2011 No. 54241

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION (COMPANY INSOLVENCY)

IN THE MATTER OF
SHERIDAN MILLENNIUM LIMITED
Company No NI033638

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

Between:

PETER GERARD CURISTAN

Applicant

- v -

THOMAS MARTIN KEENAN

First Respondent

- and -

ANGLO IRISH BANK CORPORATION LIMITED

Second Respondent

APPLICANT'S REVISED SKELETON ARGUMENT

Introduction and background

1. The Second Respondent ("Anglo") moved on 14th April 2011 to appoint the First Respondent ("the Administrator") as administrator of Sheridan Millennium Limited ("SML"). The Applicant and his wife are the shareholders of SML. The Applicant is the director of SML. The appointment was made by way of an 'out-of-Court' application, grounded on a statutory statement by the Administrator and a statement sworn by Mr Ian Wigglesworth, an officer of Anglo.

2. By virtue of Paragraph 6 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989 the administrator is an officer of the High Court whether or not he is appointed by the Court. By virtue of Paragraph 70 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989, the administrator acts as the company's agent in exercising his functions

under the Schedule. The implication of the latter provision, per Bailey & Groves 'Corporate Insolvency - Law & Practice', Chapter 10, Administration, I., Paragraph 10.59, is that this *"clearly this puts him in a fiduciary position vis-à-vis the company."*

3. The statutory statement of Mr Wigglesworth averred that Anglo was the holder of a qualifying floating charge that was *"enforceable at the date of this appointment"* and that *"This appointment is in accordance with Schedule B1 to the Insolvency (Northern Ireland) Order 1989."*

4. The statutory statement of Mr Keenan certified only that:

> I consent to act as administrator of Sheridan Millennium Limited ("the company") in accordance with the notice of appointment of Anglo Irish Bank Corporation Limited dated 13 April 2011. I am of the opinion that **the purpose of administration is reasonably likely to be achieved**.
>
> (Emphasis added)

He did not identify the 'purpose of the administration' that he considered was *"reasonably likely to be achieved"*. Nor has he in any document provided to the Applicant (whether as a Director and Shareholder of SML or as a Guarantor of its liabilities to his appointor) stated the particular statutory purpose for which SML was placed into Administration.

5. The Applicant in these proceedings claims that the Administrator should be removed from office, and the administration ceased by reason of invalidity or unlawfulness or, alternatively, that the administration should be injuncted in the exercise of the Court's discretion. In summary, the Applicant makes the following arguments:

(a) The alleged debt upon which Anglo have acted to place SML into administration is not due and owing.

Anglo asserts that it is entitled to call in its security and exercise its remedies (including that of Administration). However, the Applicant contends that it can only do so on a proper basis and for a proper basis.

This Court in *Marcus Ward Limited v. Anglo Irish Bank* [2011] NICh 7 has recognised the debt to be disputed on grounds that are genuine and substantial and prevented Anglo from proceeding to wind up Marcus Ward Limited. Anglo has declined to appeal that Judgment. It is to be noted that the 'out-of-Court' appointment of the Administrator was made when the Judgment in the *Marcus*

Ward case was pending and just prior to when it was due to be handed down.

By reason of the foregoing it is contended that Anglo was not entitled to appoint an administrator over SML.

(b) Anglo argues, in its skeleton argument dated 20th June 2011 at paragraph 7 *et seq.*, that the existence of a dispute in good faith and on substantial grounds in relation to the relevant debt does not *per se* remove the right of the holder of a qualifying floating charge to appoint an administrator.

Even if that is the case, the authorities law relied upon by Anglo acknowledge that, in the interests of justice, the Court retains discretion to restrain an administration. It is respectfully contended that the Court should exercise that discretion in this case and restrain the administration.

Alternatively, "test" for the appointment of an administrator proposed by Anglo is not without exception, and it is contended that the circumstances of the current case give rise to an exception.

(c) Anglo claims at paragraph 10 *et seq.* of its skeleton argument of 20th June 2011 that **if** the test for the appointment of an administrator is that contended for by the Applicant, then the debt cannot be said to be disputed on *bona fide* and substantial grounds because Anglo enjoys a "no set-off" clause as part of its facility with SML.

If that clause is relevant to these proceedings (which is denied by the Applicant), then it is contended that Anglo must prove its 'reasonableness' pursuant to the Unfair Contract Terms Act 1977. The Applicant contends that the clause does not meet the test of reasonableness.

The Applicant further contends in reply that the issue of whether or not the debt is due and owing is now subject to the doctrine of *res judicata* by reason of the decision in *Marcus Ward Limited v. Anglo Irish Bank* [2011] NICh 7.

(d) The administration should in any event be restrained because the Administrator is in breach of his fiduciary duties to SML. In circumstances where SML and Anglo are opposing parties in litigation concerning the alleged debt upon which Anglo has now

acted, the Administrator has entered into an extra-statutory commercial arrangement with Anglo for the payment to him/his firm of either £20,000.00 or £30,000.00 ex VAT, expenses and costs. This is in breach of the conflict of interest rule applicable to fiduciaries, as is the fact that the Administrator and Anglo's solicitor have entered into a legal professional relationship in connection with the administration, and Anglo asserts legal professional privilege against disclosure of these communications to the Applicant as Shareholder and Director of SML and the Guarantor of its liabilities to Anglo.

(e) The administration should be restrained by reason that Anglo has sought to place SML into administration for an improper motive i.e. not one of the mandatory statutory purposes of administration.

Prior to appointing the Administrator, Anglo had acknowledged in writing that SML had no realisable assets of value. In those circumstances the statutory purposes of administration could not be said to be likely to be achieved.

It is contended that Anglo's true motive in placing SML into administration was the stymieing of SML's legal proceedings against Anglo.

Neither the Administrator nor Anglo have, in the affidavit evidence filed on their behalf, particularised statutory purposes of administration that they consider is being fulfilled, nor have the particularised and detailed the basis upon which it can be said any of those purposes are likely to be achieved.

To date the Administrator has not elaborated upon his Declaration that he was *"of the opinion that the purpose of administration is reasonably likely to be achieved"*. Furthermore, he has not given his reasons for holding this opinion, nor has he particularised what detailed enquiries he has made in coming to that conclusion. That which has been identified is unpersuasive.

In such circumstances it cannot properly be said that the statutory purposes of administration are likely to be achieved and the administration should be restrained.

6. Each of those arguments is addressed in greater detail below:

(a) The alleged debt is not due and owing

7. 'Bailey & Groves: Corporate Insolvency Law & Practice', Chapter 10, "administration," Division E, "Appointment by qualifying floating charge-holder" provides at paragraph 10.34:

> The holder of the qualifying floating charge must be entitled to call in its security and exercise its remedies.

8. Article 17 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989 provides that:

> An administrator may not be appointed under paragraph 15 while a floating charge on which the appointment relies is not enforceable.

9. The alleged debt relied upon by the Second Respondent is described in paragraph 7 of the affidavit of Ian Wigglesworth sworn on 31st May 2011. Mr Wigglesworth describes it as a debt due on foot of a facility letter dated 29th July 2009 from Anglo to SML. As at 11th April 2011 Mr Wigglesworth states this sum to be £10,838,244.07.

10. This is the same alleged debt that was the subject of the proceedings *Marcus Ward* case. The background to those proceedings was that on 24th August 2010 Anglo served a statutory demand on Marcus Ward Limited ("MWL") a company related to SML through the common ownership of Peter Curistan. The statutory demand in that case sought payment on foot of a guarantee given by MWL to SML. The statutory demand provided that the debt of SML arose on foot of the same facility letter between Anglo and SML of 29th July 2009. The debt as at 19th August 2009 was stated then to be in the amount of £10,398,471.23, with interest continuing to accrue.

11. MWL issued proceedings seeking an injunction pursuant to Order 29 of the Rules of the Court of Judicature restraining Anglo from presenting a winding-up petition based on that alleged debt. That case came on for hearing on 25th February 2011, and Judgment was delivered on 15th April 2011. Paragraph 3 of the Judgment describes:

> The facts of the guarantee are not disputed. The case put forward by the Plaintiff is that there is a genuine and substantial dispute as to whether the debt which has been guaranteed is in fact due and owing to the bank. The debt in question is that of Sheridan Millennium Company which is a related company to Marcus Ward Limited.

12. The conclusion of the Court, expressed at paragraph 17 of the Judgment was that there exists *"a genuine and substantial dispute"* as to

whether the debt is due and owing. It was an abuse of process to rely upon the insolvency process of a winding-up petition in those circumstances.

13. Accordingly, it is contended that Anglo was not entitled to call in its security and exercise its remedies.

(b) The 'test' for the appointment of an administrator

14. There are a number of relevant reported decisions.

15. In *Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] All ER (D) 198 (Feb), [2004] EWHC 209 (Ch) at paragraph 4, Mr Justice Patten held that:

> 4. I should mention at the outset that it is common ground that the Court will not make an administration order on the basis of a disputed debt. A creditor is defined by paragraph 12(4) of Schedule B I as including a contingent or prospective creditor, but in each case the liability of the company to the creditor must either be established or agreed. The position has long existed in relation to winding-up petitions that if the liability remains the subject of a genuine dispute, the Court as a matter of practice and discretion will decline to entertain the application and leave the parties to resolve their differences in a different forum: see Stonegate Securities Ltd v Gregory [1980] Ch 576. In my judgment the same rule applies to administration petitions.

16. In *Hammonds (a firm) v. Pro-fit USA Ltd* [2007] All ER (D) 109 (Aug), [2007] EWHC 1998 (Ch) Mr Justice Warren at paragraph 52 considered a different approach:

> In my judgment, the court's discretion is at large and is not constrained by any practice similar to that adopted in relation to winding-up petitions. In particular, in the case of a cross-claim where there can be no argument about jurisdiction, it may be that the facts indicated quite clearly that an administration order would be desirable; in such a case, there would seem to me to be no reason for requiring that a creditor - who clearly has locus standi to make an application - should be forced to defeat the cross-claim as a pre-condition of obtaining an order.
>
> 53. Further, in my judgment, a person is a "creditor" within paragraph 12(1)(c) Schedule B1 so long as he has a good arguable case that debt of sufficient amount is owing to him (to adopt the words of Lord Denning in Claybridge Shipping). Thus, even in the case of a disputed debt, such a person may make an application for an administration order. It is then a matter for the discretion of the court whether actually to make an administration order. The court has jurisdiction to deal with the application without having to resolve the dispute about the debt.

> 54. Of course, that is not the end of the story. The court can only make an administration order if it is satisfied, in accordance with paragraph 11 Schedule B1, that the company is or is likely to become unable to pay its debts for which purpose it is necessary to refer back to section 123.

17. The decision in the *Hammonds (a firm) v. Pro-fit USA* case has been subject to commentary on the basis that it is at odds with the authorities and statutory intent (cf: Ho, 'Disputed debts, cross-claims and administration orders: Hammonds (a firm) v. Pro-Fit USA', Corporate Rescue and Insolvency Journal, 2007, Volume 23, Issue 5).

18. The case relied upon *by Anglo is BCPMS (Europe) Limited v. GMAC Commercial Finance plc* [2006] EWHC 3744. In that case Lewison J rejected an argument that the existence of a dispute in good faith and on substantial grounds removed the right of the holder of a qualifying charge to appoint an administrator. The *ratio* of the Court's rejection of that argument is contained at paragraphs 65 to 68 of the Judgment:

> [65] Either the floating charge is enforceable or it is not. That will only be determined at trial. It may not be known at this stage whether the floating charge is or is not enforceable but to read the schedule as requiring that to be known would, in my judgment, be adding a gloss to the terms of the schedule which is not there.
>
> [66] The appointment of an administrator by a secure creditor is often a hostile act proposed by the company's management. In my judgment it would be a serious impediment to the realisation of assets for the payment of secure creditors if they could be precluded from appointing an administrator merely because the debt was disputed, even if the dispute was in good faith.
>
> [67] Schedule B1 is part of a package of measures intended to encourage enterprise. That package includes the facilitation of the raising of credit. Part of the quid pro quo was to make it easier for creditors to appoint administrators, hence the current power to appoint administrators without having to apply to the court. I do not consider that Mr Lyon's analogy with bankruptcy and winding up petitions is a sound one.

19. Lewison J went on to consider, at paragraphs 86 to 94, whether an injunction should be granted to restrain the administration. The test applied balances of the risk of injustice to each party, on the lines in the *American Cyanimid* case.

20. It is submitted that the reasoning in the *BCPMS* case ought **not** to be followed.

21. It is not accepted that an assessment, on *a pr*eliminary basis, as to whether the debt is disputed on substantial and bona fide grounds, adds a gloss to the legislation. It is not correct to say that the Applicant, as Lewison J has it, is *"requiring that [it] be known"* whether or not the charge is enforceable, no more than the applicant seeking restraint of a winding-up petition, as in the *Marcus Ward* case, is requiring it to be known whether or not the other party a creditor. In neither context can this answer be known, as this will ultimate be a matter for trial.

22. For comparative purposes, the leading authority relied upon by Deeny J in the *Marcus Ward* case to the effect that existence of a *bona fide* and substantial dispute would prevent the presentation of a winding-up petition was *Mann v. Goldstein* [1968] 2 All ER 769. The Court in that case considered the statutory context (at 771):

> The presentation of a petition is governed by statutory provision. Section 224 of the Companies Act, 1948, provides that an application to wind up a company shall be by petition presented, so far as material for present purposes *"... by any creditor or creditors ..."* The section seems to me plainly, on the face of it, exhaustive, so that a person not within its ambit cannot petition. This conclusion is in accordance with the note in Buckley On The Companies Acts (13th Edn) 462, based on the observation of Wynn-Parry J in Re H L Bolton Engineering Co Ltd ([1956] 1 All ER 799 at p 801; [1956] Ch 577 at p 583). Of course, a person not named in s 224 as a person entitled to present a winding-up petition, does not become so named because the company is insolvent. Therefore, so far as material to our case, if the defendants are not creditors they are not entitled to present or advertise their petitions or apply for a winding-up order; they have no locus standi, and their petitions are bound to fail even though the company be insolvent. So if a creditor's petition is not restrained by such an application as is now before me and comes before the companies court, that court will, in limine, before proceeding further, consider the petitioner's claim to be a creditor.

23. The argument canvassed in the Journal article cited above, that in many cases administration is a straight substitute for winding-up, is borne out by the discovered evidence in the current case. The letter to Mr Wigglesworth of Anglo from the First Respondent dated 4th March 2011, quoted in detail below, sets out a process, in particular under the heading *"Complying with Statutory Requirements of the administration Process"*. It is submitted that the content of this document shows the terminus of this process to be liquidation of the company. Lewison J's consideration that the underlying dispute will *"be determined at trial"* is inapt.

24. The Applicant accordingly contends that whether as an exercise of the discretion exercised by Lewison J in the *BCPMS* case, or as an exception to any generalised principal established by Lewison J, the

specific circumstances of the current case render the appointment of the Administrator invalid and inappropriate.

25. The Applicant draws upon principles underpinning the decision of Carswell J at first instance in *Munchie Foods Ltd v Eagle Star Insurance Company Ltd* (Northern Ireland Unreported Judgments, 4 June 1993) (Upheld on appeal, [1993] NI 155). That case concerned an application by a defendant for substantial security for costs from a plaintiff company pursuant to Article 674 of the Companies (NI) Order 1986.

26. In declining to order security, Carswell J cited the dicta of Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at 626:

> The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters, which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively - so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

27. Counsel for the Plaintiff in the *Munchie Foods* case contended that the practical effect of an Order would be to prevent the Plaintiff from proceeding with the action, so that the Order would terminate the proceedings in the defendant's favour. Additionally, Plaintiff's present impecunious situation was brought about to a large extent by the Defendant's allegedly wrongful conduct.

28. Article 6 of the European Convention of Human Rights and Fundamental Freedoms is engaged when the Court is determining whether, in the context of an invoked insolvency mechanism, a party should be entitled to a plenary hearing: c.f. *James Moore T/A James Moore Earth Moving V. Commissioners Of Inland Revenue* [2001] NICh 15.

29. The principles underpinning the *Munchie Foods* case, of access to the Courts, and avoidance of injustice, are grounds for applying the higher threshold for the appointment of an administrator and ought to apply in circumstances such as the present, or alternatively in the exercising of the Court's discretion to restrain the administration.

30. SML and Anglo are, and have been since June 2010 (until the appointment of the Administrator) opposing parties to substantive litigation concerning the transaction giving rise to the alleged debt upon which Anglo has now acted. This alleged debt arises in consequence of Anglo's own wrongdoing. Given that the appointer of the Administrator is the opponent to the action constituting the company's remaining asset, there is an appreciable risk that the continuance of the administration will effectively terminate the proceedings between SML and Anglo in Anglo's favour. The documentation produced by the Respondents, discussed below, points toward the conclusion of the administration being the winding-up of SML. The Applicant's objection to the First Respondent having a direct commercial relationship with Anglo, and entering into a legal professional relationship with Anglo's solicitor, is legitimate and compelling in this context.

31. The Applicant points to evidence, recited below that Anglo is using the administration process to stifle a genuine claim.

32. It must also be proper for the Court to take into account the nature of the character of the wrongdoing alleged - which arises in connection with market manipulation by Anglo through the provision of secret loans for the purchase of its own shares. Notably Anglo has not taken the opportunity to deny, on oath, these acts alleged by the Applicant in his affidavits in the *Marcus Ward* case and the current case.

(c) The "no set-off" clause

33. Anglo contends that in the event that the validity of the appointment of the Administrator is affected by the existence of a genuine dispute on bona fide and substantial grounds, the existence of a 'no set off' provision means that there is no such dispute in the current circumstances. Anglo has accepted in its skeleton argument dated 20th June 2011, that if this clause is to be valid, the Second Respondent bears the burden of showing that the clause satisfies the requirement of "reasonableness" under the Unfair Contract Terms Act 1977.

34. The case law confirms (c.f. *Skipskredittforeningen v. Emperor Navigation* [1997] CLC 1151 at 1163) that *"if such a clause fails to satisfy the requirement of reasonableness in any respect then it fails in all respects, however immaterial may be the respects in which it is unreasonable to the particular case before the court"*.

35. The clause sought to be relied upon by Anglo reads:

> All sums payable in respect of principal, interest or otherwise shall be payable gross without deduction on account of taxes, any set-off or counterclaim or on account of any charges, fees, deductions or withholdings of any nature now or hereafter required to be deducted, imposed, levied, collected, withheld or assessed unless the Borrower is compelled by law to make such deduction. If any such deduction is required by law to be made (whether by the Borrower or otherwise) from any such payment, the Borrower shall pay such additional amounts as will result in receipt by the Bank of such amount as it would have made had no such deduction been required to be made.

36. Schedule 2 of the Unfair Contract Terms Act 1977 sets out a non-exhaustive series of guidelines to which particular regard should be had in assessing reasonableness:

(a) Strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;

(c) Whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) Where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) Whether the goods were manufactured, processed or adapted to the special order of the customer.

37. It appears from an affidavit sworn by Ciaran McAreavey on 1st August 2011 in response to the directions of this Court on 22nd June 2011, that the form of 'no set-off' clause relied upon by Anglo was not included into Anglo's standard terms and conditions until 10th February 2009. Anglo and SML had agreed numerous facility letters in a banking relationship going back to 1999 yet, Anglo has produced no evidence of having given SML any notice of this change in its terms and conditions. The Applicant has sworn an affidavit dated 1st August 2011

where (at paragraph 7) he states that he was unaware, and he believes that the other then directors of SML were unaware, of this change being effected. It is contended that the lack of such notice is relevant to a finding against the reasonableness of the clause.

38. The clause would appear on its face, and by its second sentence, to empower Anglo to recover from its customers interest or charges that Anglo has otherwise been legally compelled not to recover. It is submitted that this would extend to include unlawful penalty rates of interest, or unlawful charges. It is submitted that this is an unreasonable provision *per se*.

39. Anglo's solicitor has sworn an affidavit dated 16th June 2011 addressing use of 'no set-off' clauses within the banking sector, and drawing on his experience as a solicitor with expertise in that sector. It is significant that the examples provided by the deponent from other financial institutions are ***not*** in similar terms to the Clause now relied upon by the Second Respondent.

40. The affidavit of Ciaran McAreavey dated 1st August 2011 at paragraph 11 states that this clause was created as a result of a "general review" by Anglo concluding in January 2009, wherein *"various drafts of amended conditions were created by the Second Respondent"*. It is notable that the particular rationale for the formulation of the current clause (and in particular the second sentence) are not elaborated upon.

41. A particular factor against which the reasonableness of the clause may be assessed in the current circumstances is that it was introduced by Anglo within a course of conduct comprising the breach of fiduciary duty toward SML judicially considered in the *Marcus Ward* case. The Unfair Contract Terms Act guidelines referred to above permit the parties individual circumstances and the background facts to be taken into account. This is a compelling factor against the reasonableness of the clause, as is the stark inequality of bargaining power between the parties in the context of SML having (in July 2009, being the facility letter relied upon) already alienated its primary asset.

42. If the alleged 'no set-off' clause has application to the dispute between SML and Anglo (which is denied), then it is contended that it is unreasonable by reference to the Unfair Contract Terms Act and therefore cannot be relied upon as Anglo seeks to do.

(c) Res judicata

43. It is submitted that in any event the issue as to whether the debt is disputed on bona fide and substantial grounds has already been determined in the *Marcus Ward* case. This is now subject to the doctrine of *res judicata,* which doctrine has been considered and described by Girvan J in *Ulster Bank Limited v Fisher & Fisher* [1999] NI 68. Girvan J at 76 noted the dicta of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 , at 114–115 where Wigram V-C said:

> ... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

44. Girvan J concluded proffered a series of conclusions, including inter alia at 82:

> (6) Where the judgment sought by the party bringing the fresh proceedings would conflict with or be inconsistent with or involve a collateral attack on the correctness of the previous judgment then the second proceedings would be an abuse of process (see Port of Melbourne Authority v Anshun Pty Ltd [1999] NI 68 at 82, Stephenson v Garnett and Hunter v Chief Constable of West Midlands Police). Indeed Spencer Bower suggests that the extended doctrine does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon provided it is not substantially the same as one that has been unless success in the new proceedings would result in inconsistent judgments (see at para 454). For my own part I am not convinced that the extended doctrine is quite so limited.
>
> (7) If the later proceedings can be seen to be without merit in the light of an earlier decision a fortiori where the parties are the same, they will be struck out as an abuse of process (see Reichel v Magrath (1889) 14 App Cas 665, Montgomery v Russell (1894) 11 TLR 112).
>
> (8) Justice and fair play between the parties must represent an underlying principle of the extended doctrine of res judicata. While in seeking to prevent abuse of its process the court is exercising a form of discipline over the parties to litigation, the court's procedural rules and principles are themselves always aimed at the doing of justice between the parties.

45. There is no good reason for Anglo not having brought forward this argument in the *Marcus Ward* case and to entitle it to do so now (were it to succeed on the point) would result in inconsistent judgments. It is

respectfully submitted that, in the circumstances, Anglo is not entitled to re-argue this issue.

(d) Breach of fiduciary duty by the Administrator

46. The First Respondent met with Ciaran McAreavey, a senior official of Anglo (and the deponent of the affidavits on behalf of Anglo in the *MWL v. Anglo* proceedings) and Mr Wigglesworth, in March 2011. This meeting was apparently unminuted and unrecorded and no notes were apparently taken by any attendee. A letter to Mr Wigglesworth from Keenan Corporate Finance dated 4th March 2011 contains the following statements by or on behalf of the First Respondent:

> We refer to the recent meeting between our Tom Keenan and your Ciaran McAreavey and Ian Wigglesworth regarding Sheridan Millennium Limited ("the Company") and set out our proposal for the possible administration of the Company.
>
> We understand that the Company Directors are not co-operating with the Bank and there is a lack of clarity as to whether or not the Company owns any remaining realisable assets (e.g. property, third party debtors, related party debtors). Hence the Bank is considering enforcing its security to take control of any assets owned by the Company and then to realise them. We understand that the Bank's security allows the appointment of either an Administrative Receiver or an administrator. Arthur Cox is currently considering which enforcement option would be the most appropriate for this particular case and will advise further in due course, however, for the purposes of this proposal we have assumed that an administrator will be appointed.
>
> **Pre Appointment**
>
> We understand you have appointed Arthur Cox to perform a review on your security and they have confirmed that your security is valid and you have the power to appoint an administrator or an Administrative Receiver. With your consent I would liaise with Angus Creed of Arthur Cox in order that I might rely on his advice prior to accepting the appointment.
>
> **Our scope of Services**
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> Based on our discussions to date, we would envisage that our role will consist of the following work streams:
>
> 1. Comply with the statutory requirements of the administration process; and
> 2. Identify any realisable assets within the Company; and
> 3. Maximise the realisable value of any assets;
>
> If our review concludes that the Company has no material realisable assets we would take steps to conclude the administration and arrange for the Company to be placed into liquidation.

1. Complying with Statutory Requirements of the administration Process

- Preparing the requisite initial notifications of the appointment including the Company's creditors, tax authorities, shareholders, company solicitor, employees and the placing of a newspapers advertisement;
- Processing the redundancy of any remaining employees;
- Submission of the relevant documentation with the Companies House and the Court;
- Preparation and submission of my Proposals to all creditors within 8 weeks of my appointment;
- Conducting a meeting of creditors within 10 weeks of my appointment;
- Working to get a Director's Statement of Affairs;
- Preparation and submission of a return in relation to the conduct of the Directors in the two years prior to the administration;
- Preparation and submission of a six month progress report;
- Preparation of a Receipts and Payments account at relevant intervals;
- Preparation and submission of relevant taxation returns;
- Make timely distributions to you in realisation of your assets; and
- Proceed to an orderly winding up of the Company.

...

2. To Maximise the Realisable value of any assets

The scope of this workstream will be subject to successfully identifying material assets and will be agreed with the Bank at that stage of the process.

Keenan Corporate Finance

Keenan Corporate Finance was established in October 2008 by Tom Keenan to provide hands-on timely and independent advice to clients. The team has been built up with the aim of providing first class advise and creating long standing relationships with our clients and the Firm has quickly become the adviser of choice for the main banks in Belfast. Our present focus is on serving the immediate needs of the banking market and the Firm has been appointed to NAMA panels for both Reviewing borrower business plans and Enforcement Services. All team members have joined direct from "Big 4" firms where they trained and qualified as Chartered Accountants.

...

Our Fee Proposal

Our fee quotation for the two initial workstreams is as follows:

1. Complying with the statutory requirements of the administration £15,000
2. Performing an initial review of the Company's assets £15,000

The total fee of £30,000 excludes VAT, out of pocket expenses and costs of the administration. It is assumed these costs will be underwritten by the Bank in the event that there is any shortfall between asset realisations and the agreed costs incurred.

...

Legal Fees

We understand that there is a risk Mr Curistan will legally challenge the appointment of an administrator to the Company and the administrator

> carrying out his duties including taking control over and realising the assets. Should insufficient funds be available to the administrator from the Company's asset realisations to defend any legal action by the Directors we have assumed the Bank will provide the appropriate funds to the administrator.

47. Anglo's solicitor then acted as advisor to Anglo on the validity of his appointment. An email discovered by Anglo, from Mr McMurray to Mr Keenan dated 12th April 2011 provides:

> Tom,
>
> I refer to our attendance this morning at A Cox's.
>
> I confirm having received papers from Ken Rutherford at C&H Jefferson.
>
> In order for me to assess the position regarding the on-going litigation regarding SML with a view to advising you on the effect it may have on the proposed administration of SML and indeed the effect the proposed admin would have on the litigation I will charge a fee of £1000 plus VAT. I understand that Angus Creed will be advising you on the validity of your appointment and attending to the filing of documents should you get that far.

48. The First Respondent has been asked in correspondence of 13th June 2011 for discovery of the minutes of the meeting of 12th February 2011 with Anglo's solicitor. He has also been asked for the minute of his earlier meeting with Arthur Cox. The Administrator has asserted legal privilege in respect of these documents.

49. The Insolvency Rules (Northern Ireland) 1991 provide in respect of remuneration of an administrator:

> Fixing of remuneration
>
> 2.107. —(1) The administrator is entitled to receive remuneration for his services as such.
>
> (2) The remuneration shall be fixed either—
>
> (a) as a percentage of the value of the property with which he has to deal; or
> (b) by reference to the time properly given by the insolvency practitioner (as administrator) and his staff in attending to matters arising in the administration.
>
> (3) It is for the creditors' committee (if there is one) to determine whether the remuneration is to be fixed under paragraph (2)(a) or (b) of this Rule and, if under paragraph (2)(a) of this Rule, to determine any percentage to be applied as there mentioned.
>
> (4) In arriving at that determination, the committee shall have regard to the following matters—

(a) the complexity (or otherwise) of the case;
(b) any respects in which, in connection with the company's affairs, there falls on the administrator any responsibility of an exceptional kind or degree;
(c) the effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties as such; and
(d) the value and nature of the property with which he has to deal.

(5) If there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed (in accordance with paragraph (2) of this Rule) by a resolution of a meeting of creditors; and paragraph (4) of this Rule applies to them as it does to the creditors' committee.

(6) In a case where the administrator has made a statement under paragraph 53(1)(b), if there is no creditors' committee, or the committee does not make the requisite determination, the administrator's remuneration may be fixed (in accordance with paragraph (2) of this Rule) by the approval of—

(a) each secured creditor of the company; or
(b) if the administrator has made or intends to make a distribution to preferential creditors—
(i) each secured creditor of the company; and
(ii) preferential creditors whose debts amount to more than 50 per cent of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval;
and paragraph (4) of this Rule applies to them as it does to the creditors' committee.

(7) If not fixed under paragraphs (2) to (5) of this Rule, the administrator's remuneration shall, on his application, be fixed by the court.

(8) Where there are joint administrators, it is for them to agree between themselves as to how the remuneration payable should be apportioned. Any dispute arising between them may be referred—

(a) to the court, for settlement by order; or
(b) to the creditors' committee or a meeting of creditors, for settlement by resolution.

(9) If the administrator is a solicitor and employs his own firm, or any partner in it, to act on behalf of the company, profit costs shall not be paid unless this is authorised by the creditors' committee, the creditors or the court

50. Paragraph 53(1)(b) of Schedule B1 of the Insolvency (Northern Ireland) Order 1989, which is referred to in Rule 2.107 relates to the preparation by an administrator of a Statement of Proposals.

51. The remuneration of an administrator is a matter to be considered, and determined, by the Creditors' Committee.

52. The administrator stands as fiduciary to the Company. 'Chitty', Volume 2, Specific Contracts, 30th Edn., provides at paragraph 31-123:

> A more general principle, with which indeed the previous two headings overlap is that as a fiduciary, an agent must not, without first obtaining the informed consent of his principal, put himself in a position where his duty to his principal conflicts or may conflict with his own interests or the interests of another principal. Any benefit or gain made in circumstances where a conflict or significant possibility of conflict existed must be accounted for to the principal. A principal who has full knowledge of the facts may however assent to the agent's acts; and sometimes his instructions may be so specific as to leave the agent with no discretion, and hence to exclude this rule. This rule originated as an extension to agents of some (but not all) of the restrictions imposed on express trustees; but the law has moved beyond this analogy and "The precise scope of [the obligation] must be moulded according to the nature of the relationship.

53. A specific manifestation of the "no conflict" rule applicable to fiduciaries is the rule against fiduciary remuneration, save where specifically permitted.

54. Snell's Equity, 32nd Edition, at 7-023 recites:

> Another application of the general fiduciary duty conflict principle is the rule that trustees and executors are generally entitled to no allowance for their care and trouble, the concern being that "if allowed, the trust estate might be loaded, and rendered of little value." This rule is so strict that even if a trustee or executor has sacrificed much time to carrying on a business as directed by the trust, he will usually be allowed nothing as compensation for his personal trouble or loss of time. As it is an application of the general fiduciary conflict rule, the remuneration sub-rule also extends to other fiduciaries. Thus, a director is not entitled to remuneration for services rendered as a director, except as provided by the articles of association. And a solicitor-trustee is not entitled to charge anything except his out-of-pocket expenses for any business he does in relation to the trust, whether contentious or non-contentious.

55. Snell at paragraph 7-18 describes the general *"no conflict"* principle applicable to fiduciaries as *"prophylactic"* and not requiring an assessment of whether a breach has occurred.

56. It is submitted that where the appointer and the company are adversaries in genuine and substantial litigation the no conflict rule is drawn into focus.

57. The Administrator has provided a declaration that he considers it **likely** that the purposes of administration (which alternatively depends upon the rescuing of the company as a going concern, or the 'realisation' of assets) will be fulfilled. The statutory framework for

remuneration, rather than the extra-statutory arrangement that has been made, is consistent with a realistic appraisal of whether the statutory purposes can be met.

58. The legal professional relationship between the administrator and Anglo's solicitor is also in the circumstances liable to create a perception of non-neutrality and in breach of the avoidance of conflict rule.

59. These circumstances justify the granting of an injunction to restrain the administration, or alternatively the removal of the Administrator. Paragraph 89 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989 also provides that *"the High Court may by order remove an administrator from office."*

(e) Improper motive by Anglo in placing SML into administration

60. Anglo, by its solicitors, wrote to the solicitors for SML on 8th September 2010 stating:

> Sheridan Millennium's only real asset is the IMAX Bournemouth. As your clients have not paid on foot of demand, our Clients have appointed a fixed charged receiver over that asset on foot of their legal charge dated 29 June 2007.

61. The IMAX Bournemouth was subsequently sold. Anglo, again by its solicitors, wrote to the solicitors for SML on 4 August 2010 stating:

> The only asset of any value that Sheridan Millennium Limited now has is the IMAX Theatre, Bournemouth which is charged to our clients.

62. The Applicant has averred in his affidavits that the only asset which SML has is the chose in action comprising its claim against Anglo (save some second-hand computer equipment which he avers is of negligible value). By virtue the symbiotic nature of SML and its bank Anglo, the Applicant has averred that Anglo is well aware of precisely what the assets and liabilities of SML are. Anglo has not disputed this in its affidavit, and indeed Mr Wigglesworth's affidavit, paragraph 8, appears to agree with the Applicant's averments.

63. Limited and redacted discovery has been provided by the Second Respondent. This contains a document, which appears to relate to the Second Respondent's Credit Committee. This document is signed by Ian Wigglesworth. The date of the document is unclear but may be in

and around February 2011. It contains the following statement under *"Conclusions and Recommendation"*:

> To conclude, the Bank have now (1) appointed a receiver over Cambourne Investments Inc and its assets (2) served formal demands to Peter & Marian Anne Curistan in relation to personal debt and (3) served formal demands to Peter Curistan in respect of his guarantee regarding SML and OPL facilities. All of the above actions serve to demonstrate to Curistan that the Bank will be aggressively pursuing him for all amounts owing and this will also allow us to counteract his attempts to challenge the Bank and be a nuisance factor through the actions he is taking. The appointment of an administrator over SML and fixed charge receiver over the promoter's asset at Enterprise Crescent will further reinforce the Bank's intent to recover all sums owing.
>
> [Emphasis added]

64. There is but one action brought by Peter Curistan/companies associated with him, and Anglo, which is the action issued on 23rd June 2010.

65. Another document, being a memorandum dated 8th March 2011 from Ian Wigglesworth to Mike Aynsley, CEO of Anglo, contains the following statement:

> Group Credit Committee approved a number of requests in relation to The Peter Curistan Connection in February 2011, one of which allowed the Bank to appoint an administrator to SML. This course of action has been recommended by the Banks solicitor Arthur Cox while it ties into our overall recovery/enforcement strategy in relation to the principal – Peter Curistan. GRMU shall seek full repayment of the facility from Sheridan Millennium Limited and once an administrator is appointed the Bank will in turn be able to ascertain all assets and liabilities of the company. It is likely that SML will be put into liquidation if there is no likelihood of material recovery for the Bank.
>
> [Emphasis added]

66. It is submitted that this discovery situates the placing of SML into administration within the context of a strategy to counteract the action against Anglo. Where it is also expressly the intent that if "the Bank" do not make recovery, SML will be put into liquidation, and where neither Respondent has provided by affidavit any analytical justification of substance addressing the statutory purposes of administration, the inference can fairly be drawn that the reason Anglo has sought to place SML into administration has been the frustration of SML's action against it, the corollary of which is the suppression of allegations as to Anglo's "Golden Circle" illegality.

67. Paragraph 4 of Schedule B1 of the Insolvency (Northern Ireland) Order 1989 provides as follows:

> Purpose of administration
>
> 4. (1) The administrator of a company must perform his functions with the objective of—
>
> (a) rescuing the company as a going concern, or
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.
>
> (2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
>
> (3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either—
>
> (a) that it is not reasonably practicable to achieve that objective, or
> (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.
>
> (4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if—
>
> (a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and
> (b) he does not unnecessarily harm the interests of the creditors of the company as a whole.
>
> 5. The administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable.

68. The Statutory Declaration by the administrator is that the purpose of administration will, in his opinion be *"reasonably likely to be achieved"*.

69. This declaration imports two concepts. Firstly, the concept of likelihood - namely whether on the balance of probabilities the statutory purpose will be achieved. Secondly, the duties incumbent on an expert expressing an opinion for Court purposes. It is submitted that an expert proffering an opinion for the purpose of legal proceedings must, when called upon, be in a position to provide exposition of and justification for that opinion. That is all the more important in an 'out-of-Court' appointment.

70. Bailey & Groves, 'Corporate Insolvency - Law & Practice', Chapter 10, administration, E., *"Appointment by qualifying floating charge-holder"* states at paragraph 10.35:

> There are certain formalities which must be observed following the making of an out-of-court appointment under Sch B1, para 14(1)1, and the appointment takes effect, not from the time at which it is made, but from the time at which those formalities fulfilled. The appointor must file with the court three copies of the notice of appointment in the required form. The notice of appointment must contain a statutory declaration that the appointor is the holder of a qualifying floating charge, that the relevant charge was enforceable at the date of the appointment, and that the appointment was in accordance with Schedule B4. The statutory declaration must be made not more than five business days before the notice is filed with the court.
>
> The notice of appointment must identify the administrator and be accompanied by a written statement by the administrator that he consents to the appointment and that in his opinion the purpose of administration is reasonably likely to be achieved and the statement must be in Form 2.2B6. In giving the statement as to the likelihood of achievement of the purpose of administration, the administrator is acting as an expert. He ought, therefore, to have regard to the provisions of Part 35 of the Civil Procedure Rules and the Code of Guidance on Expert Evidence.
>
> [Emphasis added]

71. Similarly 'Kerr & Hunter on Receivers and administrators', Sweet & Maxwell, 19 Edn., paragraph 14-73 observes that:

> It is to be noted that the draughtsman has taken steps to fix the intended appointee with personal responsibility for the validity of his appointment; for he is required to participate in the notice of his appointment, by adding to his statement of consent to be appointed his opinion that the purpose of administration is reasonably likely to be achieved (by his appointment).

72. Peter Curistan in his affidavits has challenged the justification, rationale, and purported purposes of this administration.

73. It is submitted that the Administrator's response, on affidavit, is deficient. He gives no insight whatever into which of the statutory purposes he is of the opinion is likely to be capable of being satisfied. The Administrator states that he relied on:

(a) Accounts for SML year ended 31st March 2008

(b) Information provided to him by source or sources unnamed, at times unspecified, which led him to *"understand that since the date of these accounts SML has disposed of the Odyssey Arena and the Imax Bournemouth"*

74. The Administrator avers in his affidavit that on these facts alone he could 'presume' that the SML had retained realisable assets.

75. It is submitted that in light of the following, issue is taken with the lack of detailed enquiry:

(a) Anglo's acknowledgment, *supra*, that SML had no realisable assets save the IMAX Bournemouth (not now disputed in the affidavits filed on behalf of Anglo).

(b) Anglo's relationship with SML over the 10 years since the building of the Odyssey Pavilion (the Odyssey Arena referred to by the Administrator is the publically controlled stadium element of the Odyssey project which has never been an asset of SML) up to and including the transfer of the Odyssey Pavilion away from SML in April 2009, such that it is well aware that SML has no realisable assets save the cause of action against Anglo.

(c) The First Respondent's meeting with Anglo prior to the administration, at which meeting no notes or records appear to have been produced or kept

The Administrator has been asked in correspondence of 13th June 2011 for discovery of *"all documents furnished by Anglo Irish Bank to Mr Keenan upon which he based his declaration that the purpose of administration was reasonably likely to be achieved."* The response on the Administrator's behalf, on 14th June 2011, was that *"no documentation of this description exists."*

76. It is further submitted that the statutory framework sets out the primary objective of administration as *"rescuing the company as a going concern."* The other statutory objectives can only be pursued if it is not *"reasonably practicable to achieve that objective."*

77. If the Administrator has given consideration to the objective, he has discovered no notes, records, memoranda, or other documentation that refer to this objective, and no mention is made of it in his affidavit. The administrator's bullet pointed description of the *"Statutory requirements of the administration process"* begin with *"preparing initial notifications"*, move then to *"processing the redundancy of any remaining employees"* and conclude with *"Make timely distributions to you [Anglo] in realisation of your assets; and Proceed to an orderly winding-up of the Company."*

78. Given the affidavit evidence in this case to the date hereof, and in light of the Administrator's presumption, as described by him, it cannot be determined that the statutory purposes are likely to be achieved.

Conclusion

79. It is submitted that the appointment of the Administrator to SML by Anglo on 14 April 2011 was invalid with reference to Schedule B1 of the Insolvency (Northern Ireland) Order 1989 and was an abuse of process of the Court and the Administrator should be removed. Alternatively, the Court should in its discretion remove the Administrator, by reason that Anglo's conduct is oppressive, and is designed or will have the effect of thwarting a genuine, substantial and current litigation between SML and Anglo, contrary to the interests of justice.

1st September 2011

2011 No. 54241

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION (COMPANY INSOLVENCY)

IN THE MATTER OF
SHERIDAN MILLENNIUM LIMITED
Company No NI033638

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

Between:

PETER GERARD CURISTAN

Applicant

- v -

THOMAS MARTIN KEENAN

First Respondent

- and -

ANGLO IRISH BANK CORPORATION LIMITED

Second Respondent

APPLICANT'S LIST OF AUTHORITIES

Legislation & regulation

Insolvency (Northern Ireland) Order 1989 (Schedule B1)
Insolvency Rules (Northern Ireland) 1991
Unfair Contract Terms Act 1977
European Convention on Human Rights and Fundamental Freedoms, Article 6
The Rules of the Court of Judicature (Northern Ireland) 1980

Case law

1. *Marcus Ward Limited v. Anglo Irish Bank* [2011] NICh 7
2. *Spanboard Products Limited v. Elias* [2003] NICh 3
3. *James Moore T/A James Moore Earth Moving V. Commissioners Of Inland Revenue* [2001] NICh 15

4. *Ulster Bank Limited v Fisher & Fisher* [1999] NI 68
5. *Munchie Foods Ltd v Eagle Star Insurance Company Ltd* (Northern Ireland Unreported Judgments, 4 June 1993) (On appeal, [1993] NI 155)
6. *Thunderbird Industries LLC v. Simoco Digital UK Ltd* [2004] All ER (D) 198 (Feb), [2004] EWHC 209 (Ch)
7. *Hammonds (a firm) v. Pro-fit USA Ltd* [2007] All ER (D) 109 (Aug), [2007] EWHC 1998 (Ch)
8. *BCPMS (Europe) Limited v. GMAC Commercial Finance plc* [2006] EWHC 3744
9. *American Cyanamid v. Ethicon Limited* [1975] AC 396
10. *Skipskredittforeningen v. Emperor Navigation* [1997] CLC 1151
11. *Mann v. Goldstein* [1968] 2 All ER 769
12. *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609

Texts

13. Bailey & Groves "Corporate Insolvency - Law & Practice" (Chapter 10, administration)
14. Chitty on Contracts, Volume 2, Specific Contracts, 30th Edn, Chapter 31
15. Kerr & Hunter on Receivers and administrators, Sweet & Maxwell, 19 Edn
16. Snell's Equity, Sweet & Maxwell, 32 Edn

Other materials

17. Ho, Disputed debts, cross-claims and administration orders: Hammonds (a firm) v Pro-Fit USA, Corporate Rescue and Insolvency Journal, 2007, Volume 23, Issue 5