THE HIGH COURT

[2011 No. 219 MCA]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION) AND

IN THE MATTER OF THE EUROPEAN COMMUNITIES (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007 AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

ON THE APPLICATION OF KIERAN WALLACE OFFICIAL LIQUIDATOR

JUDGMENT of Ms. Justice Finlay Geoghegan delivered the 22nd day of December 2014

1. This judgment is given on a limited number of issues only arising on a notice of motion issued on behalf of the Official Liquidator seeking multiple reliefs and directions in relation to his remuneration and legal costs and expenses in the winding up. The notice of motion which seeks a total of 22 such reliefs was issued returnable for the 14th March, 2014. It followed upon (albeit with some considerable delay) a judgment delivered by me on the 9th October, 2012, *In the Matter of Custom House Capital Limited (In Liquidation)* [2012] IEHC 382, [2012] 3 I.R. 93, on a prior application seeking directions and the determination of issues relating to the quantum and discharge of the liquidator's remuneration fees, costs and legal expenses associated with the administration and reconciliation of certain client segregated accounts comprising equities and/or cash accounts.

2. The root cause of the reliefs in the 2014 Motion is the fact that this is an extremely complex liquidation where the assets of the company realisable in the liquidation are unlikely to meet the probable costs of the winding up and a significant portion of the work done and to be done by the Official Liquidator relates to the orderly distribution of client assets under management which at the date of winding up were valued at approximately €1.1bn. The relative paucity of company as distinct from client assets does not appear to have been adverted to by the Official Liquidator when he accepted nomination to act from the Central Bank and there are no indemnity arrangements in place to indemnify him for his reasonable costs not capable of discharge out of company assets.

Background

3. On the 15th July, 2011 the Central Bank commenced these proceedings pursuant to the European Communities (Markets in Financial Instruments) Regulations 2007, (SI No. 60/2007) (the "2007 Regulations"). On that day the High Court (Hogan J.) on the application of the Central Bank appointed two of its officials as inspectors (the "Inspectors") to Custom House Capital Limited ("CHC") pursuant to the 2007 regulations.

4. Subsequent to the delivery by the Inspectors of a report, they sought the winding up of CHC. On the 21st October, 2011, the High Court (Hogan J.) made an order for the winding up of CHC and appointed Kieran Wallace as official liquidator (the "Liquidator"). As appears from the judgment of Hogan J. delivered on the 28th October, 2011, *In The Matter of Custom House Capital Limited* [2011] IEHC 399, at para. 17, the views of the inspector in favour of the winding up of CHC weighed heavily with the Court.

5. Notwithstanding the origin and nature of the current proceedings, it is a winding up by the court pursuant to the provisions of the Companies Acts 1963- 2009, to which certain provisions of the 2007 Regulations apply.

6. On the 21st October, 2011, The High Court also appointed Mr Wallace as administrator of CHC (the "Administrator") for the purposes of and pursuant to s. 33A of the Investor Compensation Act 1998, as amended.

Present Application

7. Following the issue of the 2014 notice of motion, the court acceded to an application by the Official Liquidator that the reliefs sought should be determined on a phased basis. This approach arose principally by reason of Article 157 of the 2007 Regulations. This provides:

> "157(1) No liquidator, receiver, administrator, examiner, official assignee or creditor of an investment firm shall have or obtain any recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received held or paid on behalf of a client by an investment firm, until all proper claims of clients or of their heirs, successors or assigns against client money and client financial instruments or documents of title relating to such financial instruments have been satisfied in full.
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> (2) Notwithstanding paragraph (1), a liquidator, receiver, administrator, examiner or official assignee may have recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm in respect of such reasonable expenses as are incurred –
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> (a) in the carrying out of their functions under these Regulations or under the Investor Compensation Act 1998, or
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> (b) in the distribution of client money and financial instruments to clients of the investment firm where the assets of the investment firm have been exhausted."

8. Article 158 requires an application to the Court by a liquidator prior to recourse to client funds pursuant to Article 157(2). It gives the Court jurisdiction to "determine the matter and make such order as the Court sees fit".

9. The 2012 application seeking directions and the determination of issues relating to the quantum and discharge of the liquidator's remuneration fees, costs and legal expenses in relation to work done on segregated cash and equities was not brought pursuant to the 2007 Regulations. The Courts attention was drawn to it in the course of the application and in the 2012 judgment the Court held that a liquidator may have recourse to client funds pursuant to Art. 157 of the 2007 Regulation (as is stated therein) but held on the evidence on that application the Court had no jurisdiction to make such an order as the liquidator had not established that the assets of CHC were "exhausted". The factual issue had not been addressed in the evidence. As the Court did not have jurisdiction it did not consider how it might exercise the discretion given to it by Art. 158 of the 2007 Regulations in relation to the winding up of CHC. The liquidator in this module of the 2014 motion seeks decisions which may have the effect of establishing that the assets of CHC are exhausted.

10. In anticipation of the 2014 notice of motion and applications included therein, a committee of clients (the "Committee") was

formed pursuant to an order made by me on the 16th December, 2013. Provision is to be made for discharge of the reasonable costs of legal representation of the Committee as an expense of the winding up. The Committee has been served with all papers relevant to this application and (with the assistance of solicitor and counsel) has been involved in the preliminary orders in relation to the identification of the issues and has filed affidavits and legal submissions on this application. Its role is to act as *legitimus contradictor* to assist the court in the exercise of its supervisory role in the winding up.

11. The only reliefs which fall for consideration is this module of the 2014 notice of motion are those at paras. 2, 3 and 5 of the notice of motion, which are in the following terms:-

> "2. An order measuring the legal costs of the Official Liquidator in connection with the liquidation of the Company – up to the 31st October, 2013 – pursuant to the provisions of the European Communities (Markets in Financial Instruments) Regulations 2007, (as amended) in the sum of €527,876.76 – inclusive of outlays – together with VAT.
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> 3. An order permitting the payment of the legal costs of the Official Liquidator in connection with the liquidation of the company from the assets of the company.
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> 5. An order determining the Official Liquidator's remuneration, fees and expenses in connection with the liquidation of the company – up to 31st October, 2013 – in the sum of €1,624,605.27 (inclusive of professional fees, VAT and outlays)."

12. An issue paper was prepared for the purposes of identifying those matters which had to be determined by the Court in connection with the foregoing reliefs. The issues identified were as follows:-

> 1. What is the extent of the work properly undertaken by the Official Liquidator in connection with the winding up of the Company?
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> 2. Whether any of the work undertaken by the Official Liquidator in connection with the winding up of the Company was undertaken – or was more properly undertaken – by the Official Liquidator in his capacity as Administrator of the Company.
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> 3. Whether – and if so to what extent – the Court ought to have regard to the degree to which the work undertaken by the Official Liquidator in connection with the winding up of the Company represents a proportion of the total work which is likely to be undertaken in the liquidation of the Company as a whole, in measuring the fees, costs and expenses of the Official Liquidator?
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> 4. What is the proper measure of the fees, costs and expenses of the Official Liquidator in connection with the winding up of the company?

13. The Committee in submission, whilst agreeing that the above are the issues identified, sought to raise what they consider a related and consequential question as to the "responsibility [presumably financial] of the Investor Compensation Company Limited (the "ICCL") for the work undertaken by the Official Liquidator or more properly undertaken by him in his role as Administrator under the 1998 Act".

14. The Central Bank, ICCL, and the Pensions Authority are notice parties to the 2014 notice of motion. The ICCL was represented by counsel and solicitor and made submissions limited to the statutory obligations of the Administrator. The Central Bank and Pensions Authority were represented by their solicitors and save in respect of an explanation relating to the contribution of the Central Bank to the cost of the transcript did not intervene or participate in this module.

The Facts

15. The nature of the business of CHC and the findings made by the Inspectors are relevant to the issues which the court has to determine on this application. They were previously recorded in summary in the 2012 judgment but for the clarity of this judgment need some repeating.

16. CHC was incorporated as a private limited company on 28th July, 1997, and commenced trading in the same year. Its principal activity was in the provision of financial services including investment fund management, setting up and managing approved retirement funds (ARFs), pension funds, personal retirement savings account ("PRSA") products and personal savings accounts. It established investment vehicles for collective investment by clients, including exempt unit trusts, qualifying investor funds established under the laws of Ireland and for the purchase of property through special purpose vehicles ("SPVs") established under the laws of various European countries, a Mezzanine Bond Fund and other PRSA products. Many of these were regulated products to which special tax provisions applied.

17. In March 2011, CHC had assets in excess of €1.1 billion under management on behalf of its clients and €24m in cash held in designated client accounts. It had at least 1,500 clients, the majority of whom reside in Ireland.

18. Since 2007, it had been authorised under Article 11 of the 2007 Regulations 2007. It was also an approved Qualifying Fund Manager in relation to the provision of Approved Retirement Funds ("ARFs") and Approved Minimum Retirement Funds ("AMRFs"). CHC was also a PRSA provider for the purposes of the Pensions Act 1990, as amended. It had three PRSA products approved by the Pensions Authority and the Revenue Commissioners.

19. The Central Bank had been engaged with CHC since 2009. During 2009/2010 concerns were raised that some clients' monies were being invested without their knowledge or consent in the Mezzanine Bond Fund. Authorised officers were appointed to investigate, following which directions were issued by the Central Bank. Directions were given between April 2010 and July 2011, which remained in place at the commencement of the winding up and for the greater part at the date of the hearing of this application.

20. The Inspectors in their final report to the High Court on the 19th October, 2011, found "that there was a practice of CHC effecting transactions on behalf of clients in a manner which could not have been envisaged by those clients and for which no mandate or authorisation had been given by such clients to CHC. In many cases, these transactions were not only unauthorised but also improper" (para. 1.9). They further stated, at para. 23 by way of general conclusion:

> "In the introduction to the Report, the scale of the misconduct of CHC was summarised, with the body of the Report providing more detail on specific issues. The exact sums of money taken directly and indirectly from clients by CHC and placed into property investments and/or used to meet other cash needs cannot be precisely stated without a detailed

reconciliation of clients' holdings. However, it is clear that this amounted to in excess of €56 million. This does not include the funds owed to Mezzanine Bond holders, which amount to an additional €10.4 million (exclusive of interest). There was a systematic and deliberate misuse of assets and cash belonging directly or indirectly to clients of CHC. This misuse was deliberately disguised by CHC through the use of false accounting entries and the issue of false and misleading statements to clients."

21. In early 2011 CHC had sought help from Horwath Bastow Charleton ("HBC") to assist in the day to day running of the company and assist in ascertaining certain irregularities and carrying out reconciliation. A related company, Horwath Bastow Charleton Wealth Management ("HBCWM") entered into a sub-management agreement with CHC on the 13th October, 2011, whereby it would manage the assets and business of the company. Subsequent to the commencement of the winding up, the Liquidator, with the approval of the court entered into an agreement with HBCWM for the management of the assets and business of the company which subsists.

22. The Liquidator on appointment was faced with a significant challenge. Both by reason of the nature of the business of CHC and the irregularities reported upon by the Inspectors. This application relates to work done from the date of appointment i.e. 21st October, 2011 to 31st October, 2013 and the fees claimed for that period. The Liquidator exhibited a report of the work done in the period in which he set out a high level summary of the work divided into general liquidation work and client asset work.

23. The Liquidator has attempted to distinguish between the general work and work undertaken in the liquidation in connection with client funds and indicated the hours and amounts claimed in respect of each, but he also states that he has been advised that he is not obliged to do so, and has done so for the purpose of transparency and assisting the court in determining issues which will arise on later modules on the 2014 notice of motion. It is also of some assistance to the Court on this application.

24. The initial client asset work done by the Liquidator related to the segregated equities and cash accounts. That work was the subject of the application to which the 2012 judgment relates. A detailed description of the work done by the Official Liquidator and his approach to the measurement of the fees sought and his request to the relevant clients to discharge his fees in a sum of 0.5% of the value of their account is set out at paras. 17 to 26 of that judgment and I do not propose repeating here. The Liquidator has made clear in his grounding affidavit in this application that he is standing over the undertaking he gave at that time to clients and the court that he would complete the work for what he describes as "a capped fee of €115,000 plus VAT" and is not seeking in this application any remuneration in respect of the work done. Nevertheless, the nature of the work done is relevant to the disputes on this application.

25. In the 2012 application, the dissenting clients (some of whom are members of the Committee) disputed the necessity for the Liquidator to carry out (and by implication incur the expense of) a reconciliation exercise in relation to the segregated client funds and other administrative tasks in relation to the distribution of those funds or transfer of the relevant products in the case of PRSA or ARF.

26. In the judgment delivered at paras. 39 to 49 inclusive in summary I concluded in relation to the winding up of CHC:

> 1. Having regard to the business of CHC, the obligation to wind up the affairs of the company requires the Liquidator to engage in an orderly termination of the involvement of the company in the investment and management of the client funds formerly under its control. A general description of such a task involves the return to the clients or transfer at their direction of the investments or cash to which they have a beneficial entitlement. The precise work to be done will depend, firstly upon the nature of the investments and the contractual arrangements between CHC and the clients and third parties. Secondly, it will depend upon what is required to be done to identify the investments or cash to which each client is beneficially entitled. (para.41)
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> 2. The Liquidator was correct in the decision he made that as part of the winding up of CHC, he is obliged to arrange for the orderly distribution of client funds held in investment vehicles provided by or under the control of CHC either to those beneficially entitled or where appropriate to a qualified person or product at their direction. (para. 43) Having regard to the facts referred to in the Inspector's reports and the practice within CHC of receiving initial investments into pooled client accounts and then paying the money out to a stockbroker or financial institution, the reconciliation process undertaken by the Liquidator was a reasonable and appropriate step for him to have taken prior to distributing or transferring equities in segregated cash accounts. His obligation as part of the winding up of the affairs of the company is to facilitate and effect the transfer of investments or cash to or at their direction of those beneficially entitled. He had to be satisfied that it was the relevant client's money and not another client's money which had been transferred to the stockbroker or other financial institution from the pooled client account.
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> 3. The other aspect of the work undertaken related to the identification of the different nature of the investments, procuring valuations and other necessary regulatory and tax clearances arising principally from the nature of ARF, AMRF and PRSA products. This work also appears to be necessary for the orderly and appropriate transfer of such products.

27. It is relevant to note that whilst in the 2012 judgment I had referred to the fact that the Liquidator was also appointed as Administrator of CHC for the purposes of s. 33A of the Investor Compensation Act 1998, as amended, I did not expressly address the issue raised on this application namely, that some or all of the reconciliation work done by the Liquidator is work which the court should consider he is required to do as Administrator, rather than as Liquidator of CHC. In this application, counsel for the Liquidator referred to the fact that submissions had been made by Mr. Nugent, a dissenting client in the 2012 application to the effect that the reconciliation work, was work which he was required to do as Administrator and the cost of same should be borne by ICCL. Whilst it is correct that such a submission in writing was made by Mr. Nugent, it is not an issue determined in the 2012 judgment and therefore it is must be addressed in the current application. The focus of the 2012 application was the jurisdiction of the court on the facts before it, to make an order that the Liquidator's remuneration and the fees, costs and expenses, including legal expenses associated with the reconciliation and administration of the segregated client accounts might be charged to or deducted from the funds or investments held in the accounts of the dissenting client.

28. For the reasons stated therein, I held that at the relevant time, the Court did not have jurisdiction to make such an order. Hence I did not consider in the 2012 judgment whether the Court should or should not exercise a discretion to make such an order.

29. I now turn to the issues identified for resolution on this module of the 2014 motion.

Reconciliation Work – Liquidator or Administrator

30. The first two issues identified are related and fall to be considered together. The principal objection taken on behalf of the Committee to the work done by the Liquidator relates to what is termed the "reconciliation" work. The Committee do not object to

the necessity for the work itself to be done (although they had some observations on the extent of the work) but rather submit that the Court should not consider this work as work which is required to be done by the Liquidator as part of the orderly winding up of the company. The principal submission as to why this is so is by reason of his dual role as liquidator and administrator and the work which he is required to do as administrator in order to comply with his statutory obligation to certify the net loss of each eligible investor.

31. As previously stated, this is an application by the Official Liquidator to the court to determine as part of its supervisory function in the winding up by the court, the reasonable remuneration of the Liquidator. It therefore appears that the court's starting point must be to consider whether the work for which the Liquidator is claiming to be remunerated is work which he is properly doing as part of the winding up of CHC.

32. Whilst I previously expressed views in the judgment of October 2012, as to the work which the Official Liquidator is required to do in this winding up, I have in the course of this application both during the hearing and since the hearing in reconsidering all the written documents, oral evidence and oral submission re-examined the question as to whether the Official Liquidator as part of his tasks as Official Liquidator is required to carry out what has been termed the reconciliation work and have reached the following conclusions.

33. I remain of the view previously expressed that the Official Liquidator is obliged in order to wind up the affairs of CHC to arrange for the orderly termination of the involvement of CHC in the client funds formerly under its control whether through contractual arrangement or corporate structures. The precise nature of the work varies according to the precise contractual arrangements for the products in which investments were made. On the facts, the work includes a return to the client beneficially entitled the relevant assets; a transfer of the asset or investment product where the applicable regulatory regime does not permit of a distribution to the client or termination of the appointment of management contracts held by CHC as in the case of certain unit trusts. There may also be other forms of disengagement for what has been loosely termed "distribution to clients". The pooled funds and SPVs present particular problems in identifying client entitlements and a return to those entitled.

34. By reason of the fraudulent activity within CHC prior to the commencement of the winding up, and the facts more fully set out in the October 2012 judgment in relation to the manner in which investments were made, the Official Liquidator is required to carry out a reconciliation exercise to determine from the records available whether the client who is recorded as potentially entitled to the assets in question is in fact by reason of the investments made and subsequent transfer of monies within CHC the person so entitled.

35. It is appropriate to emphasise that the reconciliation work required for the purpose of the orderly winding up is limited to such reconciliation work as is necessary to enable the Official Liquidator with confidence distribute or transfer those client assets remaining under the control of CHC to the client beneficially entitled or to another qualified provider at the client's direction. Such reconciliation work for the purposes of the liquidation does not require the computation of loss to the client.

36. The Official Liquidator in the course of his oral evidence to the Court said that unlike in many liquidations the books and records of CHC are good. He explained that they detail all the relevant transactions both authorised and unauthorised by clients. Nevertheless by reason of the multiplicity of accounts and extent of unauthorised transactions the reconciliation exercise required does involve (for some accounts at least) a painstaking exercise of tracing funds through various accounts.

37. For the purpose of assessing the work required to be done by the Official Liquidator for the purposes of the winding up, it is also necessary to emphasise that the reconciliation work referred to above is only the first part of the work in the process of distribution or transfer of client assets. Once it is ascertained who is beneficially entitled then there are further regulatory and tax clearances to be obtained prior to the transfer, distribution or release of the assets. The Central Bank Directions' require to be lifted in all instances but there are also other regulatory approvals relating to specific products. This is also work required of the Official Liquidator in order to appropriately terminate the involvement of CHC and transfer or release the client assets. Much of this latter work is directly for the benefit of clients so as to avoid undesirable tax consequences or breaches of regulatory requirements particularly in relation to products such as PRSAs or ARFs.

38. In summary therefore, reconciliation work for the purpose of identifying the person entitled to client assets still remaining under the control of CHC and the Liquidator is prima facie work which he is required to do as part of the winding up of CHC. Added to this is the necessary regulatory administrative work to enable him distribute and/or transfer and also do so in a manner which does not cause adverse tax or regulatory consequences for the client.

39. I now turn to the work which Mr. Wallace as Administrator appointed pursuant to s. 33A of the Investor Compensation Act 1998, (Act of 1998") is required to do.

40. The functions of the Administrator are primarily contained in ss. 33(3) – (4) of the Act of 1998 (as amended) which provides as follows:-

> "(3) The administrator shall deliver to the Company, or, where appropriate, to the operator of the compensation scheme concerned –
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> (a) a statement, or
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> (b) if an interim statement is delivered under subsection (3B) a final statement,
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> specifying the names of eligible investors and the net loss (if any) and the compensatable loss (if any) of each of [those eligible investors]
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> (3A) As a prelude to complying with subsection (3), the administrator may, if the Company or the operator of the relevant compensation scheme so agrees, deliver an interim statement specifying names of eligible investors and the estimated net losses (if any) and the estimated compensatable loss (if any) of each of those eligible investors.
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> (3B) On, or as soon as practicable after, delivering a statement in accordance with subsection (3) or (3A), the administrator shall deliver a copy of the statements to the supervisory authority. (4) Following consultation with the Company, an administrator may apply to the Court to determine any question arising in relation to his or her functions under this Act."
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> The "Company" is ICCL.

41. There is an elaborate definition of net loss in s. 30(1) of the Act of 1998. It is unnecessary to consider the detail of the definition. It essentially includes money or investment instruments owed to or belonging to a client held by CHC in connection with its investments business services which it is unable to discharge in accordance with the applicable legal and contractual conditions excluding certain specified amounts, money or investments.

42. The Liquidator prepared a summary of the reconciliation work in the liquidation dated the 2nd July, 2014, in which he set out in addition an explanation of the work which he had done prior to that date as administrator. That document is appended to this judgment.

43. The Committee retained Mr. Jim Luby an experienced insolvency practitioner who considered the Liquidator's above summary and his earlier affidavits together with what in Mr. Luby's view is required of an administrator in order to provide a statement of net loss to the ICCL. Mr. Luby at para. 6 of his affidavit stated that the following steps are required in order to provide a statement of net loss to ICCL:-

> "6.1 Examine the company's books and records to establish a list of all investors;
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> 6.2 Identify excluded investors (companies, professional clients etc.) to arrive at a list of eligible investors;
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> 6.3 Establish amounts invested by each eligible investor;
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> 6.4 Reconcile the investment movements by client which would include withdrawals and additional amounts invested;
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> 6.5 Reconcile investment income allocated to the client, and charges and deductions;
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> 6.6 Establish a current valuation of the client's investment from third parties, including brokers, fund valuations etc;
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> 6.7 Contact the client to agree reconciliation with the client's claim form, present value and net loss;
>
> 6.8 Notify ICCL of the agreed claim (net loss) and compensatable loss capped at the statutory maximum claim of €22,222; and
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> 6.9 Liaise with ICCL regarding its queries.
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> Mr. Luby further expresses the view that for the purpose of confirming the compensatable loss claimed that "it is difficult to exclude any of the above steps, with the possible exception of step 6.5."

44. Mr. Luby also expresses the view that the steps identified by the Official Liquidator in the summary of 2nd July, 2014, in the reconciliation process in the liquidation includes the same items of work as he has referred to at points 6.3, 6.4, 6.6 and 6.6 above.

45. The evidence of the Liquidator on affidavit and orally does not dispute what is stated by Mr. Luby to be necessary work for the purpose of his role as Administrator. Rather he has explained (albeit in some instances confusingly) that his work as official liquidator has informed his work as administrator.

46. The reason for which I make the comment "confusingly" is that Mr. Wallace in the affidavit sworn on the 18th September, 2014, averred expressly at para. 14:

> "The only reason that I was in a position to certify – in my capacity as Administrator – the 487 claims completed to date for the purposes of the 1998 Act was because the reconciliation work had been performed by myself and my liquidation team in respect of those accounts in my capacity as Official Liquidator".

47. However, a consideration of the summary of the reconciliation work dated 2nd July, 2014, makes clear that the reconciliation work completed to date in his capacity as liquidator relates to certain categories of segregated client assets (p. 1) whereas the only investments which are stated to have been reviewed for compensation are certain specified pooled clients' assets (p. 3). Further the Liquidator has made clear that in this application insofar as the Court is being asked to measure fees and remuneration he is not making any claim for the amount which he expressly categorised in the schedule to his first report as relating to reconciliation work all of which related to segregated assets.

48. Hence in the course of the hearing an issue arose as to whether this dispute as to whether the reconciliation work should be properly considered as work done in the winding up for which the Liquidator is entitled to be remunerated (to which much time and submissions were devoted) was on the facts in this application moot. No claim is being made for the work expressly categorised as reconciliation work. However, Counsel for the Liquidator informed me on instructions that certain of the work which had been carried out in relation to property unit trusts included reconciliation work and therefore the Court did have to determine whether or not the Liquidator was entitled to be remunerated as part of his work in the winding up for reconciliation work of the type described.

49. It is also necessary to refer to the fact that by reason of the averments made by the Liquidator at para. 13 of the affidavit of the 18th September, 2014, and his oral evidence in explaining the lesser work required in order to certify to ICCL the "compensatable loss" as compared with the more detailed work explained by Mr. Luby as necessary to certify "net loss" within the meaning of the Act of 1998 there were submissions on a further issue as to whether or not the Official Liquidator is obliged pursuant to the Act of 1998 to certify net loss as distinct from compensatable loss. Compensatable loss is defined as the lesser of €20,000 or 90% of net loss. Unfortunately for many eligible investors of CHC the Court was told the losses are such that it is obvious that limit of €20,000 applies. Counsel for the Committee submitted that, notwithstanding, the Administrator is under a statutory obligation to certify net loss and Counsel for ICCL submitted he was obliged to do so subject to any application to the court pursuant to s. 33(4) of the Act of 1998.

50. I wish to make clear that the Court is not expressing any view on the obligation or otherwise of Mr. Wallace as Administrator on the facts in relation to CHC to certify net loss as distinct from compensatable loss for all eligible investors to ICCL. If that becomes a relevant issue it can be considered at another time. It is not relevant to this application for the following reasons.

51. As already stated I remain of the view that it is appropriate on the facts relating to CHC that Mr. Wallace as official liquidator carry out reconciliation work relevant to determining which client is entitled to be distributed or to have transferred at his or her direction those client assets remaining under his control as official liquidator of CHC.

52. Counsel for the Committee submitted that it follows from the judgment of the English High Court (Jacob J.) in *Re. Telesure Limited* [1997] BCC 580 that the court should only take the view that Mr. Wallace was required to do the reconciliation work as official liquidator if there was no one else in a position to carry out this work. I respectfully disagree. The facts in CHC are different to those in *Telesure* and it does not seem to me that the decision in *Telesure* gives rise to any such general principle. Each winding up in which a liquidator is potentially required to do work in relation to client assets in the sense of assets under the control of or held in trust by the company in liquidation must turn on its own facts. The reason for which I consider Mr. Wallace is obliged to carry out the reconciliation work as official liquidator CHC derives from my conclusion that on the particular facts of CHC an orderly winding up of its affairs requires the Liquidator to arrange for the distribution and transfer of client assets in an orderly fashion. It is the Liquidator who must conduct the orderly winding up. He cannot complete this without the distribution or release of client assets which CHC controlled as part of its business. By reason in particular of the prior fraudulent activity and other facts set out, this in turn requires a reconciliation process in order that the Liquidator has confidence that the assets are being distributed to, or transferred at the direction of those entitled.

53. The more nuanced submission is that even if this work does form part of his work as official liquidator that he should not be remunerated for same as official liquidator by reason of the fact that he may also be required to carry out this work (or part thereof) as Administrator and is separately remunerated for his work as Administrator by ICCL. Mr Wallace has an agreed fee structure with ICCL for his work as Administrator on a per claim (eligible and ineligible) basis disclosed to the Committee and the Court. I accept the general proposition that an official liquidator should not be allowed remuneration by the court for work done as official liquidator if he is being separately remunerated by a third party for that work.

54. On the facts of this application I am not satisfied that there is evidence that the Liquidator has been or is being remunerated as Administrator for any reconciliation work included in the remuneration claim to 31 October 2013 for two reasons. Firstly, the principal reconciliation work in the liquidation to date has related to segregated assets whereas as explained in the summary of 2 July 2014 the certification as Administrator has related only to pooled asset funds. I am satisfied on the facts that the Official Liquidator is not currently being remunerated as Administrator for the detailed reconciliation work which has been done in the liquidation for the purpose of the distribution or transfer of those client assets.

55. Second the Liquidator's overall evidence leads me to a conclusion that in certifying as Administrator in relation to the pooled assets he probably did make use of some work done in relation to client assets as liquidator (whether or not precisely reconciliation work). However, that of itself does not in my judgment mean that he either did that work as Administrator or is being remunerated as Administrator for it. Common sense dictates that he should use work done in the winding up if relevant for the certification work required as Administrator. However, provided the primary purpose of the work is the tasks he has to complete as liquidator it remains work for which he is entitled to be remunerated as liquidator.

56. The work done to 31 October 2013 appears on the evidence to be done as part of the winding up work in the liquidation. For so long as there are assets of CHC available to discharge the Liquidator's reasonable remuneration for such work, then it appears to me to follow that he should be entitled to be paid out of the assets of CHC.

57. The Court was also referred in this context to s. 20(4) of the Act of 1998 (as amended) which provides that ICCL ". . . is not responsible for expenses that an administrator of an investment firm incurs in respect of functions that the administrator performs contemporaneously with functions that the administrator performs as liquidator . . . even though those functions may also relate to the performance of functions as administrator of the firm." However, on the facts relating to the work done to October 2013 this does not arise.

58. For the purposes of the present application insofar as there is included amongst the work done by the Liquidator for which he is now seeking remuneration up to the 31st October 2013, work which falls within the description of reconciliation work already given, it appears to me that the Official Liquidator is entitled to have the Court measure such remuneration on the basis that the reconciliation work done forms part of the work properly done by him as official liquidator in the winding up of CHC and for which he is entitled to be remunerated as official liquidator without any deduction by reason of his role as Administrator.

Relevance of progress or proportion of work completed to date.

59. The Official Liquidator does not dispute that the Court should have regard to the work done to October 2013 in the context of the outstanding work required to complete the winding up of CHC. Counsel on his behalf has placed emphasis on the fact that approximately 40% of client assets aggregating approximately €55m had been distributed or transferred prior to that date. That is a considerable achievement by the Official Liquidator. Nevertheless, there remains very significant work to be done and it would appear more complicated work to enable the distribution and transfer of the remaining client assets.

60. Counsel for the Liquidator has referred to the decisions of this Court in Re. *Sharmane Limited* [2009] 4 I.R. 285. The Official Liquidator and his lawyers are also aware of the practice which has developed in windings up by the court, whereby in the course of the liquidation payments on account of fees, remuneration and legal expenses are made and the court normally would make an overall determination as to the total amount to be allowed for remuneration fees and legal expenses at the end of the liquidation when the work is completed. At that point in time the court is better able to judge the nature and complexity of the work carried out, the importance of the work to the client in the sense of what has been achieved and returned to creditors as well as the time taken to complete the liquidation. The Court is being asked to deviate from that practice principally by reason of a potential application under Art. 158 of the 2007 Regulations.

61. Following directions given in the course of this application the Liquidator prepared a proposal dated 1st August, 2014, in which he outlined the work yet to be completed in the liquidation. Again he divided this into general liquidation work and work in relation to client assets. The estimated time to complete the liquidation in the sense of completing in full the orderly distribution or transfer of client assets depends upon how in particular it is determined that the work should be done in relation to special purpose vehicles (SPVs) which hold properties throughout Europe. The timing varies from three to five years and it is envisaged that the general liquidation work should be completed within the earlier time scale.

62. The Official Liquidator has also estimated the cost of doing the balance of the work in this liquidation both in relation to general company and client related work and prepared an estimated outcome showing estimated future company realisations. Whilst the Court has considered same it appears that there are too many uncertainties to be of direct relevance to the measurement of the fees up to October, 2013. However, it will be directly relevant to future applications and the estimates suggest that company realisations may be available to discharge the cost of general company work.

63. For that reason I draw attention to the judgment in *the Matter of Home Payments Limited (In Liquidation)* [2013] IEHC 507. In it I determined that the court should exercise its discretion under s. 244 of the Companies Act 1963, on the facts of that liquidation by

making an order that the assets of the company be used to discharge the total remuneration costs and expenses in relation to both the company and customer related work in equal priority. The company assets were only sufficient to discharge a portion of the total company and customer work. It was only after such use of the assets of the company that the Court in exercise of its equitable jurisdiction (as it related to trust assets and monies) permitted a deduction to be made in respect of the unpaid balance of the remuneration allowed in respect of customer related work from customer monies. The joint liquidators were however left at a loss in respect of the unpaid balance relating to general company liquidation work. I make this comment as the August 2014 proposal prepared by the Official Liquidator seeks to apply in his forecasts future realisations in the winding up of CHC only towards general liquidation work. If the approach in H*ome Payments Limited* is followed this would not be correct. They would be applied towards all costs of the winding up including client related work.

64. The fees being claimed up to October 2013, and the progress in the liquidation to date must also be considered by the Court in the context of the business plan prepared by the Official Liquidator and submitted to the court in December 2012. A redacted version of this was made available to the Committee in the course of the hearing. That business plan was prepared subsequent to the judgment of October, 2012. The 2012 business plan outlined a timeline with significant progress on distribution of assets through 2013. However, it made clear that the timeline was set out on the basis "that the issue of funding the liquidation costs is resolved by the end to January 2013". Elsewhere it was also indicated that an application would be made to the court by the end of January 2013. This application was in fact made more than a year later.

65. In measuring the remuneration of the Official Liquidator up to October 2013, the Court should, it appears to me, take into account the progress achieved in the liquidation to date, but must also take into account that progress in the context of what the Liquidator had envisaged in December 2012 and the delays in the liquidation since the commencement of 2013.

66. The delay in progress in the liquidation appears primarily to have been caused by the lack of clarity as to how the complex work in this liquidation is to be funded. That is a matter which ought to have been resolved at an earlier date and which must primarily be resolved by the Official Liquidator. There are others who may have a role to play including the Central Bank as both the supervising authority who nominated him and the person subject to whose directions, the liquidation continues to be conducted. For the purpose of measuring the remuneration to October 2013, the Court must have regard to the delays since early 2013 for which the Liquidator accepts (as in the Court's view he must do) some responsibility.

67. For the purpose of placing the remuneration to be assessed in the overall context of the liquidation it is also relevant to note that this application only relates to remuneration in respect of work done up to October 2013. The proposal of 1st August in its estimated outcome only includes additional fees for the Liquidator from Q4 2014. It is not clear whether there are fees to be claimed in respect of the period between 31st October, 2013 and 1st October, 2014. Relevant to this is the fact that it appears there is a further approx. €23m worth of client assets which have been reconciled and awaiting resolution of funding issues for the remaining distribution work. Also there is ongoing work on property unit trusts intended to be released as by reason of continuing payment of management fees the Liquidator is not proposing to seek any contribution from the client to liquidation costs.

Measurement of Fees, Costs and Expenses of Liquidator

68. The general principles according to which the Court should measure the amount of fees of the Official Liquidator are not in dispute. In exercise of its supervisory function the court must measure the reasonable remuneration of the Liquidator. As previously stated (*Re. Sharmane Limited* [2009] 4 I.R. 285. at para. 36), the court should have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client whilst taking into account the total charge out costs computed from the hours spent and relevant hourly rates of the Liquidator and those working with him. Further the Liquidator has helpfully, in his initial report to the court in this application divided the claim in respect of his fees from the 21st October, 2011 to the 31st October, 2013, between the amount charged in respect of what he terms "general work" in the liquidation and "client assets work", and further subdivided, the amount claimed under a number of headings in each of these.

69. In respect of the general work, the total amount claimed (exclusive of VAT and outlay) is €506,144.48. It is relevant to the conclusions which I have reached to note that in the breakdown of that amount he has attributed €55,216.63 to work connected with the Central Bank. That apart and some observation in relation to the hourly rates, the amount claimed for the general work did not attract any particular submission on behalf of the creditors committee, nor did the court raise any questions with the Liquidator in respect thereof.

70. The Liquidator claims for the same period a total sum of €804,664.64 plus VAT in respect of work done in connection with client assets. That sum is claimed at hourly rates which are stated to be discounted rates from the general rates charged by KPMG in accordance with the High Court judgment (Kelly J.) in *Re. Missford Limited* [2010] IEHC 240, [2010] 3 I.R. 756 and other judgments which followed.

71. The said sum was broken down by the Liquidator at Appendix 2A to his report as follows:

Non-Syndicated Property funds €119,002.18

Syndicated Property Funds €140,636.53

Client Correspondence/Queries €293,500.22

Central Bank €63,690.80

Legal €90,805.20

Client Books and Records €24,178.98

HBCWM €72,850.73

Total €804,664.63

72. The above figures exclude any claim in respect of reconciliation work done on segregated cash and equities which the Liquidator had agreed to do for a fee of €115,000 plus VAT. The Liquidator's report includes the amount for such work at €453,256.95. It was explained that this was the cost of such work to KPMG at full charge out rates prior to Missford. As appears from the 2012 judgment, the Liquidator agreed to a fee of €115,000 at a time when he estimated that the costs incurred by him and his team in carrying out reconciliation work prior to the 30th March, 2012, was €235,022.95 (excluding VAT). It appears therefore that subject to the

comments above in relation to the additional €23m (approximately) of client funds reconciled the Liquidator is not seeking to charge for work done after the 30th March, 2012, in respect of such reconciliation.

73. Having carefully considered all the written evidence presented on this application in the affidavits and reports of the Liquidator and in particular the oral evidence of the Liquidator, I have concluded that I should reduce the amount claimed up to the 31st October, 2013, in respect of fees (exclusive of VAT) by a sum of €200,000. My reasons for this deduction are as follows.

74. Whilst I recognise that this is a liquidation of extraordinary complexity and inevitably time consuming by reason of the number of clients of CHC (>1500), nevertheless it appears to me that the total fees (both general and client work) claimed in respect of communications with clients and communications with the Central Bank of approximately €410,000 should not be allowed in full and should be substantially reduced. The evidence is that the directions of the Central Bank which were in place prior to the commencement of the winding up and which precluded the Liquidator both from distributing or transferring sums, investments or assets of clients and also from issuing any statement to any client describing the clients' investments or clients' holdings remain in general in place. They were lifted from time to time in relation to specific clients and assets. The Liquidator in his oral evidence has fairly said that whilst he considered the directions to be of assistance at the outset of the liquidation, he considers that might no longer by the position. Nevertheless, as late as June 2014, he sought the extension of the directions. He also explained to the Court that there continue to be very significant inquiries made by clients, many of whom are frustrated by reason of the inability of the Liquidator's staff to give them information. That inability results primarily from the directions of the Central Bank and possibly also by reason of the lack of clarity on future progress of the liquidation. Whilst it appears to me, inevitable that the Liquidator would have had to spend some time in communication with the Central Bank and more time in communication with clients, nevertheless it appears that the sums being sought for this work are excessive having regard to the value of that work to the creditors and clients in this liquidation. Added to this is the fact that as the Liquidator fairly accepted in his oral evidence there has been a stalling in the work required for the distribution of client assets. This in turn is caused in part by reason of the absence of clarity as to how the balance of the work to be done is to be funded and I conclude delay on the part of the Liquidator in working out a funding plan and progressing the commencement of this application following the judgment of October 2012 and the business plan presented to the Court dated the 5th December, 2012. The primary responsibility for working out a plan to fund the balance of the liquidation rests with the Liquidator. As a matter of common sense the longer the delays the more time is spent on client communication and probably some other additional expense has been incurred.

75. In the course of the hearing I expressed some concern at the continued application of charge out rates in accordance with those allowed in 2010 in *Re. Missford* having regard in particular to information available to the Court and brought to the attention of the Liquidator in relation to average rates paid by NAMA to the larger accountancy firms for work done for it. Nevertheless, having regard to the significant reductions applied by the Liquidator in respect of the reconciliation of the segregated cash and equities and the proposed deduction of €200,000 I am not proposing to make any specific reduction by reason of the charge out rates applied by the Liquidator herein.

76. Accordingly, I will measure the remuneration fees and expenses of the Official Liquidator for the period from the 21st October, 2011, to 31st October, 2013, in a sum of €1,110,809.11 plus outlay of €10,008.19 plus VAT.

77. The court is not being asked on this application to make any order for the payment out to the Official Liquidator. However, it may be helpful to help progress matters to indicate that insofar as there are assets of CHC available in the winding up that it follows from the decisions in this judgment that the Official Liquidator is entitled subject to the priority of his legal costs (and any other prior claim) to be paid such amount out of monies standing to the credit of the winding up.

Measurement of Legal Fees

78. The Official Liquidator seeks an order measuring his legal costs up to the 31st October, 2013, in the sum of €527,876.76. He also seeks an order permitting the payment of same out of the money standing to the credit of the winding up.

79. The Liquidator in his grounding affidavit at para. 19 to 22 inclusive has set out the different elements in the legal fees charged by Messrs McCann Fitzgerald, both in respect of their own work, the fees incurred to counsel retained by them and outlay. He also notes the reduction of 50% of the fees sought in respect of the 2012 application for directions in relation to the Liquidator's fees, costs and expenses associated with the reconciliation of the client segregated cash and equity accounts pursuant to the order made by the Court on the 15th November, 2012,

80. The amount of the fees charged by Messrs McCann Fitzgerald and counsel is supported by two reports from Behan and Associates, Legal Costs Accountants dated the 26th February, 2014, and the 28th March, 2012. In those letters they express the view that if an itemised bill of costs were prepared for taxation in accordance the amounts set out that the amounts claimed would be allowed in taxation. No submission was made on behalf of the Committee raising any particular objection to the amount of the legal fees. They expressed general concern as to the overall costs of this liquidation, a concern shared by the Court. The Court has already in substance reduced the amount of legal costs recoverable by reason of the 50% reduction applied to the costs associated with the application for directions in 2012 amounting to approximately €28,000.

81. The reasons for which the court has reduced the amount of remuneration of the Official Liquidator as set out above are not reasons which it appears as a matter of probability contributed to additional legal costs being incurred. In those circumstances and having regard to the prior reduction made, it appears appropriate to allow the legal costs claimed in respect of the period up to the 31st October, 2013 in full.

82. As there are presently in the liquidation sufficient funds to meet the amount being allowed in respect of legal costs and no evidence of a significant expense to be paid in priority to same, there will be an order for the payment of either the amount allowed or the unpaid balance of same. The reason I state this in the alternative is I note from para. 22 of the grounding affidavit that the solicitors were paid a sum of €73,882.67 inclusive of VAT in respect of reconciliation of client funds prior to the 31st October, 2013. This amount appears to be included in the measured amount. It is also unclear as to whether the measured amount is inclusive or exclusive of VAT having regard to the order sought at para. 2 of the notice of motion and para. 22 of the grounding affidavit. This also requires clarification prior to the order being drawn.

Concluding Remarks

83. This application is only the first part of a notice of motion which comes before the Court exercising its supervisory jurisdiction in the winding up by the court. Notwithstanding the limited issue which the court was actually asked to determine there were wide ranging submissions and oral evidence from the Liquidator all of which I have considered carefully in preparing this judgment and hence propose making some further comments for consideration in particular by the Official Liquidator and other relevant persons. They follow on some comment I made at the end of the hearing. My concern as to how a fair solution for all is to be determined

without significant cost and further delay has been heightened by the detailed consideration given since the hearing to all the papers and the transcripts of the oral evidence. It is clear and has been for some time that the principal issue holding up further progress in this liquidation is uncertainty in relation to how the Liquidator is to be indemnified in respect of his reasonable remuneration, fees, legal costs and expenses which will be incurred in completing the orderly winding up of CHC. It is highly desirable that a solution is found promptly and if at all possible without the necessity for further lengthy court applications.

84. There are many potential liquidations where it is clear to both the petitioner for the order for winding up and the liquidator requested to act that the assets of the company may not be sufficient to meet the probable costs and expenses in the winding up. A practice has developed in this jurisdiction and has been approved of by the court on a pragmatic basis that provided disclosure is made, a liquidator may enter into an arrangement with the petitioner or another creditor to indemnify him in respect of costs on an agreed basis in the event that the assets realised in the winding up are not sufficient to discharge his reasonable remuneration and legal costs. This is a regular feature of windings up by the court where the Revenue Commissioners are the petitioners. Absent such an arrangement it would not normally be possible to get a liquidator to act in certain liquidations where it is considered a winding up by the court is desirable or indeed necessary.

85. In evidence, Mr. Wallace informed the court that he did not obtain any such indemnity from the Central Bank at the time he accepted the nomination to act as Liquidator. He also fairly indicated that this arose by reason of a mistake on his part as to the probable assets of CHC. At all material times CHC has been spoken about as a company with approximately €1.1bn in assets under management. It appears that it was overlooked that the assets under management were not beneficially owned by CHC and hence not prima facie available to discharge the expenses of the winding up.

86. It is of course not possible to say now what would have occurred if the mistake as to the available assets in CHC had not been made by Mr. Wallace at the time when the Central Bank sought to nominate him as Official Liquidator. However, it is clear from the judgment of Hogan J. in making the proposed order for winding up that it was then the view of the Inspectors, who were officials of the Central Bank, that the court should make an order for the winding up of CHC. Any such order inevitably required the appointment of a liquidator and common sense suggests that if the true position had been identified arrangements would have had to have been put in place which enabled a liquidator with the type of experience of Mr. Wallace to be appointed. In addition KPMG had already carried out work which meant there were efficiencies in appointing a liquidator from that firm.

87. Mr. Wallace when giving evidence made very clear his ambition to try and finalise this liquidation as soon as feasible. Nevertheless, considerable work remains to be done as indicated in his proposal of the 1st August, 2014. That document brings some clarity as to what remains to be done and also the choices to be made going forward. Mr. Wallace's ambition to complete the work and take a reasonable approach to remuneration was demonstrated by an indication at one point in his evidence that he would be prepared to forego a part of the claimed remuneration amounting to approximately €800,000 if that was the only matter required to enable the liquidation be completed.

88. Regrettably it is clear that that is not the only matter required. It is not appropriate that the Court give any particular indication about the balance of this application. Nevertheless, having regard to the detail of the evidence presented in this application, the nature of the client assets remaining to be distributed and applicable regulatory restrictions and the point of time in the liquidation when this application is being brought it is appropriate to emphasise that there remain many difficult issues relating to any proposed application under the 2007 Regulations.

Order and Future Directions

89. I will hear counsel prior to determining the precise order to be made on this part of the notice of motion and further directions to be given in respect of the balance of the notice of motion.