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Judgment: approved by the Court for handing down | *Delivered:* **10/11/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (COMPANY INSOLVENCY)

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IN THE MATTER OF SHERIDAN MILLENNIUM LIMITED

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

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BETWEEN:

PETER GERARD CURISTAN

Applicant:

and

THOMAS MARTIN KEENAN
and
ANGLO IRISH BANK CORPORATION LIMITED

Respondents:

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McCLOSKEY J

I INTRODUCTION

[1] There has been active participation by three parties in these proceedings, which are brought by originating summons. In brief compass, Anglo Irish Bank Corporation Limited ("*the Bank*") claims to be a creditor of Sheridan Millennium Limited ("*Sheridan"*). The Applicant and moving party,

Mr. Curistan, is a shareholder of Sheridan. Mr. Keenan (hereinafter "*the Administrator*") has been appointed administrator of Sheridan at the instigation of the Bank by a mechanism which did not involve any order of the court. Pursuant to the appointment of the Administrator, Sheridan finds itself in administration. The originating summons, in its final incarnation (following a succession of amendments) seeks the following forms of relief:

(a) A declaration that the appointment of the Administrator was unlawful on the ground that the floating charge on which the appointment was based is not enforceable, as required by paragraph 17 of Schedule B1 to the Insolvency (Northern Ireland) Order 1989, as amended ("*the 1989 Order*").

(b) A declaration that the appointment of the Administrator was unlawful on the further ground that, contrary to paragraph 19(3)(b) of Schedule B1, the Administrator failed to discharge his duty of inquiry prior to making the requisite statutory declaration.

(c) A declaration that the appointment of the Administrator is unlawful on the further ground that, at this stage, the Administrator is obliged to provide adequate reasons for his statutory declaration and has failed to do so.

(d) A declaration that the appointment of the Administrator was unlawful on the further ground that, when making the statutory declaration, the Administrator did not hold the opinion that Sheridan could be rescued as a going concern.

(e) A declaration that the appointment of the Administrator was unlawful on the further ground that his statutory declaration was defective inasmuch that it failed to identify which of the objectives contained in paragraph 4 of Schedule B1 was, in his opinion, likely to be achieved; and, further (mirroring the third of the declarations sought) the Administrator, at this stage, has not provided adequate reasons for his opinion.

(f) A declaration that the appointment of the Administrator was unlawful on the further ground that the appointing Bank was motivated by the improper purposes of frustrating Sheridan's litigation against the Bank (in separate proceedings) and seeking to benefit from the distribution and control provisions in paragraphs 66-68 of Schedule B1; and was not, therefore, motivated by the statutory purpose enshrined in paragraph 4 of Schedule B1.

(g) An order pursuant to paragraph 89 of Schedule B1 removing the Administrator from office on the ground that he has acted in breach of the fiduciary duties owed by him to Sheridan and in breach of his duties as an officer of the court.

(h) An injunction (invoking the court's inherent jurisdiction and Section 91 of the Judicature (NI) Act 1978) restraining the administration of Sheridan on a series of grounds relating (broadly) to the nature and legality of the underlying debt.

[2] While these proceedings have generated multiple bundles replete with voluminous documents, it is worthy of highlighting that in the formulation of their respective submissions to the court the parties relied only on a fraction of these. This judgment is prepared accordingly.

II HISTORY AND CHRONOLOGY

[3] At the request of the court, the parties provided a useful chronology which, for convenience, is reproduced below:

17 February 1998	Incorporation of Sheridan
13 January 1999	Initial Facility letter between Anglo and Sheridan in re finance for development of the Odyssey project, Queens Quay, Belfast
2007 – 2009	Sheridan seeks purchasers for Odyssey Pavilion and IMAX
22 December 2008	Cooney Carey report to Anglo Irish Bank
13 January 2009	Letter from Anglo to Sheridan setting out the Bank's proposals to facilitate the disposal of Sheridan's interests to a third party
10 February 2009	First introduction by Anglo Irish Bank of the form of "no set off" clause now relied upon by Anglo Irish Bank Facility letter and general terms signed by the Applicant
8 April 2009	Odyssey Pavilion LLP (OPL) formed Last accounts filed by the Applicant on behalf of Sheridan
16 April 2009	Facility letters dated 14 and 20 April 2009 executed by directors of Sheridan Some contractual documents signed by the Applicant
20 April 2009	Sheridan transfers the Odyssey Pavilion and IMAX to OPL
29 July 2009	Subject Facility Letter Anglo Irish Bank to Sheridan Millennium Limited

	Contractual documents signed by the Applicant
14 September 2009	Letter from Anglo to Sheridan
23 June 2010	Sheridan commences litigation against Anglo
4 August 2010	Correspondence between Solicitors for Anglo Irish Bank and Solicitors for Sheridan discussing inter alia the financial position of Sheridan
20 August 2010	Anglo appoint Fixed Charge Receiver to Imax Bournemouth
24 August 2010	Anglo issue statutory demand against MWL
8 September 2010	Correspondence between Solicitors for Anglo Irish Bank and Solicitors for Sheridan discussing inter alia the financial position of Sheridan
16 September 2010	MWL v. Anglo injunction proceedings issued (re statutory demand presented by Anglo against MWL)
November 2010	Sale by Receiver of IMAX Bournemouth
February 2011 (date unknown)	Anglo Irish Bank Credit Committee meeting discussing re Curistan litigation
25 February 2011	Hearing Marcus Ward v. Anglo Irish Bank
February/March 2011 (date unknown)	Meeting between First Respondent and Anglo
4 March 2011	First Respondent issues letter to Anglo comprising Administration proposals
3 April 2011	Statutory Declaration of Second Respondent in relation to the Administration of Sheridan
14 April 2011	Statement of Proposed Administrator made pursuant to Rule 2.003(5) of the Insolvency (Amendment) Rules (Northern Ireland) 2005
14 April 2011	Appointment of Administrator by Anglo Irish Bank
15 April 2011	Judgment in Marcus Ward v. Anglo Irish Bank
4 May 2011	Issue of Originating Summons in the current proceedings

The following aspects of the history are in dispute between the parties:

7 August 2007	Sheridan migrates tax status to Cyprus
2008 – 2009	Anglo engages in "Golden Circle" activities, including inter alia with a director of one of its

	customers, PBN
December 2008 onwards	Purchaser of Odyssey Pavilion and IMAX to be PBN
mid-November 2009	Anglo decide to terminate the PBN deal and ask Sheridan to inform PBN
23 December 2009	Anglo email that Anglo did not want to make a non-recourse loan to PBN by reason of "Golden Circle" activities
12 February 2011	Meeting between Second Respondent and First Respondent's Solicitor in respect of which privilege is asserted by Second Respondent

III STATUTORY FRAMEWORK

[4] The statutory provisions of relevance for present purposes are all arranged in Schedule B1 to the Insolvency [NI] Order 1989 ("*The 1989 Order*"). This schedule is of comparatively recent origin, having been inserted by the Insolvency (Northern Ireland) Order 2005, effective from 27th March 2006. It is convenient to record at this juncture that Schedule B1 mirrors its English counterpart, also labelled Schedule B1, which was inserted in the Insolvency Act 1986 by the Enterprise Act 2002 and came into operation on 15th September 2003 [per SI 2003 No. 2093]. This statutory reform introduced an entirely new regime for the administration of companies in both jurisdictions. Having regard to the present litigation context, the most important innovation effected by the new Schedule B1 was to provide for the appointment of an "out of court" administrator. The former office of "*administrative receiver*" has been superseded, as reflected in bridging provisions such as paragraph 15(1)(c) of Schedule B1.

[5] The architecture of Schedule B1 begins with certain key definitions. Per paragraph 2(2)(a):

> "*A company is 'in administration' while the appointment of an administrator of the company has effect*".

Pursuant to paragraph 2(2)(c):

> "*A company ceases to be in administration when the appointment of an administrator of the company ceases to have effect in accordance with this Schedule*".

This must be considered in conjunction with paragraph 2(2)(d):

> "*A company does not cease to be in administration merely because an administrator vacates office (by reason of resignation, death or otherwise) or is removed from office*".

I would at once observe that the legislation makes a distinction between two separate scenarios:

(a) The appointment of an administrator ceasing to have effect in accordance with the Schedule.

(b) The vacation of or removal from office of the Administrator.

In scenario (a), the company ceases to be in administration. In contrast, in scenario (b), the company does not cease to be in administration, the underlying intention evidently being that a replacement administrator will normally be appointed. In short, the striking feature of scenario (b) is an expectation that the administration will usually continue: the factor giving rise to the discontinuance of the Administrator's functions is not adjudged sufficient to warrant termination of the administration.

[6] By paragraph 3 of the Schedule, one of the three permitted methods of appointing an administrator is appointment by the holder of a floating charge under paragraph 15. This is the power of appointment which the Bank purported to invoke in the present case. In paragraph 4 of Schedule B1, under the rubric "Purpose of Administration", it is provided:

> *"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.".

Paragraph 6 provides that every Administrator is an officer of the High Court. Paragraph 15, which is germane to the present litigation, provides:

"15. – (1) The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company.

(2) For the purposes of sub-paragraph (1) a floating charge qualifies if created by an instrument which –

(a) states that this paragraph applies to the floating charge,

(b) purports to empower the holder of the floating charge to appoint an administrator of the company, or

(c) purports to empower the holder of the floating charge to make an appointment which would be the appointment of an administrative receiver within the meaning given by Article 5(1).

(3) For the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company's property if he holds one or more debentures of the company secured –

(a) by a qualifying floating charge which relates to the whole or substantially the whole of the company's property,

(b) by a number of qualifying floating charges which together relate to the whole or substantially the whole of the company's property, or

(c) by charges and other forms of security which together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge.".

Pursuant to paragraph 16, the appointor must give advance notice in writing to the holder of any prior floating charge.

[7] Paragraph 17 of Schedule B1 contains a provision of some importance in the present litigation context:

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

There is a discrete regime governing the formalities to be observed in the appointment of an Administrator. In this respect, paragraph 19 provides:

> *"19. – (1) A person who appoints an administrator of a company under paragraph 15 shall file with the High Court –*
> *(a) a notice of appointment, and*
> *(b) such other documents as may be prescribed.*
> *(2) The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment –*
> *(a) that the person is the holder of a qualifying floating charge in respect of the company's property,*
> *(b) that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and*
> *(c) that the appointment is in accordance with this Schedule.*
> *(3) The notice of appointment must identify the administrator and must be accompanied by a statement by the administrator –*
> *(a) that he consents to the appointment,*
> *(b) that in his opinion the purpose of administration is reasonably likely to be achieved, and*
> *(c) giving such other information and opinions as may be prescribed.*
> *(4) For the purpose of a statement under sub-paragraph (3) an administrator may rely on information supplied by directors of the company (unless he has reason to doubt its accuracy).*
> *(5) The notice of appointment and any document accompanying it must be in the prescribed form.*
> *(6) A statutory declaration under sub-paragraph (2) must be made during the prescribed period.*
> *(7) A person commits an offence if in a statutory declaration under sub-paragraph (2) he makes a statement –*

(a) which is false, and
(b) which he does not reasonably believe to be true. ".

Per paragraph 20, once the requirements of paragraph 19 are satisfied, the appointment of an Administrator under paragraph 15 takes effect. Pursuant to paragraph 20, it is obligatory for the appointor to notify both the Administrator and any prescribed persons as soon as reasonably practicable following compliance with the requirements of paragraph 19. Notably, both the Notice of appointment and the Administrator's statutory declaration must be in "*the prescribed form*", per paragraph 19(5). In the case of a so-called "out of court" appointment, Rule 2.003(5) of the Insolvency Rules (Northern Ireland) 1991, as amended ("*the 1991 Rules*"), provides:

> "*There shall be attached to the application a written statement which shall be in Form 2.02B by each of the persons proposed to be administrator stating –*
>
> *(a) that he consents to accept appointment;*
> *(b) details of any prior professional relationship(s) that he has had with the company to which he is to be appointed as administrator; and*
> *(c) his opinion that it is reasonably likely that the purpose of administration will be achieved*".

[8] Form 2.02B has four components. Pursuant to the first, second and fourth of these, the proposed Administrator must certify that he is an authorised insolvency practitioner, that he consents to the appointment and that he has not had any prior professional relationship with the company concerned. The third of the four elements which this Form comprises states, in paragraph [3]:

> "*I am of the opinion that the purpose of administration is reasonably likely to be achieved*".

As currently conceived, the Form neither requires nor makes provision for any particularisation of this statement of opinion. As regards the appointor, Rule 2.017 provides that in the case of an appointment under paragraph 15 (the present case) the Notice of appointment shall be in Form 2.06B. Paragraph 22 of Schedule B1 provides that where the appointment of an administrator purportedly under paragraph 15 proves to be invalid, the High Court may order the appointor to indemnify the appointee against "*liability which arises solely by reason of the appointment's invalidity*".

[9] Paragraphs 47-59 of Schedule B1 contain a series of provisions arranged under the banner "*Process of Administration*". These provisions impose on the Administrator duties such as obtaining a list of the company's creditors and preparing a statement of the affairs of the company which must

be in the prescribed form and verified by affidavit, as well as complying with the other discrete requirements of paragraph 48. The Administrator must formulate a statement setting out his proposals for achieving the purpose of administration (per paragraph 50). All of these requirements, in my view, are properly analysed as duties imposed on the Administrator. The next segment of Schedule B1 consists of paragraphs 60 – 76, arranged under the title "Functions of Administrator". These provisions endow the Administrator with a broad discretion. Pursuant to paragraph 60(1), he may do anything necessary or expedient in the management of the affairs, business and property of the company. He also enjoys the powers conferred by Schedule 1. The role of the court features in paragraph 64, which empowers the Administrator to apply to the High Court for directions in connection with his functions. One of those functions is that of exercising the discretionary power enshrined in paragraph 66(1) to make a distribution to a creditor of the company. One of his general duties, per paragraph 68, is to take custody or control of all of the company's property upon appointment. The Administrator's management of the company's affairs, business and property must accord with his proposals for achieving the purpose of administration (required by paragraph 50), pursuant to paragraph 69.

[10] Paragraph 75 of Schedule B1 empowers a creditor or member of a company in administration to complain to the High Court about the conduct of the Administrator. The paragraph 75 regime is formulated in terms which suggest that it is freestanding. Paragraph 76 of Schedule B1 empowers the High Court to examine the conduct of an administrator upon the application of certain specified persons alleging, in terms, misconduct or misfeasance. The court's powers under this paragraph do not expressly include a power to terminate the appointment or the administration. Although paragraphs 75 and 76 are inserted under the title "Functions of Administrator" (beginning with paragraph 60), this appears somewhat incongruous, since each of these provisions is concerned with the powers of intervention of the High Court – albeit the legislation clearly envisages that an application of this kind will relate to the discharge of the Administrator's duties and/or functions.

[11] Paragraphs 77-87 of the Schedule are concerned with the termination of administration, arranged under the title "Ending Administration". These provisions must be considered in conjunction with the definitions contained in paragraph 2(2) of the Schedule: see paragraph [5] *supra*. Pursuant to paragraph 77, the appointment of an administrator automatically terminates upon the expiry of one year from the date of commencement, subject to the court's power to extend the term. Paragraph 80 obliges an administrator to apply to the court for an order terminating his appointment where:

> "*(a) he thinks the purpose of administration cannot be achieved in relation to the company,*

> *(b) he thinks the company should not have entered administration, or*
> *(c) a creditor's meeting requires him to make an application under this paragraph*".

Once again, the court is given wide powers in its determination of any such application. Pursuant to paragraph 80, the High Court has a specific role in decreeing that the appointment of an Administrator ceases to have effect from a determined date. This jurisdiction is exercisable only where the Administrator applies to the court. The scheme of paragraph 80 is that the Administrator **must** make such an application to the court in certain circumstances. In particular, he **must** so apply if he forms the opinion that "*the purpose of administration*" [the recurring statutory phraseology] cannot be achieved **or** that the company should not have entered administration. Where such an application is made, the court is endowed with wide powers. Paragraph 81 contains comparable provisions, concerned with the contrasting scenario where the Administrator considers that the purpose of administration has been sufficiently achieved. Upon filing the requisite notice with the High Court and the Registrar, the appointment in such circumstances ceases to have effect. Pursuant to paragraph 82, the High Court is empowered to terminate the appointment of an administrator upon the application of a creditor alleging improper motive. This is another judicial power of evidently broad scope.

[12] Notably, paragraphs 77 – 87 of Schedule B1 are arranged under the heading "*Ending Administration*". In this respect, they are to be contrasted with paragraphs 88 – 100, which appear under the banner "*Replacing Administrator*". I have already highlighted this distinction in paragraph [5] above. Paragraph 88 regulates the subject of *resignation* of an Administrator. Paragraph 89 (bearing the title "*Removal of Administrator from Office*") provides:

> "*The High Court may by order remove an administrator from office*".

The theme of *replacement of an administrator* extends throughout the remaining provisions of this part of Schedule B1. To highlight but one illustration, paragraph 97 empowers the holder of a *prior* floating charge to challenge an out of court appointment under paragraph 15 and seek the court's approval of a substitute nominated administrator. The "replacement" theme of these provisions finds further emphasis in paragraph 100, which provides for the remuneration of a former administrator.

IV THE EVIDENCE

[13] Those aspects of the evidence assembled before the court which featured most prominently in the parties' arguments are summarised in the following paragraphs.

The Debt Arrangements

[14] Much of the evidence pertaining to the debt arrangements between the parties is uncontroversial. These arrangements were, in outline, as follows. The lending arrangements between the Bank and Mr. Curistan's companies date from 1999. They have consistently had two main elements. The first is the debenture which was executed on 13th January 1999. This contains (*inter alia*) a charging clause, a floating charge, a covenant to pay and provision for the appointment of a receiver. The second basic element is a succession of so-called "facilities" letters. These were generated periodically during the period 1999 to 2009, each new letter succeeding the former. Both the floating charge and the facilities letter in vogue for the time being are properly analysed as contracts between the parties. In their essence, each of these contracts makes provision for loans to Mr. Curistan's companies, on the basis of specified securities and subject to extensive terms. From the outset, the loans advanced by the Bank were designed to finance the development of the new Odyssey project. Between 1999 and 2004, the loan contracts included a "no set off" clause. From 2004 to January 2009, they did not. From January 2009, they contained a more elaborate "no set off" clause. As appears from the contract dated 13th October 2004, Sheridan's debt to the Bank has been repayable on demand since then. By 2004, the debt had increased to some £50 million and by 2009 it was approximately £80 million. While the debt continued to increase, the asset providing security therefor, the Odyssey development, was diminishing in value.

[15] The terms of the Debenture highlight the interplay between the consensual, contractual arrangements between the parties governing their debt and repayment arrangements (on the one hand) and the statutory regime (Schedule B1 to the 1989 Order) regulating an "out of court" administration (on the other). From 1999 there was a series of "facilities" letters, culminating in the most recent version, which is dated 29th July 2009. The structure of these letters is uncomplicated. Prior to signature by the debtor, they constitute an offer by the Bank (creditor) to advance certain financial facilities to the debtor subject to a series of specified conditions. By his signature, the debtor accepts the Bank's offer and a legally binding contract is thereby executed between the parties. In this case, the debts generated by these arrangements became repayable on demand from 2004, per clause 2 of the General Conditions of the most recent contract between the parties. During the hearing, much of the argument focussed on clause 23.4, which provides:

> "*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 or hereafter required to be deducted, imposed, levied, collected, withheld or assessed unless the Borrower is compelled by law to make any 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 received had no such deduction been required to be made*".

As the litigation has progressed, this condition has acquired the label of convenience of "the no set off clause".

[16] The evidence establishes that between 1999 and 2004, the debt arrangements between the parties contained a comparable clause. Between October 2004 and January 2009 this clause did not feature in the parties' debt arrangements. It "*reappeared*" in January 2009 and was repeated in the most recent contractual loan arrangements (in clause 23.4). The reason for its disappearance during a period of some five years is unclear. The evidence includes an affidavit sworn by the Bank's solicitor focussing specifically on clause 23.4. The deponent suggests that this kind of provision has been typically contained in bank lending arrangements for many years. The evidence highlights the practices of the organisation known as the Loan Market Association and the Bank of Ireland. This affidavit also places some emphasis on the legal representation and advice which Sheridan evidently received during the period culminating in the sale of the Odyssey Pavilion in April 2009. The evidence establishes that Sheridan's solicitors received, *inter alia*, copies of the then extant facilities letters, which contained this clause. The solicitors concerned raised no objection to the inclusion of this clause.

[17] There is an affidavit sworn by Mr. Wigglesworth on behalf of the statutory appointor, the Bank. He is the author of the internal Credit Committee Report mentioned in paragraph [9] above and his affidavit contains the following averment:

> "*At paragraph 18 of his affidavit the Applicant avers that* [Sheridan] *'has not assets or income' to meet a claim by* [the Bank] *… it is clear from these averments that* [Sheridan] *is not in a position to make good on its covenant to pay* [the Bank] *and I believe they support* [the Bank's] *decision that it was entitled to appoint the Respondent to address* [Sheridan's] *outstanding indebtedness*".

This affidavit also puts in evidence the Bank's letter of demand to Sheridan, dated 11th April 2011, requiring the discharge of indebtedness amounting to some £11 million. It is averred that Sheridan's failure to satisfy this demand entitled the Bank to appoint an administrator under clause 6 of the Debenture. This affidavit also makes clear that the Bank made available to Sheridan a series of financial facilities, all repayable on demand. It is accepted that the sale of Imax Bournemouth yielded just over £1 million in the Bank's favour. The documentary evidence to which Mr. Wigglesworth's affidavit may be related includes in particular the debenture executed by the parties dated 13th January 1999 whereby, pursuant to clause 3.1(M), Sheridan –

> "*… by way of first floating charge* ***charges*** *on to the Bank its undertaking and all its other property, assets and rights whatsoever and wheresoever both present and future …*".

[18] This floating charge was additional to the series of fixed charges immediately preceding it. The Debenture also empowered the Bank (per clause 7.1) to appoint a receiver of the charged assets at any time after the power of sale should become exercisable. Pursuant to this clause, any appointed receiver would have powers of possession, management, borrowing and sale (amongst others).

The Sale of the Odyssey Pavilion

[19] In 2009, yet another chapter in the Odyssey saga unfolded. At this time, both Sheridan and the Bank were actively involved in attempts to sell the Odyssey Pavilion, with a view to reducing Sheridan's debt to the Bank. There was an evident mutuality of interest. It was suggested in argument that, having regard to the commercial realities of the situation prevailing, the Bank would have to fund any new buyer. This suggestion was uncontroversial. It is not in dispute that for a period at least the Bank favoured PBN as a purchaser. Nor does it appear to be contested that there was a second serious potential purchaser. By 2009, the Bank was no longer prepared to support the sale of the Odyssey Pavilion to PBN. In the event, a different sale/transfer arrangement outlined in paragraph [21], *infra* ensued. The evidence shows that during this period, in April 2009, there was a restructuring of Sheridan's debt to the Bank. This entailed the transfer by Sheridan of the Odyssey Pavilion and Imax cinema to another of Mr. Curistan's companies, Odyssey Pavilion Limited ("OPL"). This also involved the transfer of some £70 million of Sheridan's debt (to the Bank) to OPL. This left Sheridan with whatever residual assets the company owned and the balance of its debt to the Bank, of around £10 million. At this stage, the Imax Bournemouth cinema was still a Sheridan asset and Mr. Curistan was a personal debtor of Sheridan, in the amount of around £1 million. This was followed by the further loan agreement between the parties, dated 29th July

2009, paragraph [20], *supra*. By letter dated 4th August 2010 to Sheridan's solicitors, the Bank solicitors stated, *inter alia*:

> "*It is quite clear that prior to the restructuring of 20th April 2009, Sheridan Millennium Limited was hopelessly insolvent due to the mismanagement of your clients …*
>
> *The only asset of any value that Sheridan Millennium Limited now has is the Imax Theatre, Bournemouth which is charged to our clients*".

In November 2010, pursuant to the Bank's appointment of a fixed charge receiver, Imax Bournemouth was sold, thereby removing this asset from Sheridan's portfolio of assets. Prior to the enforced sale of Imax Bournemouth, there were two noteworthy letters from the Bank's solicitors, dated 4th August and 8th September 2010 respectively. These letters described Imax Bournemouth as "*the only asset of any value*" and "*the only real asset*" belonging to Sheridan

[20] While the PBN/OPL saga was unfolding, in March 2009 (as evidenced by certain e-mail communications) the Bank's financial advisers sought confirmation that PWC (accountants) were "*… getting rid of the inter-company balances in all the accounts.*" This is, evidently, a reference to internal debts owed by and to companies belonging to the Sheridan group. Next, by letter dated 1st May 2009, Mr. Curistan represented to the Bank that all debts had been cancelled, thereby reducing the relevant balances to zero. According to Mr. Shields, of counsel (on behalf of Sheridan), this was achieved by a simple, unilateral act of forgiveness. Subsequently, on 29th July 2009, the Bank forwarded a facilities letter to the directors of Sheridan. This superseded all previous letters of this *genre*. Pursuant to this arrangement a total loan of approximately £12,000,000 was made by the Bank to Sheridan. This arrangement became contractual in nature, following the signatures of all relevant parties, including Mr. Curistan, on 7th and 8th August 2009. While the basic terms of this contract are contained in the letter itself, the "General Terms" are attached. These include clause 23.4 (subsequently described in shorthand as the ("no set off clause"). This provides:

> "*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 …*
>
> *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 receipts by the*

> *Bank of such amount as it would have received had no such deduction been required to be made*".

I have already adverted to the history and evolution of this clause (in paragraph [15] above) and I record, but do not rehearse, the averments in the Bank's affidavit evidence pertaining thereto.

The Impugned Appointment of the Administrator

[21] The next succeeding chapter in the saga surrounds the events surrounding the appointment of the Bank of the Administrator which is challenged in these proceedings. The impugned appointment was preceded by the preparation of a report by the Bank's Credit Committee, around February 2011. The copy disclosed by the Bank in its evidence is very heavily redacted. In the "Conclusion and Recommendation", it is recorded that the Bournemouth asset has been realised through sale and the text continues:

> "*To conclude, the Bank have now (1) appointed a receiver over Cambourne Investments Inc and its assets, (2) served formal demands to Peter and Marian Curistan in relation to personal debt and (3) served formal demands to Peter Curistan in respect of his guarantees regarding Sheridan 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 Sheridan and fixed charge receiver over the promoter's asset at Enterprise Crescent will further reinforce the Bank's intent to recover all sums owing*".

In this excerpt, the "*action*" mentioned appears to be a reference to proceedings commenced by Mr. Curistan, Sheridan and others (including Marcus Ward Limited) by Writ in June 2010, endorsed with the following claim:

> "*The Plaintiffs' claim is for damages for loss and damage including consequential loss sustained by the Plaintiffs by reason of the negligence, breach of contract, breach of fiduciary duty, breach of statutory duty and misrepresentation of a Defendant, its servants and agents as concerns the Plaintiffs and each of them around a sale transfer or disposal and in and around the arrangements for and*

conduct of a sale transfer or disposal of the premises known as the Odyssey Pavilion Belfast and the Imax Belfast on and after 2008".

The Statement of Claim was served on 15th February 2011.

[22] There are two *inter-partes* letters which have some bearing on events during this phase. By letter dated 13th June 2011, Mr. Curistan's solicitors requested the Bank solicitors to provide discovery of certain documents – to include minutes of the meeting conducted on 4th March 2011, minutes of the meeting conducted at the offices of Messrs. Cox on 12th April 2011, the legal advice provided during the aforementioned meeting and copies of all documents provided by the Bank to the Administrator forming the basis of the Administrator's statutory declaration. The response of the Administrator's solicitors was to the effect that there are no minutes of the meeting held on 4th March 2011; the Bank provided no documents whatsoever to the Administrator in advance of his appointment; and the minutes/advice pertaining to the meeting of 12th April 2011 are privileged. It is clear from the evidence that the appointment of the Administrator was preceded by certain meetings and communications involving Bank representatives and him. The evidence includes a letter dated 4th March 2011 from the Administrator to the Bank, containing the following passages:

"*We understand that … 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 …*

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. …*

Complying with statutory requirements of the administration process ...

> *Proceed to an orderly winding up of the company …*
>
> ***To maximise the realisable value of any assets …***
>
> *The scope of this work stream will be subject to successfully identifying material assets and will be agreed with the Bank at that stage of the process*".

[Emphasis added].

A later passage in the letter suggests that the Administrator's remuneration will be met by the Bank. A further passage suggests that the Bank will indemnify the Administrator against any legal costs arising out of proceedings brought by Mr. Curistan in the event of insufficient funds being available from realisation of Sheridan's assets.

[23] On 3rd April 2011, the Bank made the requisite statutory declaration regarding the proposed appointment of the Administrator in the following terms:

> "*Anglo Irish Bank Corporation give notice that Thomas Martin Keenan … is hereby appointed as administrator of Sheridan Millennium Limited …*
>
> *The written statement in Forms 2.02B are* [sic] *attached …*
>
> *The appointor is the holder of the following qualifying floating charge …*
>
> *The above charge is enforceable at the date of this appointment …*
>
> *There are no prior qualifying floating charges …*
>
> *The company is not, at the date of this notice, the subject of insolvency proceedings*".

This statutory Notice purported to be in accordance with Form 2.06B of Rule 2.017 of the Insolvency Rules (NI) 1991, as amended. On 14th April 2011, the Administrator made the requisite statutory declaration, signifying his consent to act as the Administrator of Sheridan in accordance with the Bank's Notice of Appointment and stating:

> "*I … certify that I am authorised … to act as an insolvency practitioner.*

> *I consent to act as administrator of Sheridan Millennium Limited in accordance with the appointment of Anglo Irish Bank Corporation Limited dated 13th April 2011 …*
>
> *I am of the opinion that the purpose of administration is reasonably likely to be achieved…*
>
> *I have not had prior professional relationships in the company*".

As appears from the outline of the relevant statutory provisions in paragraph [5] above, this is a formal instrument, required by paragraph 19 of Schedule B1 to the 1989 Order. In accordance with this provision, the appointor must file with the High Court the relevant Notice of Appointment and the Administrator's "statutory declaration". The Administrator's statutory declaration purports to comply with Paragraph 19(3), which provides that a valid Notice must include a statement of the Administrator's opinion that the purpose of administration is likely to be achieved.

[24] In his affidavit sworn for the purpose of these proceedings, the Administrator deposed that prior to his appointment he obtained from the Companies Registry the last statutory accounts filed by Sheridan, which related to the period ending 30th March 2008. He further averred:

> "*From these accounts it is clear that* [Sheridan] *continued to hold assets at the time the accounts were signed off. I understand that since the date of these accounts* [Sheridan] *has disposed of the Odyssey Arena and the Imax Bournemouth. Notwithstanding these disposals it is not unreasonable to presume that the company retained realisable assets. I therefore believe that it was legitimate for me to form the opinion that at least one of the statutory purposes of the administration process, as set out in paragraph 4 of Schedule B1 … , was reasonably likely to be achieved …*
>
> *At the time of swearing hereof I have not had the opportunity to further assess the purpose of the administration. This is because the Applicant has refused to co-operate and has not provided me with the books and records of* [Sheridan]. *Furthermore the Applicant has failed to provide me with the sworn Statement of Affairs of* [Sheridan] …".

The March 2008 statutory accounts of Sheridan were exhibited to the Administrator's affidavit. These show that the company had trade debtors of

almost £1 million and "*amounts owed by related undertakings*" of some £6.5 million. The latter included an amount of some £5.4 million falling due after more than one year, together with approximately £1 million owed by Mr. Curistan. It was submitted in argument on behalf of the Bank that Mr. Sheridan's affidavits fail to confront these figures. It is undisputed that Sheridan has not filed statutory accounts since March 2008 and the evidence includes a formal statutory notice emanating from the Registrar of Companies, dated 1st April 2011, signifying an intention to strike Sheridan off the Companies Register and to dissolve the company.

[25] In the midst of these proceedings, new *draft* management accounts and an associated balance sheet were exhibited to one of Mr. Curistan's affidavits. In addition to being mere drafts, these are uncertified and unaudited. They purport to show trade creditors of around £873,000. No debtors and no current assets of any kind. From the perspectives of both timing and content, the reliability of these materials is challenged strongly by the Bank. At the time of preparing this judgment, Sheridan has made no further statutory returns. In his second affidavit, the Administrator avers that he has reviewed all of the documentation produced on behalf of Sheridan since the initiation of these proceedings. He deposes:

> "*Having reviewed all the documents provided by the Applicant, I have not identified any reason why I would alter my previous view concerning the purpose of administration and my opinion remains that the statutory purpose of the administration remains reasonably likely to be achieved. As also set out previously, the last set of audited accounts submitted* [on behalf of] *the company clearly suggest that there are assets held by it. In addition, the Applicant is recorded as a debtor of the company*".

Finally, the Administrator avers that he will keep under review the viability of the administration, from the perspective of the statutory purpose.

Marcus Ward Limited –v- AIB

[26] On 15th April 2011 (the day following the completion of the statutory formalities pertaining to the appointment of the Administrator), another landmark event materialised. Marcus Ward Limited ("*Ward*") is a company related to Sheridan, having a lease of certain units in the Odyssey Pavilion. In September 2010, Ward applied to the court for an order restraining the Bank from pursuing winding up proceedings against it. On 25th February 2011, the court heard Ward's Application. On 15th April 2011 (the day following the Administrator's appointment), judgment was delivered. In determining this application, the test applied by the court was whether the debt was genuinely disputed on apparently substantial grounds. As appears from the court's

judgment, the previous sale of the Odyssey Pavilion features prominently in the litigation which has materialised subsequently. The court accepted that there was at least an arguable case that the Bank, by its actions, had breached the fiduciary duty which it owed to Sheridan in the events surrounding the sale of this asset. It followed that, in the opinion of Deeny J, there was a genuine and substantial dispute about the debt in question. Following delivery of this judgment, the present proceedings were instigated swiftly, on 4th May 2011. While the financial liability the Bank was proposing to enforce against Ward arose out of the debt arrangements described in paragraphs [14] – [18] above, the two litigation contexts are quite different.

V CONSIDERATION AND CONCLUSIONS

[27] All of the issues to be considered and determined by the court are, in one way or another, raised within the ambit of each of the forms of relief sought in the latest incarnation of the Originating Summons. This is the template which I propose to utilise in the analysis and conclusions which follow.

The Statutory Regime

[28] Paragraphs 15-22 of Schedule B1 are, in my view, to be read and considered as a composite unit. Their central and unifying theme is that of the appointment of an administrator by the holder of a floating charge. The model which they establish is a novel one. This collection of statutory provisions is not, in my opinion, to be viewed as a series of mere procedural formalities. Rather, they establish an elaborate regime incorporating a series of inter-related substantive requirements and duties. The provisions contained in paragraphs 15-22 must also be considered, and construed, in the wider context of Schedule B1 as a whole. Paragraphs 15-22 contain a series of checks, restrictions and safeguards. These, in my view, reflect, *inter alia*, the consideration that the court is not involved in the appointment process. Judicial scrutiny is imported only in the event of a challenge such as that materialising in the present case **or** if one of the applications to the High Court permitted by the new statutory regime eventuates. The proposition that one of the underlying statutory aims reflected in paragraphs 15-22 is to counter the mischief of the possible misuse of the novel power of out of court appointment enshrined in paragraph 15 seems to me unassailable.

[29] The power of the High Court to remove an administrator from office is enshrined in paragraph 89 of Schedule B1. The equivalent English statutory provisions were considered by the Court of Appeal in ***Finnerty –v- Clark*** [2011] EWCA. Civ 858. Mummery LJ, delivering the judgment of the court, observed that paragraph 88 (the equivalent of the Northern Irish paragraph 89) is wider than paragraph 74 (which equates with our paragraph 75) and

"*… is available where there is harm to creditors without them having to prove unfairness*". With specific reference to the power of removal enshrined in paragraph 88, he stated:

> "*[32] … the statutory discretion of the Registrar on an application to remove an administrator under paragraph 88 is very wide indeed …*
>
> *[33] It must … be established by the evidence that there is a good or sufficient ground or cause for the removal of the administrators and for their replacement by another administrator. Only then can the court properly proceed to consider the exercise of its discretion by having regard to all the relevant factors for and against an order for removal, such as the beneficial consequences of success in possible legal proceedings*".

The analysis of Mummery LJ is suggestive of a two stage approach. It is worthy of note that the impetus for the removal application in that case was a dispute between the company shareholders and the Administrators about the viability of bringing certain legal proceedings. The application to remove the Administrators was, ultimately, unsuccessful. In dismissing the appeal, the appellate court expressed its satisfaction that the Administrators had acted competently, without bias and with the benefit of independent legal advice: see paragraph [41].

[30] I consider that the issue raised by this aspect of the Applicant's challenge must, in common with certain others, be evaluated and determined by considering the statutory context in its entirety and giving effect to the underlying legislative intention. It is trite that the processes of winding up and administration of companies are different. I begin with an authoritative statement on this issue by Saville LJ in ***Re MTI Training Systems*** [1998] BCC 400 and [1997] EWCA Civ 1364, made in a context where the Chancery Court made administration orders and subsequently refused to rescind the same, giving rise to an application to the Court of Appeal for leave to appeal, which was dismissed in the following terms:

> "*It seems to me that there is a sharp distinction to be made between winding up and administration orders. The former bring the life of the company to an end.* ***The latter are designed to revive, and to seek to ensure the continued life of the company if at all possible****. The former is in the nature of a final order,* ***the latter is again, by its very nature, an interim measure****. In the former case it is to my mind self-evident that before the court will bring the company to an end it will have to be satisfied, save perhaps in a wholly exceptional case, that the person seeking to*

> *achieve that objective has the right status to petition the court. Whether that can be described as a limitation on the jurisdiction of the court, or as an obvious common sense rule of practice, does not to my mind really matter. What matters is whether there is a similar jurisdictional or practice bar requiring the rescission of administration orders …*
>
> *In my judgment there is no such bar*".

The court unhesitatingly upheld the judge's conclusion that the continuation of the administration in that case was vital if the companies were to have any prospect of survival. While there was evidence to suggest that the Petitioners did not fall within the classes specified in Section 9(1) of the Insolvency Act 1986, basically the company or its directors or a creditor, this did not oblige the court to rescind the administration orders. What is noteworthy in these passages is the repeated emphasis on continuing the life of the company in administration where possible. This now finds expression in the statutory language contained in paragraph 4(1)(a) of Schedule B1 viz. "*rescuing the company as a going concern*".

The Floating Charge Issue

[31] In his thoughtful submissions on behalf of Mr. Curistan, Mr. Shields described his client's claim that the floating charge is unenforceable as his "*core contention*". He submitted that nothing is owed by Sheridan to the Bank. He described the decision in ***Ward*** as the cornerstone of his client's challenge to the enforceability of the floating charge. He was, of course, driven to acknowledge the differing litigation contexts, the ***Ward*** case being concerned with an application by a sister company for an order restraining the Bank from pursuing a winding up petition against a sister company. Moreover, in ***Ward***, the issue of the enforceability of the floating charge did not arise. In ***Ward***, the litigation was stimulated by a statutory demand served by the Bank on Ward seeking payment on foot of a guarantee executed by Ward in favour of Sheridan. This guarantee formed part of the loan arrangements contained in the most recent version of the "facilities" letter, dated 29th July 2009. As I have recorded in paragraph [27] above, Deeny J, applying the established test, concluded that there was a genuine and substantial dispute about Sheridan's alleged liability to the Bank under the floating charge on account of an arguable breach of fiduciary duty by the Bank in its conduct pertaining to the sale of the Odyssey Pavilion.

[32] In support of his arguments, Mr. Shields relied on the statement of Patten J in ***Thunderbird Industries –v- Simoco Digital*** [2004] EWHC 209 (Ch) at paragraph [4]. There are two material features of that first instance

decision which I would highlight. The first is that the learned judge's statement that the court will decline to make an administration order on the basis of a disputed debt was founded on a concession. Furthermore, in adopting this approach, the learned judge made a direct analogy with winding up proceedings. Secondly, the litigation framework in that case was concerned with a court appointed administrator. It is the first of these points of distinction which is more germane in the present context.

[33] This issue received rather fuller treatment in the judgment of Lewison J in ***BCPMS (Europe) –v- GMAC Commercial Finance*** [2006] EWHC 3744 (Ch), in which the analogous English statutory provisions arose for consideration. In ***BCPMS*** (as in the present case), administrators were appointed "out of court" pursuant to a debenture. This was followed by an interim injunction restraining the exercise of their powers. One of the arguments advanced specifically to the court, based an analogy with insolvency proceedings, was that the debenture holder was not entitled to appoint an administrator as there was a genuine dispute about the asserted debt. The learned judge formulated the following question:

> "[50] *The question is: does the existence of a dispute in good faith and on substantial grounds remove the right of the holder of a qualifying charge to appoint an administrator?*"

Having noted the decision of the Court of Appeal in ***Rushingdale SA –v- Byblos Bank*** [1986] 2 BCC 99, the judge continued:

> "[56] *It is clear that prior to the introduction of Schedule B1 to the Insolvency Act the existence of a substantial dispute, both as to the existence of security or as to whether that security had become enforceable, did not prevent a creditor from appointing receivers. He did so at his own risk. If the appointment turned out to be invalid then the receivers would be trespassers on the company's property".*

His Lordship then considered the question of whether this principle had been altered in any way by Schedule B1. Founding substantially on the wording of paragraph 16 of the Schedule (the direct equivalent of the Northern Ireland paragraph 17), Lewison J, in a reasoned passage, rejected the argument advanced: see paragraphs [57] – [68].

[34] The suggested analogy between the insolvency regime (winding up proceedings) and the administration regime (now Schedule B1) was also rejected in the first instance decision of ***Hammonds –v- Pro-Fit USA Limited*** [2007] EWHC 1998. Mr. Shields' meticulous researches drew to the attention of the court a critique of this decision in the Insolvency Law and Practice Journal (2007), Volume 23, p. 146. Noteworthy features of this critique, in my view, are the strong assertion of the author's personal opinion without any

clear supporting authority and a failure to grapple with the wording of paragraph 16 of Schedule B1. Furthermore, the persuasiveness of this critique is undermined by the absence of any reference to the decision in ***BCPMS.***

[35] The decision in ***MTI Training Systems*** lends strong support to the submissions of Mr. Hanna QC (appearing with Mr. Colmer) on behalf of the Bank that there are significant differences between winding up and administration. It seems to me that Schedule B1 was clearly designed to encourage enterprise and liquidity generally. This statutory purpose is identifiable in the innovative provisions relating to "out of court" appointments of administrators. This new mechanism is designed, *inter alia*, to obviate the cost and delay associated with applying to the court. Viewed in this way, and giving effect to the clear wording of paragraph 17 of Schedule B1, I reject the Applicant's arguments, preferring the cogent and careful reasoning of Lewison J in ***BCPMS***, while recognising one point of distinction. This relates to the litigation context in that case and that prevailing in the present case. In ***BCPMS,*** the course of the proceedings was such that a substantive trial of the issues was going to materialise at a later stage: the simple reason for this is that the court was seised of an application for an interim injunction. The present case is different, the application which I am determining being final in nature. However, I do not consider this point of distinction to be material. In particular, it does not, in my view, undermine the reasoning of Lewison J or preclude its application to the present case.

[36] The approach which I propose to adopt in determining this discrete issue differs from that advocated by the two parties, steering something of a middle course between the positions which they adopted. On behalf of Mr. Curistan, it was argued that, in order to secure a declaration by the court that the appointment of the Administrator was unlawful, it suffices to demonstrate that the alleged indebtedness of Sheridan to the Bank is disputed on bona fide and substantial grounds. On behalf of the Bank, it is submitted that this is not the correct test to apply. In my view, where a challenge of this nature is presented (this *not* being an application for an interim injunction), the simple question to be determined by the court is whether the floating charge is enforceable: I consider that this follows inexorably from the clear language of paragraph 17 of Schedule B1. In the present case, I am fortified in this view by two considerations in particular. The first is that there is no evident reason – such as a marked gulf or deficiency in the evidential framework – contra indicating this course. The second is that neither party submitted that the court could not adopt this course for this or any other reason. Furthermore, these proceedings are self-contained and final in nature and it is, therefore, incumbent on both parties to ensure that they place before the court all evidence available to them bearing on all material issues.

[37] In determining the question of whether the floating charge is enforceable, the spotlight is placed on clause 23.4 of the contractual lending

arrangements. Mr. Curistan's challenge to the enforceability of the floating charge is based squarely on the legality of this clause. On behalf of Mr. Curistan, it is submitted that clause 23.4 is unreasonable by virtue of the Unfair Contract Terms Act 1977 ("*the 1977 Act*"). This argument is resisted on behalf of the Bank. I have already summarised above the evidence bearing on this discrete issue. It is undisputed that the onus rests on the Bank to establish that the clause is reasonable. The court's resolution of this issue entails consideration of the relevant evidence and the application of the non-exhaustive guidelines contained in Schedule 2 to the 1977 Act. The assertion by Mr. Sheridan in one of his affidavits that he was unaware of the existence of this clause in the contractual lending arrangements governing the relationship between the parties is surprising. Even if correct, this does not in my view, sustain his case in this respect having regard to the events in and prior to April 2009 and, in particular, the provision of the relevant documentary materials to the reputable and experienced commercial solicitors representing Mr. Curistan at that time. I also take into account the evidence relating to the longevity of this clause, its widespread use throughout the banking and financial industries and its plainly inadvertent omission from the debt arrangements between the parties during a finite period. In ***Skipskredittforeningen –v- Emperor Navigation SA*** [1997] 2 BCLC 398, Mance J, considering a similarly worded clause, stated (at p. 414):

> "*Such a clause in a loan facility like the present is generally familiar, sensible and understandable. There is nothing about the nature of this particular loan to make it otherwise.*"

In that case, notably, one of the features of the relevant clause was its purported exclusion of set off on the ground of alleged fraud by the lender.

[38] I consider that, as a matter of law, Sheridan were on notice of the offending clause: see Chitty on Contracts (13th Edition), paragraph 12-013 and ***Shepherd Homes –v- Encia Remediation*** [2007] EWHC 70 (TCC), paragraph []. Taking into account also the involvement of Sheridan's lawyers and the repeated acts of signature, I reject any suggestion that Sheridan's assent to the terms of the offending clause was more apparent than real: see ***Balmoral Group –v- Borelis UK*** [2006] EWHC 900 (Comm), paragraph [412]. While I have considered the transcript of the ruling of the Dublin High Court in ***Allied Irish Bank –v- Brown*** and have noted, with due respect, the views expressed by Kelly J, I observe that, unlike the present case, there was no substantive trial. The court was, rather, forming provisional views about the strengths and merits of the issues. Furthermore, it is clear that both the litigation context and the evidential framework of ***Brown*** differ from those prevailing in the present case. Giving effect to the analysis and reasoning above and attributing due weight to the evidence on behalf of the Bank on this issue, I conclude that the floating charge underpinning the appointment

of the Administrator in the present case was, and is, enforceable. The Bank has discharged its onus of establishing the reasonableness of clause 23.4. It follows that there are no grounds for granting the first declaration sought on behalf of Mr. Curistan.

The duty of Inquiry Issue

[39] The "duty of inquiry" formulation was coined by the court in exchanges with counsel. On due reflection, it is probably more appropriate to view this issue through the lens of *sufficiency of information and knowledge* on the part of the *proposed* Administrator. In my opinion, the requirements of paragraph 19 of Schedule B1 to the 1989 Order are both solemn and strict. This analysis is reinforced by the consideration that, in the process of appointment, the legislature has made provision for the possibility of the commission of criminal offences by the appointor: see paragraph 19(7) and 21. In this respect, I refer also to the power conferred on the High Court to order the appointor to indemnify the appointee against any liability arising from the invalidity of the appointment: see paragraph 22(2). Furthermore, the court has no role in the appointment of an Administrator under paragraph 15. In accordance with paragraph 19(3)(b), the proposed Administrator must declare "*that in his opinion the purpose of administration is likely to be achieved*". This declaration clearly refers to paragraph 4 of the Schedule. In my view, it is self-evident that a proposed Administrator cannot lawfully make this declaration of opinion in the absence of sufficient information and knowledge. If it were otherwise the "out of court" power of appointment would be vulnerable to significant misuse. Furthermore, I would highlight that, upon appointment, the Administrator becomes an officer of the court.

[40] I consider that where a challenge of the present *genre* is made, the court will inevitably scrutinise the proposed Administrator's state of information and knowledge immediately prior to the execution of his statutory statement of opinion. I accept that, in performing this exercise, the court will accord a reasonable degree of latitude to the expertise and credentials of the Administrator which include his status of licensed insolvency practitioner. The court will also consider any affidavit sworn by the Administrator. I do not accept either that the court is bound by the *ipse dixit* of the proposed Administrator in his statutory statement *or* that, as suggested in ***Long and Others –v- Turner*** [2010] WL 473776, paragraph [26], the court should not "*go behind*" this. In my view, the overall scheme of Schedule B1, particularly paragraphs 15 – 20, is not supportive of the suggestion that the court's role is so emasculated. Rather, I consider that it is incumbent on the court to subject all of the evidence to appropriate scrutiny. This is the approach which I adopt in the present case. I have already summarised above the salient aspects of the evidence assembled before the court. Adopting this approach, I consider that the Administrator was sufficiently informed to make his statutory statement of opinion. The evidence establishes that the opinion

which he formed is a sustainable one. It follows that there are no grounds for granting the second of the declarations sought by Mr. Curistan.

The Adequacy of Reasons Issue

[41] There is some association between this issue and the duty of inquiry issue considered in paragraphs [39] – [40] above. Implicit in the analysis and conclusion contained in those paragraphs is a finding by the court that, based on all the available evidence, adequate reasons for the Administrator's statutory statement of opinion have been demonstrated to exist. I would, however, highlight one particular feature of this discrete ground of challenge. In my opinion, where a challenge of the present kind is mounted and where the Administrator chooses to participate actively in the proceedings, any affidavit sworn by him must deal fully and frankly with all material issues. This duty, in my view, has two bases. The first is that, in any form of modern litigation, the proposition that any party or witness who swears an affidavit has a duty to make full and frank disclosure to the court seems to me unimpeachable. The second is that, at the stage of participating in the proceedings, the Administrator has acquired the status of an officer of the court. This, in my estimation, reinforces the duty which I have identified.

[42] Approached in this way I consider that, in the present case, the Administrator trod something of a tightrope. While the Administrator's second affidavit contains averments to the effect that the essence of his statutory declaration remains unchanged, references therein to "*the statutory purpose*" are unparticularised. Both affidavits are silent as regards events preceding, pertaining to and surrounding the Administrator's appointment. They contain no averments relating to the undisputed meetings conducted on 4th March and 12th March 2011. Furthermore, the affidavits shed no light on the interaction between the Bank and the Administrator prior to his appointment. I would observe further that it is not entirely clear whether the "advice" provided to the Administrator immediately prior to his appointment by the solicitors representing the Bank (to be contrasted with his own retained solicitors) properly attracts the protection of privilege. The claim for privilege is based on an evidential foundation which I would describe as bare.

[43] In my view, the Administrator's affidavits were not as full or as frank as they could have and should have been. They are properly described as coy and reluctant. I consider that they ought to have more fully illuminated the interaction between the Bank and the Administrator prior to his appointment. Furthermore, the Administrator sought to take shelter behind a defensive wall of legal professional privilege which, in my view, is of dubious foundation. On the evidence before the court, it is not clear that communications between *the Bank's* solicitors and the (proposed) Administrator were indeed protected by legal professional privilege. This

claim for privilege is based on a rather sparse evidential foundation. Moreover, there is no indication whatever that any consideration was given to waiving such privilege as may have been in existence, particularly at the stage when the dispute between the parties materialised into litigation. In short, I hold that, in swearing his two affidavits, the Administrator, bound by a duty of candour to the court **and** as an officer of the court, should have disclosed more about the events immediately prior to and surrounding his appointment. However, I have already held that he was possessed of sufficient information to make the statutory statement of opinion. I have further held that the opinion which he formed is an objectively sustainable one. Consistent with these conclusions, I conclude further that, on the basis of all the evidence bearing on this issue, sufficient reasons for his opinion have been demonstrated, albeit in a somewhat unsatisfactory manner.

The Administrator's Opinion

[44] As the exercise of examining each of the forms of relief sought in the amended originating summons progresses, certain overlaps become increasingly clearer. In disposing of this discrete issue relating to the Administrator's opinion, I refer to the reasoning, analysis and conclusions in paragraph [40] above. Consistent therewith, I am satisfied that the Administrator, at the time of his proposed appointment, held the opinion specified in his statutory statement. This conclusion disposes of the fourth of the forms of relief sought.

The Adequacy of the Administrator's Statutory Statement

[45] In pursuing this discrete form of relief, the burden of Mr. Shields' argument was that every putative Administrator, in making his statutory declaration, must identify which of the objectives contained in paragraph 4 of Schedule B1 is, in his opinion, likely to be achieved. This gives rise to consideration of paragraph 4 of Schedule B1. I consider that, within this paragraph, one finds, in the language of paragraph 19(1)(b), "*the purpose of administration*". The equivalent English statutory provision was considered by Warren J in ***Hammonds –v- Pro-Fit USA*** [2007] EWHC 1998 (Ch):

> *"[] In contrast with the position under the old law where it was necessary to identify which of the purposes of an administration would be fulfilled, the current provisions refer in paragraph 11(b) to a single purpose. Whilst not spelt out, this 'purpose' is clearly a reference back to the objectives set out in paragraph 3(1). The purpose is therefore, I consider, the effecting of the objectives set out in paragraph 3(1) in the order of priority there laid down. It is not necessary to identify in advance with certainty which of those objectives is to be attained*".

The equivalent English statutory provision has also been considered in some of the leading textbooks in this field. In ***Corporate Insolvency Law and Practice*** (Bailie and Groves, 3rd Edition) it is suggested, under the rubric of "Purpose of Administration":

> "*Under the former regime there were four independent statutory purposes of equal ranking. The new regime requires an administration to have as its single purpose one of a hierarchy of three objectives. These three objectives are, in order of priority:*
>
> 1. *Resuing the company as a going concern.*
>
> 2. *Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up.*
>
> 3. *Realising property in order to make a distribution to one or more secured or preferential creditors.*
>
> *The administrator is required to perform his functions with a view to achieving the primary objective unless he 'thinks' either that it is not reasonably practicable to achieve that objective, or that pursuing the secondary objective would achieve a better result for the company's creditors as a whole, in which event he may seek to achieve the secondary objective. He may only move down to the tertiary objective if he 'thinks' that it is not reasonably practicable to achieve either the primary or the secondary objective and that in doing so he does not unnecessarily harm the interests of the creditors of the company as a whole.*"

A commentary to like effect is contained in Annotated Guide to the Insolvency Legislation (Sealy and Milman, 13th Edition, Volume 1), pp. 526-527. I accept the correctness of this analysis.

[46] In my view, the 'single purpose' rationale, the objective realities and the statutory language combine to confound Mr. Shields' argument. The detailed provisions comprising the Schedule B1 regime contemplate, in my view, that every administrator will become substantially better informed as the administration progresses. Many of the duties and functions enshrined in Schedule B1 are clearly designed to facilitate this. Viewed purely in the abstract, while every proposed administrator must, as I have held, be sufficiently informed to make a valid statutory statement at the time of appointment, it seems unlikely that particularisation of discrete purpose would be viable at this stage, in most cases. This approach does not preclude the submission that where it is possible to do so, the proposed

Administrator's statement of statutory opinion should, *as a matter of good practice,* specify clearly which of the hierarchical objectives is engaged. However, in this respect, I distinguish between good practice and statutory requirement. Here, the threefold elements of the statutory regime are the relevant provisions of Schedule B1, the amended provisions of the Insolvency Rules and the statutory Form 2.02B. I am unable to spell out of this composite regime a statutory requirement or duty that a putative Administrator must, in making the statutory declaration, specify which of the objectives in paragraph B1 is, in his opinion, likely to be fulfilled. I conclude, accordingly, that there are no grounds for granting this remedy.

Improper Purpose

[47] It was not disputed on behalf of the Bank that the appointment of the Administrator could, in principle, be vitiated if motivated by an improper purpose on the part of the appointor. This concession was, in my opinion, properly made and is consistent with the analysis of Mummery LJ in ***Finnerty –v- Clark*** (paragraph [29], *supra*). The improper purpose asserted by Mr. Sheridan was, primarily, that of frustrating and obstructing Sheridan's litigation against the Bank in separate proceedings. In my view, a reasonable and objective evaluation of the evidence confirms that this formed part of the Bank's thinking. However, I consider that the provisions of Schedule B1 have been formulated against a background of commercial realities and permissible commercial tactics and aggression. The Bank's motivation and conduct fall to be evaluated accordingly and, in my opinion, are unobjectionable. Secondly, I pose the question of whether there was any disharmony between the Bank's motivation and conduct (on the one hand) and the statutory purpose of administration enshrined in paragraph 4(1) of Schedule B1 (on the other). In my view, no such disharmony has been demonstrated.

[48] This analysis and conclusion may also be reached by a somewhat different route. I have already concluded that the (proposed) Administrator was sufficiently informed to form the requisite statutory opinion. Thus the purpose of the administration was capable of being fulfilled from the outset, in harmony with the statutory regime. It seems to me that this will normally be the main touchstone for the court. In the abstract, it is unclear whether a conclusion and finding of this kind in any case could be undermined by evidence that the appointor was motivated by a purpose incompatible with the statutory objective enshrined in paragraph 4(1). Such a conclusion would not, in my view, follow as a matter of course. Thus, again in the abstract, an aggressive and, indeed, malevolent motivation would not, *per se*, undermine the (proposed) Administrator's statutory statement of opinion. While I find that there was some hard commercial motivation in the Bank's conduct in the present case, I am of the opinion that this falls short of either constituting an improper purpose of a sufficiently vitiating nature *or* leading to the

conclusion that the Administrator had insufficient grounds for making his statutory statement of opinion. The sixth – and final – of the declarations sought by Mr. Curistan is refused accordingly.

The Breach of Fiduciary Duty Issue

[49] The injunctive relief sought under this umbrella is based on the contention that the Administrator owed certain fiduciary duties to Sheridan and has acted in breach thereof. This aspect of Mr. Curistan's challenge asserts a conflict of interest on the part of the Administrator, highlighting (a) the separate litigation between Sheridan and the Bank, (b) the disputed nature of the asserted debt, (c) the role of the Bank's solicitor, (d) the assertion of legal professional privilege, (e) the circumstances in which the Administrator disclosed his relationship with the Bank's solicitor and (f) an asserted infringement of Rule 2.017 of the 1991 Rules. Mr. Curistan seeks, accordingly, an order pursuant to paragraph 89 of Schedule B1 removing the Administrator from office.

[50] In considering this quest for relief, I refer to, but do not repeat, the observations of Mummery LJ in the ***Finnerty*** decision: see paragraph [29], *supra*. The attention of the court was drawn to the statement of Norris J in ***BLV Realty and Others –v- Batten*** [2009] EWHC 2994 (Ch):

> "*I do not consider that the fact that the administrators' firm has previously advised the principal secured creditor or the fact that a solicitor who advised the bank has been retained to advise the administrators of itself creates a conflict of interest for the adviser which disables him from acting or somehow disentitles the administrators from accepting or acting on his advice. Far from a conflict in the present case there seems to be unity of purpose … I do not accept that … the administrators were solely doing the Bank's bidding without exercising any independent judgment. The nature of the business decision itself does not suggest perversity or bad faith such as would justify the removal of an office holder*".

This passage makes clear the close kinship between the improper purpose and breach of fiduciary duty dimensions of Mr. Curistan's challenge. It also highlights the factually sensitive nature of every case. It is a well established principle of equity that a trustee must not profit from the trust in question. However, the remuneration of administrators represents a well recognised exception to this rule, as noted by Ferris J in ***Mirror Group Newspapers –v- Maxwell*** [1998] BCC 324, at p. 333. I refer also to Chitty on Contracts (30th Edition, Volume 2, paragraph 31-123 and Snell's Equity (32nd Edition), paragraph 7-023.

[51] The breach of fiduciary duty asserted by Mr. Curistan rests on a series of alleged infirmities. Addressing each of these asserted infirmities *seriatim*:

(a) In accordance with Paragraph 4(2) of Schedule B1, the Administrator has a statutory duty to perform his functions in the interests of Sheridan's creditors as a whole. This duty exists within the ambit of the hierarchical statutory purpose of administration, already discussed above. Furthermore, the Administrator must perform the other statutory duties and functions contained in Schedule B1, as summarised above. In my view, there is no warrant for concluding that the performance of the Administrator's statutory duties and functions will be compromised in any way by the extant litigation in which Sheridan is suing the Bank.

(b) The disputed nature of the underlying debt has been determined by this judgment, in favour of the Bank.

(c) In my view, it would have been preferable for the (proposed) Administrator to seek legal advice from a source other than the Bank solicitors. However, taking into account the limited evidence pertaining to this issue, this fact does not, in my view, compromise the ability of the Administrator to discharge his statutory functions and duties.

(d) I have already commented on the assertion of legal professional privilege: see paragraph [40] above. However, the overarching touchstone must be the Administrator's ability to perform his statutory duties and functions thoroughly and faithfully. Approached in his way, there can be no basis for removing the Administrator from office.

(e) The timing of the Administrator's disclosure of his receipt of advice from the Bank solicitors does not, in my view, undermine the aforementioned analysis or conclusion. There are invariably insensitivities and a degree of caution surrounding legal advice of any kind, particularly in a litigation context.

(f) The evidence establishes that the Bank will remunerate the Administrator for such expenses incurred by him which, ultimately, he is unable to recover under Rule 2.107 of the Insolvency Rules, as amended. Mr. Shields' submissions also link this aspect of his client's challenge to paragraph 53(1)(b) of Schedule B1, whereby the Administrator must prepare a statement of proposals. Once again, in determining this discrete

aspect of Mr. Curistan's challenge, I have considered all the evidence objectively, with appropriate scrutiny and in the round. Having done so, I find nothing untoward or objectionable in the Bank's commitment to remunerate the Administrator for any irrecoverable expenses to the extent that the appointment is vitiated by a conflict of interest. Viewed realistically and reasonably, I consider this to be an objectively sensible, commercial and unobjectionable arrangement.

I remind myself that each of these factors is advanced on behalf of Mr. Curistan in his quest to establish a breach of fiduciary duty by the Administrator and/or a breach of the Administrator's duties as an officer of the court. For the reasons outlined above, I conclude that there is no basis for granting this relief.

The Final Form of Relief Sought

[52] The eighth form of relief sought in the amended Originating Summons seeks an injunction on a variety of grounds:

(a) The first of these relates to the assertion that the underlying debt is the subject of a bona fide and substantial dispute. I have already determined this issue in favour of the Bank.

(b) The second asserts that the alleged indebtedness of Sheridan has arguably been brought about by the Bank's wrongdoing. Insofar as this assertion has not already been determined above, I find that on the evidence before this court it has insufficient merit and substance to warrant the grant of injunctive relief restraining the administration.

(c) The injunctive relief sought is not required in vindication of Sheridan's asserted right of access to the court under Article 6 ECHR. Firstly, it is well established that this right is not absolute in nature but is, rather, subject to certain limitations. Secondly, and in any event, this court has considered fully Sheridan's challenge to the debt, as formulated in this litigation, and has determined this discrete issue in favour of the Bank. Thirdly, I find no warrant for concluding that Sheridan's pursuit of the Bank in separate proceedings (noted above) will *ipso facto* the appointment of the Administrator be frustrated. This is not established by the evidence, which indicates that a decision on this discrete issue remains to be made. Furthermore, in thus concluding, I take into account the statutory purpose of administration specified in paragraph 4 of Schedule B1. Insofar as an analogy with orders for security for

costs is appropriate (being one of the discrete aspects of the arguments ventilated), it is clear that the possibility that a claimant will be deterred from pursuing his claim is not, without more, sufficient reason for declining to make a security for costs order: see ***Brookview –v- Ferguson*** [2011] NIQB 37, paragraph [16].

(d) The court has determined the clause 29(4) issue in favour of the Bank: see paragraph [36], *supra*.

Interim Injunction?

[53] Finally, Sheridan seeks an interim injunction, invoking the ***American Cyanamid*** principles. This has the appearance of a somewhat forlorn adjunct to the substantive remedies sought. It seems to me clearly misconceived, since, as I have pointed out above, these proceedings are final, rather than interlocutory, in nature. This, *per se*, operates to defeat this discrete claim for relief. I add only that the claim for this particular form of injunction did not feature in the parties' oral submissions (perhaps unsurprisingly). It would have failed in any event, having regard to my findings and conclusions above.

VI DISPOSAL

[54] On the grounds and for the reasons elaborated above, I conclude that Sheridan has no entitlement to any of the eight forms of relief sought in the amended Originating Summons. Sheridan's application is dismissed accordingly.

Costs

[55] I have considered the parties' representations on the issue of costs. As regards Sheridan and the Bank, I consider that there are no grounds for displacing the general rule that costs should follow the event and I order accordingly. As regards the Administrator, some particular considerations arise. During a pre-trial review hearing, I questioned the propriety of the Administrator actively participating in these proceedings. I raised this issue having regard to (a) the nature and extent of the Administrator's affidavit evidence contribution, (b) his status as an officer of the court, (c) the consideration that, in principle, he should be neutral and dispassionate regarding the outcome and (d) the full and active participation on the part of the Bank. Bearing in mind this background, I refer to the court's observations and findings in paragraphs [41] to [43] above. Having regard to this combination of factors, I conclude that, in the exercise of the court's discretion under Section 59 of the Judicature (NI) Act 1978, it would be inappropriate to

order Sheridan to pay the Administrator's costs. The Administrator must, accordingly, bear his own costs.