Neutral Citation No. [2014] NIQB 141 | *Ref:* **WEA9436**

Judgment: approved by the Court for handing down | *Delivered:* **05/11/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

JOHN CONWAY

Plaintiff;

-v-

JOHN CAVANAGH ACTING AS LIQUIDATOR OF METEOR CONTROL INTERNATIONAL LTD (IN LIQUIDATION)

Defendant.

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BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

Plaintiff;

-v-

JOHN CAVANAGH ACTING AS LIQUIDATOR OF METEOR CONTROL INTERNATIONAL LTD (IN LIQUIDATION)

Defendant.

WEATHERUP J

[1] In the first proceedings John Conway, as director and shareholder of Meteor Control International Limited, in liquidation, applies for a direction that John Cavanagh, as liquidator of Meteor, assigns to him the choses in action in three sets of

proceedings commenced by Meteor. Mr Orr QC and Mr Shields appeared on behalf of the plaintiff and Mr Colmer on behalf of the defendant.

[2] In the second proceedings the Bank of Ireland, as a creditor of Meteor, applies for a direction that John Cavanagh, as liquidator of Meteor, summon a meeting of creditors of Meteor. Mr Shaw QC appeared on behalf of the plaintiff and Mr Colmer on behalf of the defendant.

[3] I summarise the facts as they appear in the affidavits. First, the grounding affidavit of Mr Conway, a director, 100% shareholder and a creditor of Meteor and the landlord of the premises from which Meteor operated. Mr Conway claims to be a creditor of Meteor on the basis of a debt due by Meteor for rent arrears of some £40,000. In addition Mr Conway claims to have injected money into the business of Meteor before it went into liquidation and to have pledged personal assets to secure Meteor liabilities seized by creditors so that Meteor is indebted to him for sums exceeding £750,000.

[4] Meteor was placed into liquidation on 23 June 2009. Writs of Summons were issued by Meteor against, first of all, Allied Irish Bank Group UK Plc, secondly, the Governor and Company of the Bank of Ireland and thirdly, the Irish Bank Resolution Corporation. The Writs were issued protectively with the consent of the defendant liquidator to avoid limitation issues arising.

[5] In 2010 the Bank of Ireland commenced proceedings against Mr Conway claiming sums due and Mr Conway served a Defence and Counterclaim asserting misselling by the Bank of foreign exchange forwards. Mr Conway calls in aid the Markets and Financial Instruments Directive and the Financial Services Agency Conduct of Business Rules. Similar claims are made by Meteor in the three sets of proceedings against the banks.

[6] Mr Conway sought from the liquidator the assignment of the rights of Meteor, now vested in the liquidator, in the three sets of proceedings against the banks. On 17 May 2013 the liquidator wrote to Mr Conway advising that he was not at that juncture prepared to assign to him the rights in the proceedings against the banks. Negotiations were undertaken and at one stage it was proposed that a lump sum payment of £5,000 would be made by Mr Conway as consideration for the assignment of the rights by the liquidator to Mr Conway. However that offer was not accepted by the liquidator and the offer was increased to £7,500 and then to £20,000. On 19 September 2013, when it was thought that an agreement had finally been reached for assignment for a consideration of £20,000, the issue was raised on behalf of the liquidator that in the event of assignment to Mr Conway the liquidator was at risk of being liable to the Bank for any losses incurred. The liquidator produced a draft Deed of Assignment by which he sought to obtain security to cover any potential liability to the Bank in terms that Mr Conway as assignee would pay to the liquidator's solicitor £250,000 as security for any sums that may fall due. The response of Mr Conway was that the proposed security was prohibitive and could

not be made. As a result Mr Conway asserts that the liquidator has taken an unfair and unduly restrictive approach to the assignment of the rights in the proceedings against the banks and seeks the intervention of the Court to direct that the assignment should proceed without prohibitive security. The Bank contends that the terms of the agreements between Meteor and the Bank prevent the assignment of the rights in the three actions.

[7] By an affidavit of Mark John Taggart, a solicitor in C & H Jeffersons on behalf of the Bank, it is asserted that the Bank is a creditor of Meteor and that the view has been taken that the entire body of Meteor's creditors ought to have the opportunity to examine proposals and question the liquidator before any actions are carried into effect. Thus the bank applies for the direction for a meeting of creditors to be held.

[8] By a further affidavit Mr Conway stated that the Bank is not a creditor of Meteor and that the Bank has never provided any account of what book debts were collected or what remains to be collected or what insurance claims were made and paid and has never provided any information about the book debt collection exercise undertaken. His position is that if these debts had been properly collected and insurance claims properly made the Bank would have collected an amount in excess of the alleged debt.

[9] In order to further identify the nature of the claim being made by Meteor against the Bank a draft Statement of Claim was prepared for the purposes of this application. The draft Statement of Claim relies on breach of statutory duty arising from alleged breaches of the Markets in Financial Instruments Directive 2004/39/EC and the FSA Conduct of Business as being distinct from and in addition to any contractual terms and conditions. Further the draft Statement of claim pleads negligence, misrepresentation, negligent misstatement and fraud, which are claimed to be independent of any rights under the contractual terms and conditions. In any event the draft Statement of Claim pleads that the terms and conditions relied on by the Bank do not have the effect of preventing the proposed assignment and in addition pleads that the agreements are discharged by the fraudulent and reckless conduct of the Bank in the performance of obligations under the agreements.

[10] I turn to the terms of agreements between the parties. First of all the Commercial Finance Agreement dated 16 July 2002 made between the Bank and Meteor sets out the terms and conditions upon which the Bank agreed to purchase the debts payable by Meteor's debtors. Clause 3(2) provided that "Until the termination of this Agreement you will sell to us with full title guarantee and we will purchase from you all Debts to which this Agreement applies which or either Outstanding on the date of this Agreement is made or created after the date of this Agreement was made." The nature of the business is stated to be 'Distributor of electrical supplies'.

[11] Of particular note are the clauses relied on by the Bank restricting assignment. Clause 8 headed 'Your Undertakings to Us' provided as follows -

> " 8.1 Unless we have agreed to the contrary then, whilst this Agreement is in force and until you have paid all the monies owing to us, you undertake -
>
> 8.1.15. not to assign or create any charge over any of your rights or delegate any of your obligations under this Agreement without our prior written consent."

Clause 14 was headed 'Exclusion of other Terms and Preservation of our Rights' and included as follows –

> "14.8 You will not without our written consent, assign or charge any of your rights or benefits or delegate any of your duties under this Agreement. You will not dispose of any part of your business, assets or undertaking, except in the ordinary course of your business stated in the Particulars."

[12] The second agreement dealt with "Global Markets" and set out terms and conditions (described as 'Treasury Terms and Conditions') which applied to deposit accounts, foreign exchange contracts and trade finance products. Clause 27.5.2 provided -

> "You shall not assign or transfer any of your rights or obligations under these Terms and Conditions, or for the avoidance of doubt, under any of the Transactions."

[13] Mr Conway raised an issue about the terms and conditions of both agreements being brought to the notice of Meteor. By a further affidavit filed at the commencement of the application, John McParland, a Finance Manager of the Bank, stated that he worked with the bank from 1990 and in the Treasury and International Operations Branch between 2000 and 2009 dealing with the back office functions for global markets. His evidence was directed to whether Mr Conway and Meteor had reached any agreement with the Bank that included the terms and conditions relied on by the Bank. Without setting out the contents of Mr McParland's affidavit, I am satisfied from the contents of that affidavit that Meteor and the Bank were parties to the two agreements that contain the terms and conditions relied on by the Bank both in respect of commercial finance and foreign exchange and that Mr Conway and Meteor had notice of the terms and conditions.

[14] Mr Conway's application is made under the Insolvency (Northern Ireland) Order 1989. Article 98, under the heading 'Reference of questions to the High Court' provides –

> (1) The liquidator or any contributory or creditor may apply to the High Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.
>
> (2) The High Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

[15] Mr Conway contends that the rights in the choses in action, namely the claims being made against the banks, are not limited to contractual rights under the agreements but extend to tortious rights in breach of statutory duty, negligence, misrepresentation and fraud. Accordingly, it is contended that, while there may be clauses in the two agreements which restrict the right of assignment, the clauses are limited to contractual rights that arise under the agreements and do not extend to rights that arise otherwise than under the agreements and therefore do not impact on the claims in breach of statutory duty, negligence, misrepresentation and fraud. On the other side the contention is that the claims made are in effect based in contract and that all that purports to be defined as breach of statutory duty, negligence or misrepresentation is in reality but a claim in contract.

[16] This interaction of contractual claims and tortious claims has been an aspect of the common law system for a very long time. Many rights were historically limited to contractual rights. However what we have seen over the last century and more has been the emergence of additional rights developed through the common law in tort. These tortious rights have emerged in parallel with contractual claims. The issue that has arisen repeatedly is the extent to which the tortious rights are independent of and also compatible with the contractual rights agreed between the parties.

[17] In the context of contractual exclusion clauses, Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, decided in the House of Lords, arose out of a dispute between Lloyds Names and underwriting agents where an issue was whether the Names could maintain the claims in tort as opposed to contract. It was held that a duty of care was owed by the managing agents to the Lloyds Names in tort and that the existence of that duty of care was not excluded by the terms of the relevant contractual regime that existed on foot of agreements that had been entered into between the parties and under agreements prescribed by relevant by-laws. The Names were entitled to pursue their remedy either in contract or in tort.

[18] Lord Goff stated that all systems of law which recognised a law of contract and a law of tort had to solve the problem of the possibility of concurrent claims

arising from breach of duty under the two rubrics of the law. Lord Goff stated the position as follows -

> "My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and there is no sound basis for a rule which automatically restricts the claimant to either or a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed to the tortious remedy is to be limited or excluded."

[19] Thus one must look to the contract to determine whether the parties have agreed that any tortious remedy will be limited or excluded. The plaintiff contends that the tortious claims are the most advantageous. It is necessary to determine whether the agreements that the parties entered into have the effect of limiting not only the contractual rights but also the tortious rights.

[20] The exclusions in clause 8.1.15 and the first sentence of clause of 14.8 relate to rights or obligations or benefits or duties under the 'Agreement', being the Commercial Finance Agreement. The exclusion under clause 27.5.2 relates to rights or duties under the 'Terms and Conditions', being the Global Market Treasury Terms and Conditions. The clauses are excluding rights that have accrued under the agreements, that is, they are excluding the contractual rights. The exclusions are limited to the contractual rights arising under the Commercial Finance Agreement and the Global Market agreement. Claims in tort are not the subject of non-assignment clauses under the agreements. The terms of the agreements do not purport to restrict, nor can they be read as having the effect of restricting, the rights in the tortious claims, they do not seek to limit the rights in the tortious claims, they do not exclude the rights in the tortious claims.

[21] Clause 14.8 contains two separate provisions. The second sentence is concerned with Meteor disposing of any part of the business, assets or undertaking 'except in the ordinary course of your business.' For present purposes I will assume that the assets referred to include debts due or claims that might be made by Meteor and that the claims that are being made against the banks are, for the purposes of this clause, to be treated as assets. This restriction requires Meteor and now the liquidator not to dispose of such assets, qualified by the reference to the ordinary course of business, stated in the particulars to be the business of a distributor of

electrical supplies. It is apparent that the Bank is there seeking to restrict the disposal of value in Meteor as it is referring not only to assets but to business and undertakings and that it is doing so in respect of action outside the ordinary course of the business.

[22] I interpret that clause as not being applicable to the transfer of rights of action arising in the ordinary course of the business of Meteor. I consider that the restriction would not have applied, for example, to limit the use of Meteor assets to fund an action for the recovery of a debt due to Meteor. That exercise of using assets to recover funds due to Meteor would, I believe, be treated as something that would arise in the ordinary course of business. It is not directly an electrical distribution exercise, but it would be undertaken in the ordinary course of the pursuit of that business, should Meteor have sought to recover the debts due from trading in electrical supplies. It could not be contended that the use of funds by Meteor to recover a debt, even if unsuccessful, would be a matter that would fall foul of the restriction on the disposal of assets. That being so, the same would apply when it is the right of action that is proposed to be transferred, if value is obtained in return. Equally so with an absolute transfer in good faith for valuable consideration, which must also be treated as being undertaken in the ordinary course of business. Such activity would be outside the scope of this restriction by which the Bank seeks to prevent Meteor from dissipating its assets.

[23] Meteor having gone into liquidation, the liquidator stands in the shoes of Meteor for these purposes. The limits that are imposed on Meteor are the limits that are now imposed on the liquidator. The limits on the transfer of rights and obligations and benefits and duties under the agreements do not limit the transfer of the tortious rights of action by Meteor or the liquidator. My conclusion is that the clauses relied on by the Bank do not apply to the tortious remedies sought in the actions against the banks and do not operate to restrict the proposed assignment of the choses in action.

[24] What then would be the effect of the proposed assignment? I have the benefit of a recent consideration of the issue by the Court of Appeal in Northern Ireland where Girvan LJ delivered the judgment in Curistan v Keenan [2014] NICA 29. I will not rehearse the circumstances of that case but the effect of the judgment is that a legal assignment transfers the asset from the liquidator to the beneficiary. That is to be contrasted with an equitable assignment where the assignor and the assignee may have a share of the benefits.

[25] The proposed assignment would be an absolute assignment. However, the Bank proposes to hold the liquidator liable if the proposed assignment to Mr Conway were to proceed. By letter of 28 March 2014 the Bank's solicitor wrote to the liquidator's solicitor stating the objection to the assignment to Mr Conway, referring to the terms of the agreements between the Bank and Meteor and stating –

> "Please note once again that should your client assign any rights under the Commercial Finance Agreement, or dispose of any Company asset, in breach of the terms of that agreement, then our client will hold your client personally responsible for any and all losses suffered".

[26] In the light of my findings in relation to the scope of the agreements and with reliance upon the nature of a legal assignment I conclude that no liability will arise on the part of the liquidator upon the assignment of the choses in action by reason of the liquidator acting in breach of the agreements between Meteor and the Bank. Therefore for present purposes I remove the threat contained in the letter of 28 March 2014. The result is that the liquidator is relieved of the risk of such liability on the grounds relied on by the Bank in their letter and can therefore consider whether to make the assignment in those circumstances.

[27] I have been asked to direct that the assignment should take place. I consider that it would be more appropriate if I left it to the liquidator to decide what to do in the circumstances. I have cleared away some of the concerns. I have decided not to direct the liquidator as to what he should do in relation to assignment of the choses in action. I leave it to the liquidator to decide whether and on what terms he might wish to assign the choses in action to Mr Conway. I adjourn this application while the matter is considered by the liquidator in light of this ruling.

[28] This approach also applies to the second application that the liquidator summon a meeting of creditors. Whether a meeting of creditors is required rather depends on what the liquidator decides to do about the assignment. I adjourn the Bank's application pending decisions by the liquidator as to the assignment and as to a meeting of creditors.