey J concluded, in the event of the assignment occurring and the action proceeding successfully any damages awarded to SML would in the first instance be recoverable by the secured creditor, though if the effect of judgment in the proceedings was to

reduce the debt of the secured creditor the charge could only relate to the balance due.

The Judge's Conclusions

[10] The judge proceeded on the basis that the appellant was unable to make the payment of £250,000 required of her by the administrator. He concluded that the estimate of the costs was not, in the contemporary world of expensive and protracted multiparty commercial litigation, unreasonable. While it was possible that the 2010 action could succeed in whole or in part, the court could not realistically venture to assess the likelihood of success. In the event of the 2010 action proceeding in full the damages potentially recoverable were on paper substantially greater than those which she might receive if successful in her own right as sixth plaintiff. There was a theoretical possibility that, in the event of the assignment occurring and the 2010 action proceeding, the administrator could incur a liability in costs having regard to the breadth of the discretion conferred on a court of trial by section 59 of the Judicature (Northern Ireland) Act 1978. The appellant would pursue her personal claim in the 2010 action as sixth plaintiff in any event. The judge reminded himself that the contours and the boundaries of the application were shaped and constrained by the terms of the Originating Summons. There was 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. Nor was there any challenge to the administrator's conduct of the administration.

[11] In paragraph [18] of his judgment McCloskey J set out the reasons for his conclusion that he should reject the appellant's application. In his view the harm contemplated in paragraph 75 of Schedule B was something of a tangible detriment to an individual creditor or member as against another creditor or member. Taking the appellant's case at its highest point, there was a possibility that the non-pursuit of the 2010 action on the part of all the plaintiffs could inflict some detriment on the appellant as it extinguished the possibility of a better outcome in damages, which might be financially advantageous to her as a creditor of the company. He did not consider that the possible detriment constituted "unfair" harm to Mrs Curistan within the meaning of paragraph 75 of Schedule B1. While it might 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 as she would be no worse off than any other creditor or member of the company. The impugned decision did not discriminate against her. It entailed no differential treatment of creditors or members of the company. Her ability to pursue her personal claim was unaffected. While the impugned decision reflected extreme caution on the part of Mr Keenan, it was based on his assessment of a risk which he considered could not be dismissed as frivolous or non existent nor did he find it tainted by partisanship or improper motive, absent any evidential foundation therefore or a sufficient evidential basis for making the inference.

The Relevant Statutory Provisions

[12] Under paragraph 68 of Schedule B1 the administrator of the company on appointment takes custody and control of the property to which he thinks the company is entitled. Under paragraph 69 it is his duty to manage the company's affairs, business and property in accordance with any proposals approved under paragraph 54, any revision of those proposals which is made by him and which he does not consider substantial and any revision of those proposals approved under paragraph 55. Paragraph 75 of Schedule B1 makes provision for a challenge to the administrator's conduct of a company:

> "75(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, or
>
> (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).
>
> (2) A creditor or member of a company in administration may apply to the court claiming that the administrator is not performing his functions as quickly or as efficiently as is responsibly practicable.
>
> (3) The court may:
>
> (a) grant relief;
>
> (b) dismiss the application;
>
> (c) adjourn the hearing conditionally or unconditionally;
>
> (d) make an interim order;
>
> (e) make any other order as it thinks appropriate.

(4) In particular, an order under this paragraph may:

(a) regulate the administrator's exercise of his functions;

(b) require the administrator to do or not do a specified thing;

(c) require a creditor's meeting to be held for a specified purpose;

(d) provide for the appointment of an administrator to cease to have effect;

(e) make consequential provisions.

(5) An order may be made on a claim under sub-paragraph (1) whether or not the action complained of –

(a) is within the administrator's powers under this schedule.

(b) was taken in reliance on an order under paragraph 72 or 73.

…"

[13] Under Section 87 of the Judicature (Northern Ireland) Act 1978 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."

Conclusions

[14] Mr Orr on behalf of the appellant did not challenge the administrator's decision to seek a 50% share of that part of the claim referred to in Recital 4 of the draft assignment. His challenge was to the administrator's refusal to enter into the assignment unless the indemnity secured by the payment of £250,000 was provided by the appellant.

[15] Counsel further accepted that the proposed assignment could not qualify as an absolute assignment within section 87 of the 1978 Act. The assignment accordingly, if it was an effective assignment, would amount to an equitable assignment. Where there is an equitable assignment of part of the chose in action (which would be the case here since SML was retaining a share of part of the claim) neither the assignee nor the original creditor can sue for the chose without joining the other as claimant, if he consents, or as defendant if he does not. The court must have before it all parties interested in the chose so that there may be a final adjudication binding them all (see, for example, Deposit Protection Board v Dalia [1994] AC 367 at 381). See generally Snell on Equity 22nd Edition paragraph 3.023. As pointed out in Snell at paragraph 3.002 the assignee must give the assignor a proper indemnity against costs.

[16] The imposition of a requirement by the administrator that the appellant provide an indemnity in relation to costs was in line with the normal and reasonable requirements of any party assigning a chose in action (otherwise than by way of an absolute statutory assignment) where the assignor remains at risk of an order for costs. If the assignment is an absolute statutory assignment, the assignor steps out of the picture and is not at risk of an order for costs in litigation, since the assignee becomes absolutely entitled to the chose in action and all remedies available in connection with it. Where the administrator is acting reasonably and lawfully in seeking an indemnity, it could not be said that the appellant has been unfairly harmed. She could not be said to have suffered any harm from being required to do what the law permits and considers as reasonable in the context of an equitable assignment. Nor could it be said that the administrator's requirement, which is based on prudence and commercial judgment as to the risks of uncertain, complex and expensive litigation, is unfair. Consideration of the question whether an impugned action works unfairness to one party must call for a consideration of what is fair in relation to both sides of the equation.

[17] Mr Orr stressed that the administrator was in reality more concerned about protecting his own position as an administrator potentially at risk of an order for costs than about protecting the interests of the creditors of the company. He argued that the administrator's fears about the risk to himself of an order for costs were unjustified since, as a mere agent of SML, it was inconceivable that an order for costs would be made against him. However, the terms of the proposed assignment sought an indemnity in relation to costs in respect of SML the company, and himself

as administrator. Since the company in an equitable assignment of this kind is a necessary party in the proceedings and is continuing to assert at least part of the claim for its own benefit, it is clear that the company would be at real risk of an order for costs. Furthermore, while the risks to the administrator of an order for costs being made against him are low, Mr Orr could not go so far as to say that the risk was non-existent. In the developing field of insolvency law there has been no clear definitive case law in relation to the position of administrators in which costs orders would definitely not be made against the administrator. In Hunt v Asis [2011] EWCA Civ 1239 Lord Neuberger pointed out that in the case of a claim brought by a liquidator the liquidator would have taken the decision to institute or continue proceedings and will normally have had control of their management. He will not stand to benefit personally from any recovery save to the extent that the recovery may enable his own professional fees to be paid. In such a case then -

> "although there is jurisdiction to make a third party costs order against him that jurisdiction will only be exercised in exceptional circumstances, such as where there has been some form of impropriety … Impropriety is not a prerequisite of a third party costs order even against a liquidator although it is a powerful factor in the exercise of the court's discretion one way or the other: Dolphin Keys Development Ltd v Mills [2008] WLR 1829."

Lord Neuberger pointed out that while the court in that case knew of no comparable case involving an administrator there was no reason to suppose the position of an administrator was any different. In that case the court was actually concerned about the legal position of a trustee in bankruptcy where the situation was different for the reasons set out therein and which are not material in the present context. While this case is certainly some obiter authority for the proposition that it would be highly unlikely that an order for costs would be made against the administrator in the event of an assignment of the cause of action being made or the action continued by the administrator in relation to part of the claim, the court recognised that there may be exceptional circumstances. In the present instance that introduces an element of risk, remote though it may be, that there could be circumstances in which an order for costs would be made against the administrator. It is, however, unnecessary for present purposes to come to a concluded view as to whether or not the risk of an order for costs against the administrator was so negligible that it could be disregarded. The fact remains that the administrator was requiring an indemnity also in relation to SML which clearly was at real risk of a costs order being made if the litigation continued.

[18] McCloskey J's view that £250,000 was a reasonable sum to require as an indemnity in view of the potential costs of the litigation appears to be entirely justified. In all the circumstances of the case if this administrator was entitled to ask for an indemnity he was not acting unreasonably in concluding that the proposed

assignee should make good the indemnity by the provision of funds to underwrite it.

[19] We conclude, accordingly, that the judge reached the correct conclusion and we dismiss the appeal. In the course of submissions there was discussion as to whether there were other possible mechanisms whereby the appellant might seek to acquire an absolute assignment of the cause of action. There was also discussion of the question whether the administration would continue beyond its projected end date in April 2014 when the administration order will expire unless renewed. It is, however, unnecessary, and would be inappropriate, to expatiate further on those issues which do not presently arise in the application before the court.

[20] We will hear counsel on the question of costs.