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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/06/2015**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**IN THE MATTER OF LATLORCAN DEVELOPMENTS LTD (IN ADMINISTRATION) AND IN THE MATTER OF WL DOLAN CONSTRUCTION LIMITED (IN ADMINISTRATION)**

**JOHN J CAVANAGH**

**v**

**WILLIAM JOHN DOLAN**

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**MR JUSTICE DEENY**

[1] The court has before it today two summonses relating to the affairs of Latlorcan Developments Ltd (In Administration) ('Latlorcan') and W J Dolan Construction (Ireland) Ltd (In Administration) ('W J Dolan'). Although there have been a number of references to the second company the court is particularly concerned on an interlocutory basis with the affairs of the first company.

[2] The applicant, Mr John J Cavanagh, is a chartered accountant and insolvency practitioner of Dungannon, Co Tyrone. As he avers he is a very experienced figure in both those fields and he comes before the court as the administrator of Latlorcan Developments Ltd. That company was operated to some degree in connection with the other company, W J Dolan, and, principally, by the respondent to the application and the moving party on the second summons, Mr William John Dolan. The Latlorcan company was principally concerned with the ownership of property whilst the other company built houses upon it. The Ulster Bank had three mortgages of 2003 and 2004 relating to lands owned by Latlorcan in 3 folios in Co Monaghan and the indebtedness on foot of those, it is averred, at 3 December 2014 was €12,890,638.25. The debt in May 2010 was similarly substantial, though less, as less interest had been accrued but was already over €12m in December 2011 when an application was made for an administrator to be appointed.

[3] The court has had the benefit of able and well researched arguments by Mr Adrian Colmer on behalf of Mr Cavanagh and by Mr Richard Shields on behalf of the respondent and moving party in the second application.

[4] One of the points relied on Mr Colmer is that the appointment of the administrator was by its Directors under Schedule B1 of the Insolvency (Northern Ireland) Order 1989 and therefore, in effect, by Mr Dolan himself. Subsequently, Mr Dolan was unhappy about Mr Cavanagh's conduct of the company, he was also unhappy about the conduct of the bank but he did not take any steps in regard to the appointment of Mr Cavanagh. In the fullness of time Mr Cavanagh found a buyer for the principal asset of Latlorcan, namely Monaghan County Council. They were going to buy its principal asset which apparently is a small housing estate of partially completed or wholly uncompleted dwellings in that county and they were prepared to pay a sum in excess of €1m for that and also to waive a bond. The bond, I was informed, and it is averred, was in the sum of €277,000, that was a bond for completion of the infrastructure of the estate; it is a contractual obligation owed by the main borrower, the Ulster Bank, to Monaghan County Council I was informed.

[5] Mr William John Dolan's brother-in-law, Mr Maughan, offered to purchase the property for a quarter of a million euros more than the figure offered by Monaghan County Council but that would be slightly less than the value of the bond. The agreement of the mortgagee, Ulster Bank, was required for such a sale by Mr Cavanagh and the mortgagee declined to approve the sale to Mr Maughan but was prepared to approve of the sale to Monaghan County Council. There was some apprehension on the part of Mr Cavanagh about this sale because of Mr Dolan's assertions from time to time that he did not accept that Mr Cavanagh was properly appointed even though he had had a central role in that appointment. In 2014 an application was brought before this court on Mr Cavanagh's part seeking the court's consent to him consenting to an application by the Ulster Bank to appoint a fixed charge receiver over this asset that would have obviated the need for him to sell. In the events that happened Mr Dolan on notice of those proceedings chose to take no part in them provided that no order for costs was made against him. His counsel, Mr Shields, points out that the application, which is not actually before me today, did not seek any declaration on the part of Mr Cavanagh but was merely for the approval of the court to him consenting to the appointment of the fixed charge receivers.

[6] In the event no fixed charge receiver was appointed by the bank, possibly [the court was told] because it subsequently transferred the economic benefit of these charges to an affiliate of Cerberus Securities Ltd. But the document informing the relevant parties of this expressly states that the debt was still owed to Ulster Bank. I outline these facts briefly - they have been set out more fully, obviously, in the affidavits and in the submissions of counsel. Suffice to say, therefore, with no fixed charge receiver Mr Cavanagh was still the vendor of the land, but he and, even more so, the County Council and its solicitors were still uneasy that the completion of the sale might be vulnerable to a belated attack from Mr Dolan. There is actually a

contract in force between Mr Cavanagh and Monaghan County Council which was due to have been completed some 6 months ago but has not been.

[7] Mr Cavanagh then brought a further summons on 22 May 2015 in which he seeks various reliefs. The particularly relevant reliefs are as follows. At (3) he seeks:

> "Pursuant to the inherent jurisdiction of the court, a declaration that the applicant was lawfully and validly appointed as administrator of Latlorcan Developments Ltd."

and further at (7) he asks:

> "Further or in the alternative pursuant to paragraph 64 of Schedule B1 to the 1989 Order a direction that the applicant in his capacity as administrator of Latlorcan Developments Ltd may lawfully and properly complete the sale by him to Monaghan County Council of the lands situate at and known as lands and premises at Latlorcan, Co Monaghan."

[8] Paragraph 64 of Schedule B1 which deals inter alia with administration or deals in particular with administration permits an administrator of a company to apply to the High Court for directions in connection with his functions.

[9] If this was simply a matter of the court approving of the sale as a proper one it would not give rise to much difficulty as the court would not find it difficult to be satisfied on the affidavit evidence that this was a legitimate and proper decision. It may well be, and I do not say to the contrary, that the bid by Mr Dolan's brother-in-law which is still extant according to a letter received and forwarded by the solicitors for Mr Dolan, that that is also a bona fide bid but both the administrator and the bank were entitled to take the view they did about choosing to sell to Monaghan County Council. But Mr Shields of counsel takes a more fundamental point which he submits is important. It is perhaps convenient to quote briefly from the summons issued, I have to say belatedly issued, by William John Dolan against John J Cavanagh and received by the court on 11 June 2015. Therein Mr Dolan sought:

> "(1) A declaration that the appointment of administrators to Latlorcan Developments Ltd and W J Dolan Construction (Ireland) Ltd pursuant to Schedule B1 of the Insolvency (NI) Order 1989 is invalid by reason that the centre of main interest of the company is in the Republic of Ireland and is not in Northern Ireland, contrary to Council Regulation EC No: 1346/2000."

His second paragraph alleges a breach of fiduciary duties by Mr Cavanagh in purporting to sell the lands. As I have indicated if it was simply that I would have little difficulty in finding in favour of Mr Cavanagh for the reasons set out in the affidavits and briefly averted to by me.

[10] However, Mr Shields has wisely concentrated his fire on the first point. His submission is that the appointment of Mr Cavanagh is inherently and fundamentally flawed and is not valid because, in truth, at the time and at all relevant times the centre of main interest of these two companies and, in particular Latlorcan, was not in Northern Ireland but in the Republic of Ireland. He says the real issue in the case is where the centre of main interest is. There is a keen contest between the parties on this issue. Mr Colmer of counsel invited me to take the view, consistent with the dictum of Lord Diplock in *American Cyanamid* when applied by way of analogy and the decision of Mr Justice Laddie in *Series 5* and, if I may say so, decisions of this court, that the court could look at the strengths of the respective cases and in this case reach a conclusion that his client had very probably been properly appointed. He says that because Latlorcan was registered in Northern Ireland, because it is registered in Northern Ireland, its centre of main operations is presumed to be in Northern Ireland unless that presumption is rebutted and the authority for that is to be found at Article 3(1) of the European Regulation itself and his client and he, in his skeleton argument, outline 7 others factors which they say point to the centre of main interests being in Northern Ireland including where the directors lived and certain other matters with regard to the payment of tax. The respondent to the main application before me (because the Notice of Motion of Mr Dolan was only issued on 11 June) Mr Dolan and his counsel dispute this strongly. They do not dispute that Latlorcan was registered in Northern Ireland but they list a considerable number, some 11 grounds, for saying that the presumption here should be rebutted. They are not trivial grounds; for example, the accountants to the firm Messrs Moore Stephens venture their opinion the COMI was in the Republic of Ireland not Northern Ireland. They point to a number of factors and they seek to rebut some of the factors relied on by Mr Cavanagh.

[11] What became absolutely clear at the hearing of this matter before me this morning was that some of the dispute is a factual dispute, for example, where meetings with the bankers were held, were they held in Northern Ireland, were they held in Co Monaghan, what was debated with Mr Dolan; there is a stark contrast of fact at the moment between Mr Dolan and Mr Cavanagh's partner, Mr Gildernew, as to whether or not Mr Dolan at the time he signed the necessary papers was aware of the issue of centre of main interest. He now avers that he was simply unaware of that issue. Mr Gildernew says on the contrary it was discussed and points to an email, albeit between other parties, that might corroborate his recollection but what is clear is there is a dispute as to fact which the court cannot determine at this stage on the papers. There would have to be oral evidence before the court could reach a safe conclusion. However, Mr Cavanagh is in the position that he signed a contract with Monaghan County Council, they are understandably getting restless, completion date is long in the past, his own appointment as administrator expires

even by the extension given by the court on 5 July he really needs to have a decision on whether or not he can safely complete on this sale to Monaghan County Council of the principal, effectively the only asset of Latlorcan.

[12] The parties require a decision from the court today at a stage when the court is not in a position to rule one way or the other on what was the centre of main interest at the time of the appointment of Mr Cavanagh in 2011. Mr Shields, as I say, provided the court with a helpful skeleton argument and then he supplemented it in a further skeleton argument today and he has located several English authorities which are of assistance to him. The authorities are at first instance so they are not binding on me but they are of persuasive authority. One of them is *Pillar Securitisation SARL and others v Spicer and another* [2010] EWHC 836 and that is a decision of Mrs Justice Proudman which, like the decision I am now delivering, appears to have been made ex tempore on the day of hearing. There were issues there as to whether or not the insolvency proceedings which were being challenged had been brought and decided and granted in the right jurisdiction. Was the company's centre of main interest in Guernsey?

[13] There were other issues relating to forms. I should say that a subsidiary part of Mr Dolan's complaint is that the forms were not correctly filled in. I do not have to decide that, it was not pressed by Mr Shields but I think it fair to say that if that had been his only point that would be unlikely to have prohibited a view being formed. There is statutory provision for the court to overcome any defect of that nature in the steps that have been taken and that would be applicable but Mr Shields relies on a stronger point that because, in his submission, Latlorcan's centre of main interest was in truth in the Republic, Mr Cavanagh's whole appointment is invalid. He does not rely on the form. Now Mrs Justice Proudman was in the position that nobody was suggesting on either side that there were apparently untruths being told and there was no conflict of fact between the parties and no need to hear oral evidence so she was able to conclude at paragraph 27 as follows:

> "Therefore it seems to me that the presumption as to COMI based on the location of Master's registered office was rebutted on the facts of this case so that the English court has jurisdiction under the EC Regulations."

Then she goes on to consider other matters including, as I have said, the effect of using the wrong form and it was a substantively wrong form in that case, it was quite a significant defect. She went on at paragraph 56 to say as follows:

> "In these circumstances, waiver or correction does not arise. The court has no jurisdiction to correct any errors, since relief can only be granted once insolvency proceedings have begun. If the appointment is invalid, there are no insolvency proceedings. Thus in the case of a fundamental flaw going to validity of the appointment

> itself, neither 7.55 of the Insolvency Rules 1986 nor paragraph 104 of Schedule B1 can be applied: see *G-Tech* at paragraphs 7-16 and contrast (as to paragraph 104) *Re Blights Builders Ltd* [2006] EWHC 3549 (Chancery), 2007 3 All ER 776, 208 1 BCLC 245. See also *Re New Cedos Engineering Company Ltd* [1994] 1 BCLC 797 applying *Morris v Kanssen* [1946] AC 459, 1946 1 ER 586, 115 LJ Chancery 177, a decision of the House of Lords, as to the effect of a null appointment.
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> [57] In those circumstances I find that the appointment was invalid. The administration has proceeded without challenge from 9 October 2008 until now, and I am only too aware that my finding has draconian effects. However, an invalid appointment cannot be cured."

[14] Mr Shields is entitled to rely on that as supporting the contention that he puts forward and he relies also on the decision of Mr Justice Henderson in the matter of *Frontsouth (Witham) Ltd (In Administration)* [2011] EWHC 1668 Ch. and I need not read that at length but at paragraph 16 one finds this:

> "The question whether Rule 7.55 can be used to cure a defect in the appointment of an administrator has been considered by the court on at least three occasions. In each case, the court concluded that Rule 7.55 could not be so used."

That rule is the equivalent of our Rule 7.50 of the Insolvency Rules (Northern Ireland) 1991 which provides that:

> "No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court."

[15] Mr Justice Henderson relied on Mrs Justice Proudman's decision and also on a judgment of Mr Justice Hart in *Re G-Tech Construction Ltd* [2007] BPIR 1275. There was also discussion of two further authorities which I think I need not go to. Those are positive authorities. As I have just read out one of the learned judges referred to the decision of the House of Lords and I have taken the opportunity of the short interval to look at that and I think it is of relevance and, of course, binding upon me and this is the case of *Morris v Kanssen* [1946] AC 459 and the head note sets out the relevant provision of the Companies Act 1929 which was then applicable. It records that C and K, that is Mr Kanssen, were in 1940 the only directors and the only

shareholders in the company holding one share each. The articles of association incorporated Article 88 of Table A. C and one S falsely claimed that at a meeting held on that date S was duly appointed a Director and a minute was concocted to record the alleged appointment. On April 9 1940 C and S in purported exercise of the power conferred by the articles of association, requested Mr Kanssen to resign his office and on April 12 1940 they purported to hold a meeting of Directors and to issue one share to S and seven more shares to C. I can summarise by saying there were further purported issuance of shares including one in 1942 to C and to S and to one M. Their Lordships, per Lord Simmonds, with whom Viscount Simon, Lord Thankerton, Lord Porter and Lord Uthwatt agreed, held that the invalid appointment of M as a Director and the invalid allotment of shares to him were not validated by Section 143 of Act nor by Article 88 of Table A since these were designed as machinery to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment of a Director and not to override substantive provisions relating to such appointments.

[16] In looking at the case I came upon the following passage at 468 from the judgment of Lord Simonds, commenting on Mr Morris, that is the M I just referred to:

> "He further claimed that Kanssen was debarred by his laches from alleging the invalidity of the issue of shares. This last claim has no justification. I observe that neither Cohen J nor the Court of Appeal deal with it, presumably because to them, as to me, it appeared upon the facts to be incapable of serious argument."

[17] I mention that for completeness but I think in this context the finding of the court was that Mr Kanssen was being defrauded by these people and therefore his laches should not count against him. I point therefore to some authorities relied on by Mr Dolan as saying where there is an issue going to the heart of the appointment of the administrator that is not one that is curable by the court under 7.50 of the Rules or otherwise. Furthermore, I asked both counsel whether they had located an authority where a judge in my position had done what Mr Cavanagh is asking me to do, i.e. approve a step being taken by an administrator, the validity of whose appointment was in doubt, and both counsel had been unable to find an authority on that precise point. It is of relevance that the step here proposed by Mr Cavanagh is to dispose of the main, virtually the sole, asset of the company. So that is the strength of Mr Shields' case.

[18] Mr Colmer, in his learned argument, draws attention to facts that if this was a purely discretionary matter would count severely against Mr Dolan. He invited me to take a view about the COMI but I do not prefer his submissions on the centre of main interest, I think it is a very open question at the present time. Indeed, I take the opportunity to observe that as W J Dolan was actually registered in the Republic of Ireland and not in Northern Ireland it would certainly appear, at least at this stage,

that Mr Dolan has certainly the better part of the argument there. Latlorcan is in a different position being registered here but there is a very live issue as to whether this was the right jurisdiction in which to appoint a practitioner and an issue, as I say, which it does not appear the court can decide without oral evidence.

[18] Mr Colmer legitimately points out that it appears to be a proper sale which, as I say, I am minded to accept. He argued that Mr Dolan is estopped from resiling from his appointment of Mr Cavanagh in 2011. Mr Dolan tackles that issue head on by denying that Mr Cavanagh's partner had discussed centre of main interest with him. If Mr Dolan is right in that that might answer the point in 2011. It does not necessarily answer the point that he then failed to take any active step in the matter until in effect 11 June 2015. He is still at risk of being estopped and counsel legitimately referred to a passage in the well-known text book of Professor Goode on *Principles of Corporate Insolvency Law* at paragraph 15-47 to the effect that the principle of estoppel might sound in circumstances of this kind, albeit the learned author does not have particular authority to support that.

[19] I have reached the conclusion that the issue of estoppel is one to be decided by the court when it has made its findings of fact and it should not be made on an interlocutory basis. The exercise of the discretion of the court and its inherent jurisdiction in equity should be made in the light of all the facts as found by the court and not at this stage. What is certainly undeniable is that Mr Dolan faces the formidable obstacle of coming in 3½ years after Mr Cavanagh was appointed and that remains a formidable obstacle to him and the court will have to consider whether that laches does not indeed defeat his application completely even if he was right on COMI or query whether it defeats any application for costs or other relief. These are not matters to be decided by me today on an interlocutory basis. I reserve them for the trial judge whoever that may be. It seems to me that it would be incorrect to approve this important transaction, delayed transaction, urgent transaction, I acknowledge, while the validity of Mr Cavanagh's appointment remains in doubt. It seems to me the proper course is to take a cautious approach as taken, it would appear, by other judges sitting in the Chancery Division across the water and stemming from further appellate authority in the past.

[20] I am not going to make any ruling on Mr Dolan's recent summons which, as I say, has just come before the court but I decline to grant Mr Cavanagh the relief sought at paragraph 7 of his originating summons. I will hear counsel now on what flows from that decision for the management of the administration in the near future. It seems to me that a decision should be made in regard to these matters as soon as a trial can be arranged.