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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **11/12/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

O'KANE POULTRY LIMITED

Plaintiff;

and

GARTH HENRY

Defendant.

GIRVAN LJ

[1] In these proceedings, as they started out, the plaintiff to the action, O'Kane Poultry Limited, sought an order for specific performance of an agreement of indemnity and a separate deed made between the parties on 9 March 2003. The case, as originally pleaded, was based essentially on the argument that the defendant had been guilty of breach of contract in failing to take steps to call a meeting or seek a special resolution placing the various companies in the group into members' voluntary liquidation. The companies in question are Roundhead, as the holding company, Farmfed Chickens, which is an unlimited company, and Carnview Hatcheries Limited and Livestock Services.

[2] It became clear as the case proceeded that that was not essentially the relief or the totality of the relief that the plaintiff was seeking in relation to the case and amendments were made to the relief sought. In essence the plaintiff's claim is that specific performance should be granted in relation to a number of matters. The first of those was that the defendant, as a director of each beneficiary company, should make a statutory declaration that he had formed the opinion that the relevant company would be able to pay its debts in full together with interest at the official

rate within a period not exceeding twelve months from the commencement of the winding up.

[3] It is quite clear that in order to have a members' voluntary liquidation it is a prerequisite that there is in place a statutory declaration and that is provided for in Article 75 of the Insolvency Order. Article 75 provides:

> "Where it is proposed to wind up a company voluntarily, the directors may at a directors' meeting make a statutory declaration to the effect that they have made a full inquiry into the company's affairs and that having done so they have formed the opinion that the company will be able to pay its debts in full together with interest at the prescribed rate within twelve months from the commencement of the winding up."

and under subsection (2):

> " The declaration must embody a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration."

For directors of a company to make a statutory declaration of solvency it is quite clear that they must have made a full inquiry into the company's affairs, and they must have formed the opinion that the company would be able to pay its debts in full with interest within the maximum period of twelve months.

[4] This is an unusual set of proceedings in that the court is being asked to require the defendant, as a director of the company, to swear a declaration which is requiring him to state that he has formed the opinion that the company would be able to pay its debts within the requisite period. Before the court could even contemplate making such an order it would have to be satisfied that the director in question had, indeed, formed the opinion that the company would pay its debts within the twelve month period because if the director had not formed that opinion it cannot be right that the court should require him to state that he has formed the opinion to that effect.

[5] There is a further complication in the case in that at the moment there are within the companies two directors, the defendant and his brother, Nigel Henry. Nigel Henry is not a party to these proceedings nor is he a party to either of the documents of 9 March 2006. Indeed, his position in relation to the companies was mis-stated in the agreement of 9 March 2006 which records O'Kane Poultry Limited and Garth Henry as being between them director and the beneficial owners of the entire issued share capital of Roundhead. Nigel Henry is a party who is clearly affected by these proceedings but as I say he is not a party to them.

[6] Mr Hanna, on behalf of the plaintiff, seeks to avoid the consequence of that by contending that in the circumstances the obligation is on Garth Henry to procure the necessary steps. This implies with it an obligation, if necessary, to vote for and trigger the removal of Nigel Henry as a director of the company if he is not prepared to, as it were, swear up to the statutory declaration which Mr Hanna argues the court should require of Mr Garth Henry.

[7] That is an unusual scenario and a court would be extremely slow to make an order which impacts on the rights of a person who is obviously involved in the procedure but who is not involved in these proceedings. That is one problem that lies in the path of the plaintiff in relation to the application.

[8] When one turns to the argument in relation to the case that Mr Garth Henry ought to make the statutory declaration, the case is really based upon the proposition that Mr Henry has material evidence which should satisfy him to reach the opinion that his father, Robert Henry, has quite sufficient assets to meet the liability on foot of the indemnity under the Indemnity Agreement. It is argued that the evidence points to the conclusion that Mr Robert Henry is a man of considerable substance who would have the wherewithal to meet the shortfall in the assets of Farmfed Chickens.

[9] Before a director could be required to enter into a statutory declaration of solvency, assuming that the court has a power to require somebody to sign such a document, the court would have to be satisfied that the director should reasonably come to the conclusion on the material before him that the indemnity will be met within the requisite twelve month period. Assuming that the evidence points to the conclusion that Mr Robert Henry has sufficient assets; that Mr Garth Henry has enough information and evidence to form the conclusion that Mr Robert Henry has the wherewithal to meet the indemnity; and that Mr Nigel Henry can be squeezed out of the situation in one form or the other, one comes back to the question whether the defendant as director could and should reasonably have formed the view and did form the view that the debt would be paid within twelve months. That to my mind throws up a question as to the possibilities or the probabilities of the indemnity being paid up within the twelve months assuming that it is recoverable under clause 3 of the agreement and again assuming that the deed can be relied on in the absence of anything other than a £1 payment and a seal on the document.

[10] What is clear as one goes through the evidence in relation to this matter is that the Indemnity Agreement is a rather unsatisfactory document. One can see within it the clear indications of a very likely dispute on the part of Robert Henry in relation to an obligation to meet the indemnity. The Indemnity Agreement falls to be construed in accordance with the rules of construction that relate to guarantee and indemnity agreements. These rules of constructions point to the conclusion that such agreements must be strictly construed in favour of the surety or the indemnifier and no liability is to be imposed on him which is not clearly and distinctly covered by the contract. These issues are dealt with in Chapter 44 of Chitty in fairly clear

terms. The contra proferentem rule of construction applies and the courts should in general require evidence of clear intention from the words used in the contract of a guarantee or indemnity to justify the nature and extent of the liability to be undertaken by the surety.

[11] Those principles also clearly establish that any variation on the terms of the agreement between the creditor and debtor which could prejudice the surety will, unless he consents thereto, discharge him from liability. It is immaterial that the variation has not in fact prejudiced the surety and that the likelihood of that happening is remote. The principle is applied very strictly so that even trifling variations may discharge the surety. An example given in Chitty is where an agreement is entered into with the debtor to extend time. That will be the type of variation which would discharge the surety in the absence of the guarantee permitting it.

[12] One thus starts off with the proposition that the indemnity agreement will have to be strictly construed as far as Robert Henry is concerned. A number of problems arise in relation to the document which one can clearly envisage Mr Robert Henry relying on in opposition to a claim to pay up on the indemnity. There is the question of whether time was of the essence or whether it was a condition of the guarantee that the winding up would take place no later than 31 March 2006 as envisaged in the recital to that effect. The other agreement of March 2006 proceeds upon the basis of an agreement that the winding up would take effect on 31 March and no later than that date. Certainly one can see a basis for Mr Robert Henry arguing that it was a basis of his understanding in relation to the indemnity that the winding up would take place no later than 31 March.

[13] There may be arguments against that proposition. At this stage it is not necessary for the court to come to any conclusion on that. In the absence of Mr Robert Henry being a party to these proceedings (and I think he should have been in the first place) this court will be very slow to come to a definitive view on any of those issues. What the court has to look at is what is the real possibility of the indemnity being paid in full within the twelve months and if there are genuine litigation issues which will take some time to resolve then that clearly impacts on the question of whether this defendant or a reasonable director could prudently sign a statutory declaration against the background of the real possibility of lengthy and complex litigation.

[14] There are other legal issues that do arise in relation to the guarantee. There is the question of whether there was in fact a variation by the extension of time in relation to the winding up. That may be a separate question from whether time was of the essence or a condition of the contract. There may be a question which may not at the end of the day be a difficult one, but it is one that certainly could be raised by Mr Robert Henry, namely whether he can be required by the liquidator to pay up on foot of the guarantees on the basis of an agreement whereby for the consideration of

£1 he was undertaking a liability which turned out to be of the amount of over £1 million.

[15] There are arguments about, for example, that this is a deed and, therefore, that in itself provides consideration, but there are other arguments too. The rule in Pinnel's case is that payment of a lesser sum is never a good consideration for a greater sum so one can see arguments that will have to be faced in the event of a dispute. One comes back to the proposition that the event of a dispute with Mr Robert Henry is certainly probable if an attempt were made to enforce a £1 million plus claim. I would imagine that he would be advised to take whatever legal points are open to him. It seems to me that the timescale of twelve months would just be an impossible one to hold to. That being so, this court in enforcing an obligation to make the statutory declaration could not do so if it took the view that no reasonable director in those circumstances would sign a statutory declaration against that background. The court could not enforce an obligation to swear a document that expresses an opinion which this defendant currently does not have or could not reasonably form.

[16] Mr Horner did refer me to the references from, for example, Loose on Liquidators which points out that:

> "No director would be acting wisely if he made the declaration in any case where there was the slightest doubt as to the company's solvency."

Another passage from another text book expresses it not in dissimilar terms that:

> "Directors should be advised that if there is a doubt as to the solvency of the company, it is good practice to let the liquidation proceed from the start as a creditor's voluntary liquidation and if there is a doubt they should not sign a statutory declaration."

That is, of course, important to bear in mind because a director is liable criminally if he makes a declaration without reasonable grounds for the opinion. If the defendant has not formed the opinion (and on the basis of the advice given to him by Mr Gordon, one can see why he would not form the opinion) that he should sign it. this court could not require him to sign the statutory declaration. Even if he had formed the opinion one still has to pose the question of whether this court, as a court of equity enforcing specific performance, should require him to go ahead and sign a document where there is a real possibility that the debt could not be paid within the twelve month period and thereby leave the director open to the situation of facing potential criminal liability.

[17] On those grounds the application for specific performance must fail. What this case does not decide is a raft of other issues which will have to be faced in due

course if the matter cannot be resolved. We have touched on those in the course of the case. There are issues about the fact that there has been a wind down of the company in breach of rateable distribution of the assets between creditors and that will give rise to questions. There are questions as to the enforceability of the indemnity and whether Mr Robert Henry can escape from it. There are questions as to whether at the end of the day there will be a recovery on foot of the Indemnity Agreement from any party but these are all issues for another day and they have not been raised in these proceedings. In retrospect it is unfortunate that the proceedings took the form that they did. I think it would have been more desirable if Mr Robert Henry and Mr Nigel Henry had been parties and the issues affecting them could have been resolved and other further relief could have been sought in relation to the construction of the Indemnity Agreement and its enforceability. However that has not happened in these proceedings and so my decision will not resolve many of the outstanding questions.