THE HIGH COURT

[2017 No. 239 COS]

IN THE MATTER OF MARLBORO HOLDINGS (DGT) LIMITED (IN VOLUNTARY LIQUIDATION) AND

IN THE MATTER OF THE COMPANIES ACTS, 2014

AND IN THE MATTER OF SECTION 588, 638 AND 698 (9) OF THE COMPANIES ACT, 2014

BETWEEN

ALLIED IRISH BANKS PLC

APPLICANT

AND

THOMAS O'DRISCOLL

RESPONDENT

AND BY ORDER OF THE COURT

ANTHONY J. FITZPATRICK

SECOND RESPONDENT

AND

MARLBORO HOLDINGS (DGT) LIMITED (IN VOLUNTARY LIQUIDATION)

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 12th day of July, 2018

1. The issue for decision in this case is whether the second named respondent, Mr. Fitzpatrick, was validly elected liquidator of Marlboro Holdings (DGT) Ltd ("the company") at a meeting of creditors held on the 23rd July, 2017. This in turn depends upon whether the chairman of the meeting, the respondent, was correct to rule the value of the claim of the applicant as unascertained and therefore nil.

The facts

2. By letter of sanction dated 3rd September, 2010 Allied Irish Banks Plc ("the bank") offered the company three facilities, being the renewal of three existing facilities in the amount of €1,095,000 in respect of the first facility, €500,000 in respect of the second facility and €399,000 in respect of the third facility subject to the terms and conditions therein set out. Each of the facilities was to be repaid or refinanced by the 31st March, 2011. The facility letter was accepted on the 27th September, 2010.

3. In the event the facilities were neither repaid nor refinanced and ultimately the properties securing the facilities were sold by the company and the net proceeds of sale were applied in diminution of the relevant outstanding loan facilities. There were negotiations in 2015 and 2016 to try to compromise the personal indebtedness of the respondent, the residual debt of the company and the debt of a related company, Thomas J. O'Driscoll & Associates Ltd. The global settlement of €1.15 million offered in April 2015 was rejected by the bank's credit committee and the bank made a counter offer on 17 December 2015. Ultimately the negotiations were unsuccessful and the respondent's agent, Ms. Olivia O'Leary, by email dated 11 March 2016 said that "what was agreed months ago is off the table. Currently we don't have any offer to give AIB." Thereafter, by letter of demand of the 7th October, 2016 the bank demanded repayment from the company of the residual sums then due on foot of each of the three loan facilities. In respect of the first facility the balance outstanding was €911,037.76; in respect of the second facility, €363,552.38 and in respect of the third facility, €223,323.63. The total balance due in respect of the three facilities was €1,497,883.77. There was no response to say that these sums were not due and owing.

4. The company filed unaudited abridged financial statements for the year ended 31st December, 2015 in the Companies Registration Office on the 23rd November, 2016. The accounts were dated 9th November, 2016 and were signed by the respondent and Ms. Olivia O'Leary, the directors of the company. The accounts described creditors: amounts falling due after more than one year as being €1,484,844. The carrying amount of financial liabilities is stated as €1,499,637. In the notes to financial statements at Clause 2.2 the directors state:

> *"2.2 Going concern*
>
> *The company incurred a loss before tax for the year of €46,498 and has a negative shareholders' funds [sic] of €1,090,407. The company is dependent on the continued support of its bankers. The company is currently in negotiation with AIB in relation to the residual debt. The directors have prepared the financial statements on a going concern basis on the assumption that the negotiations with AIB will have a favourable outcome."*

5. No agreement was in fact reached and the bank's solicitors served a statutory notice pursuant to s. 570 of the Companies Act, 2014 on the 2nd June, 2017 formally demanding payment of the sum of €1,508,122.60 from the company.

6. The company's solicitor replied to the bank's solicitor by email dated 15 June, 2017 stating "our client disputes the extent of the debt alleged and requires details as to what how [sic] the sum Claimed is arrived at.". It did not write asserting that the debt had been compromised and that the debt had been reduced to nil. Instead on 9th June, 2017 the company resolved to place the company in voluntary liquidation. On the 12th June, 2017 the company published a notice pursuant to s. 585 of the Act of 2014 in the Irish Daily Mail advising creditors of a meeting fixed for the 23rd June, 2017. The company did not properly notify the bank as a creditor of the company of the meeting pursuant to s. 587 (2) of the Act of 2014. On the 16th June, 2017 Ms. Mary Whelan, case manager of the bank, wrote to the directors of the company notifying them of this omission and requesting that they arrange for the notice to be forwarded immediately to the bank and to confirm the name and address of the proposed liquidator. The letter stated:

> *"As a list of creditors has not been received, please note that pursuant to s. 587 (4) of the Companies Act, 2014, Aaron Sweeney of AIB Bank will attend at the registered office of the company at 3.30 pm on Monday the 19th June, 2017 to inspect the list of creditors."*

7. By email dated 19th June, 2017 Ms. Olivia O'Leary emailed documents to Ms. Whelan in relation to the proposed creditor's meeting. Those documents stated that the person to be proposed for appointment as liquidator had not yet been decided but in the email Ms. O'Leary identified the proposed liquidator as Mr. Tony Fitzpatrick of Fitzpatrick Dwyer & Co. Clonmoney House, Newenham Street, Limerick. She said that there was a list of creditors in the front desk for Aaron Sweeney to pick up at any time on Monday that suited. The list of creditors listed AIB Bank as the first creditor. Other creditors included directors of the company, Olive O'Driscoll, Thomas O'Driscoll and Olivia O'Leary.

8. On 23rd June, 2017 the members of the company resolved to wind up the company and nominated Mr. Fitzpatrick to be the liquidator of the company. At the creditors meeting on the 23rd June, 2017, the bank was represented by Mr. Aonghus Carney and its solicitor, Mr. Donnchadha Murphy of Barry C. Galvin and Son solicitors and they were accompanied by Mr. Barry Donoghue, one of the bank's nominees to act as liquidators of the company. Mr. Carney and Mr. Murphy were presented with a directors' estimated state of affairs as at 23rd June, 2017. No value whatsoever was attributed to the bank's debt. Note 1 of the schedule of unsecured creditors stated:

> *"The AIB debt is in dispute and therefore the directors have decided that, as same is not ascertained, it would be misleading to include any amount in the statement of affairs at this time."*

The total unsecured creditors (excluding the bank) was €28,961. Of this, €23,857 was made up of the respondent, the chairman of the meeting, and his wife, Ms. Olive O'Driscoll and their fellow director Ms. Olivia O'Leary.

9. The minutes of the meeting records that a representative of the bank sought to nominate Barry Donohue and/or Conor Pyne as liquidator but the respondent concluded that there were three creditors entitled to vote and that the bank's debt was unascertained and therefore its vote was nil. Mr. Carney questioned the respondent in relation to the treatment of the debt of the bank and asked that a minimum value be allocated to the claim for the purpose of voting but this was refused. The respondent said that the bank had entered into a deal and then subsequently reneged on it. Therefore, there was uncertainty as to the bank's debt and it was not entitled to any vote on the appointment of a liquidator. As result the respondent, his wife and Ms. O'Leary, as the three creditors held to be entitled to vote at the meeting, secured the nomination of Mr. Fitzpatrick to act as liquidator.

10. The bank was dissatisfied with the conduct of the creditors meeting and with the decision of the respondent not to allow the bank to vote at the meeting in respect of its debt. The bank claims that the indebtedness had been recognised in the filed accounts of the company over many years and that the actions of the respondent appeared to have been motivated solely by the desire to ensure the successful nomination of the members and shareholders own nominee (Anthony J. Fitzpatrick) as liquidator.

11. It issued an originating notice of motion on 5th July, 2017 for the purposes of addressing the claimed wrongful actions of the respondent and to rectify the situation. Having regard to the quantum of the company's indebtedness to the bank in comparison to the quantum of the balance of the creditors (if admitted it represents 98% of the unsecured creditors), the bank was and is entitled to ensure that its own nominees, Mr. O'Donoghue and Mr. Pyne, are appointed to act as liquidators of the company.

12. The bank brought an application to amend its originating notice of motion on the 17th July, 2017 which was heard on the 24th July, 2017 seeking to change the name of the respondent (from Mr. Brendan Dooley to Mr. Thomas O'Driscoll) and to amend the sections of the Act referred to in the title to proceedings. By order of Mr. Justice Keane on the 24th July, 2017 the amendments were made. The order continued:

> *"And upon hearing what was alleged by said counsel and by counsel for Anthony J. Fitzpatrick the liquidator of Marlboro Holdings DGT Ltd (in voluntary liquidation)*
>
> *It is ordered that the said Anthony J. Fitzpatrick be and he is hereby joined as respondent to the within proceedings."*

The order was perfected on the 28th July 2017 and the motion was then adjourned for hearing to the 9th October, 2017.

13. On the 6th October, 2017 Messrs. Herbert Kline solicitors entered an appearance for Marlboro Holdings DGT Ltd (in voluntary liquidation), not for Mr. Fitzpatrick.

14. The respondent swore a replying affidavit on the 9th October, 2017 where he detailed negotiations entered into between his solicitors and solicitors for the bank between April and December, 2015. In relation to the company's debts, he says that the bank's residual debt was shown in full in the accounts for the year and 31st December, 2015on advices from his accountants. At para. 20 of his affidavit he stated:

> *"I say in the directors' estimated statement of affairs for each company I did not record any amount due to the AIB bank as a creditor as, in each case, I considered the amount due to be unascertained. I could not quantify the debt due to the bank at the time. I was uncertain when preparing statement of affairs leading up to the creditors meeting as nobody could confirm the sums owing to the bank to be entered in the statement of affairs given the uncertainty created by reason of the unresolved dispute concerning the settlement agreement and ongoing efforts to reach a satisfactory conclusion with the bank. The bank negotiations had ebbed and flowed up to the creditors meeting. My solicitor advised that he was confident that there was a deal to be done with the bank. I did not accept at that time that the bank's debt was ascertainable in the circumstances."*

15. In reply to the respondent's affidavit Mr. Carney swore an affidavit on the 27th November, 2017. He stated that the proposal to

compromise the debt due to the bank by the company and the related company was subject to approval by the applicant's credit committee and the credit committee rejected the proposed settlement figure. No proposal of any nature has been made by the respondent or any related party to attempt to resolve either his personal indebtedness or the indebtedness of his related companies since March 2016.

16. At the hearing of the motion, the respondent did not appear. Counsel instructed by Mr Kilcline appeared to represent the company in liquidation rather than Mr Fitzpatrick personally, though he had previously apparently appeared for Mr. Fitzpatrick as the liquidator of the company and applied to be joined as a respondent to the proceedings. The opposition to the application was based on one affidavit sworn by the respondent and four sworn by Mr. Fitzpatric.

The statutory provisions.
17. The creditors meeting was held pursuant to s. 587 of the Act of 2014. This section provides as follows:

> *587. (1) The company shall cause a meeting of the creditors of the company (the "creditors' meeting") to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for a creditors' voluntary winding up is to be proposed.*
>
> *(2) For that purpose, the company shall send to each creditor, at least 10 days before the date of the creditors' meeting, notice in writing of such meeting.*
>
> *(3) The notice required by subsection (2) shall—*
>
> > *(a) state the date, time and location of the creditors' meeting,*
> >
> > *(b) state the name and address of the person at that time proposed for appointment as liquidator, if any, and*
> >
> > *(c) either—*
> >
> > > *(i) attach a list of the creditors of the company, or*
> > >
> > > *(ii) notify the recipient of his or her rights under subsection (4), together with details of the location at which the list of creditors of the company may be inspected.*
>
> *(4) A creditor who has not been provided with a copy of the list of the creditors of the company under subsection (3)(c)(i) may, at any time prior to the holding of the creditors' meeting—*
>
> > *(a) having given the company 24 hours notice in writing of his or her intention to do so, inspect during business hours the list of creditors of the company at the registered office of the company, or*
> >
> > *(b) request the company in writing to deliver a copy of the list of creditors of the company to him or her, and such a request shall be complied with by the company.*
>
> *…*
>
> *(6) The company shall cause notice of the creditors' meeting to be advertised, at least 10 days before the date of the meeting, once at least in 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situate; such notice is not required to include the list of creditors attached, pursuant to subsection (3)(c)(i), to the notice required by subsection (2).*
>
> *(7) The directors of the company shall—*
>
> > *(a) ause a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims, to be laid before the creditors' meeting, and*
> >
> > *(b) appoint one of their number to preside at that meeting and it shall be the duty of the director so appointed to attend the creditors' meeting and preside at it.*
>
> *…*
>
> *(11) If default is made by the directors of the company in complying with subsection (7) or by any director in complying with his or her duty under that subsection, the directors or director, as the case may be, shall be guilty of a category 3 offence. "*

Section 588 of the Act governs the appointment of a liquidator:

> *588. (1) The creditors and the company at their respective meetings mentioned in section 587 may nominate a person to be liquidator for the purpose of winding up the company.*
>
> *(2) Subject to subsection (4), if—*
>
> > *(a) the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and*
> >
> > *(b) if no person is nominated by the creditors, the person, if any, nominated by the company shall be liquidator.*

(3) Where a person nominated by the company to be liquidator takes office before the creditors make their nomination and a different person is nominated by the creditors, the first-mentioned person shall, by virtue of subsection (2)(a), vacate office on the second-mentioned person's being nominated but—

(a) this is without prejudice to subsection (4); and

(b) for the period before the holding of the creditors' meeting under section 587 , the first-mentioned person's powers as liquidator are restricted as provided for in section 630 (2).

(4) Where different persons are nominated as liquidator, any director, member or creditor of the company may, within 14 days after the date on which the nomination was made by the creditors, apply to the court for the following order.

(5) That order is an order either—

(a) directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or

(b) appointing some other person to be liquidator instead of the person nominated by the creditors, and the court, on the making of an application under subsection (4), may make such an order accordingly.

(6) If at a meeting of creditors mentioned in section 587 a resolution as to the creditors' nominee as liquidator is proposed, it shall be deemed to be passed when a majority, in value only, of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution.

18. A creditor's entitlement to vote at a meeting of creditors convened pursuant to s. 587 is governed by the provisions of s. 698.

698. (1) Subject to subsection (3), in the case of a meeting of creditors held pursuant to section 666 or of an adjournment thereof, a person shall not be entitled to vote as a creditor unless he or she has duly lodged with the liquidator, not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting, a proof of the debt which he or she claims to be due to him or her from the company.

(2) In the case of any other meeting of creditors and subject to subsection (3) and subsections (5) to (8), a person shall not be entitled to vote as a creditor unless he or she has lodged with the liquidator a proof of the debt which he or she claims to be due to him or her from the company and such proof has been admitted wholly or in part before the date on which the meeting is held.

(3) Neither subsection (1) or (2) shall apply to any creditors or class of creditors who by virtue of this Act or rules of court are not required to prove their debts, and subsection (2) shall not apply to a meeting referred to in section 587 .

(4) The following subsections contain exceptions to, or apply restrictions on the exercise of, a creditor's entitlement to vote at a meeting to which subsection (2) applies.

(5) In respect of any unliquidated or contingent debt or any debt the value of which is not ascertained, the chairperson may put upon such a debt an estimated minimum value for the purpose of entitlement to vote and admit the creditor's proof for that purpose.

(6) A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him or her unless he or she is willing to do each of the following, namely:

(a) to treat the liability to him or her on the bill or note of every person who is liable thereon antecedently to the company and against whom an adjudication order in bankruptcy has not been made, as a security in his or her hands;

(b) to estimate the value of that liability; and

(c) for purposes of voting but not for the purposes of dividend, to deduct that liability from his or her proof.

(7) Unless he or she surrenders his or her security, a secured creditor shall, for the purpose of voting, state:

(a) in his or her proof; or

(b) in the case of a meeting that falls within subsection (8), in the statement referred to in that subsection,

the following matters:

(i) the particulars of his or her security;

(ii) the date when that security was given; and

(iii) the value at which he or she assesses that security,

and shall be entitled to vote only in respect of the balance (if any) due to him or her after deducting the value of that security.

(8) For the purpose of voting at a meeting in a voluntary winding up (not being a meeting referred to in section 587), a secured creditor shall, unless the secured creditor surrenders his or her security, lodge with the liquidator, before the meeting, a statement stating the matters referred to in subsection (7)(i) to (iii).

(9) The chairperson may admit or reject a proof for the purpose of voting, but an appeal shall lie to the court against his or her decision on that matter.

(10) If the chairperson is in doubt whether a proof should be admitted or rejected the chairperson shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

Discussion

19. Section 698 (1) applies to a meeting of creditors held pursuant to s. 666 of the Act or any adjournment of such a meeting. Section 698 (2) applies to any other meeting of creditors. However, subsection (2) does not apply to meetings of creditors subject to subsection (3) and subsections (5) to (8). Section 698 (3) provides that "…subsection (2) shall not apply to a meeting referred to in s. 587". Section 698(4) provides:-

"(4) The following subsections contain exceptions to, or apply restrictions on the exercise of, a creditor's entitlement to vote at a meeting to which subsection (2) applies.

Two things flow from this subsection. It applies to the remaining subsections in s. 698 which can only apply to meetings to which subs. (2) applies. Secondly, a meeting held pursuant to s. 587 is not a meeting to which subs. (2) applies. It follows that subs. (5)-(10) of s. 698 do not apply to a meeting of creditors held pursuant to s. 587. In addition, the Rules of the Superior Courts have been amended by the repeal of former O. 74 r. 71 which previously applied to meetings of creditors, reflecting the fact that the Rules have now been incorporated in the statute. It may be that the legislature thereby inadvertently created an anomaly in relation to meetings held pursuant to s. 528. The net result is that there is in effect a legislative lacuna governing the voting of creditors at s. 587 meetings.

20. The Act of 2014 revised the statutory provisions in relation to the role of creditors in voluntary liquidations. Section 587 enhanced the information to be given to creditors in advance of the meeting. The company is obliged to send to each creditor ten days' notice in writing of the meeting stating the date, time and location of the meeting, the name and address of the person at the time proposed for the appointment of liquidator, if any, and to attach a list of the creditors of the company or notify the creditor of the right to inspect the list of the creditors of the company. If the company is in default in respect of any of these obligations, it is guilty of a category 3 offence. Subsection 7 requires the directors of the company to cause a full statement of the position of the company's affairs together with a list of the creditors of the company **and the estimated amount of their claims** to be laid before the creditors meeting. A default in complying with this requirement is also a category 3 offence. Section 588 of the Act provides that the creditors and the company at their respective meetings may nominate a person to be liquidated for the purposes of winding up the company. If the meetings each nominate different persons, the person nominated by the creditors shall be the liquidator. Specifically, 6 provides that if at a meeting of the creditors resolution as to the creditors nominee as liquidator is proposed, it should be deemed to be passed when a majority in value only of the creditors present personally or by proxy in voting on the resolution have voted in favour of the resolution, continuing the position pertaining under s. 267(3) of the Act of 1963 since 2001. This means that one single large creditor has the statutory right to ensure the appointment of its choice as the liquidator, reflecting the fact that it is the party most concerned in the outcome of the liquidation.

21. There is no specific provision in the Act of 2014 which governs how the value to be attributed to the debt of a creditor who wishes to vote at the meeting is to be assessed for the purposes of s. 587. The relevant provisions of s. 698 do not apply and former O. 74 r. 71 has been repealed. On the other hand, the Oireachtas has made it clear that the single largest creditor may have the right to have its nominee as liquidator appointed liquidator. I also note that the directors are required in completing the statement of affairs, to estimate the amount of each creditor's claim. It is therefore not appropriate when preparing a statement of affairs in respect of a disputed debt simply to enter a nil value on the basis that the amount cannot be ascertained because it is disputed.

22. In *Re Eden Further Education Ltd; Motusmi v. Fitzpatrick and Hossain* [2015] IECA 70 the Court of Appeal had to consider the issue of creditors' proof of debt and the right to vote at the creditors meeting under the regime in place prior to the coming into force of the 2014 Act. Hogan J. pointed out that a liquidated claim does not necessarily mean that it is an ascertained claim within the meaning of O. 74 r. 68. At paras. 29 and 30 of the judgment he held:

"The context of r. 68, therefore, is to afford the unsecured creditors the right to choose the liquidator of their choice based on the value of their claim. At this stage of the liquidation, the status and extent of such claims is likely to be unclear and, in some cases at least, doubtful. The reference to "ascertained" must, therefore, be understood in this context. It cannot mean "ascertained" in the sense of judicially ascertained, since it would be quite unrealistic to expect the creditor to prove the debt at a creditor's meeting in the same manner as if he or she were doing so in a court of law. This is particularly so given that such meetings are often convened at short notice and in circumstances which may well take the creditor somewhat unawares.

…

The reference to "ascertained" must accordingly be understood as a reference to a specific sum that is capable of ready assessment and calculation, often by reference to documents such as the statement of affairs prepared by the company or unpaid invoices, payment records, tax assessments and other statutory demands to which the creditor can readily point."

23. It seems to me that the bank statements of account would be another such example.

24. The judgment continued:

"the fact that the particular sum may (or may not) be deemed to be admissible for voting purposes as an ascertained liquidated debt could not be dispositive of the ultimate question as to whether that particular sum is actually due to the creditor: all that this means is simply that by reference to the documentary proofs which are have either been supplied

by the creditor or are otherwise available to the chairman at the meeting such a sum would appear, on the balance on probabilities, to be due by the company to the creditor."

25. Inherent in this passage is an obligation on the chairman of the meeting to consider the proofs which the creditor wishes to tender in support of its assertion that it is entitled to vote at the meeting in respect of a particular liquidated sum. Hogan J. rejected the suggestion that "ascertained" must mean "known" or "made certain" on the basis that this would be unworkable and at odds with the underlying objectives of the rules governing the voting procedures. In that case he held that the claims of 190 students to damages for breach of contract were properly disallowed for voting purposes by the chairman at the creditors meeting. At para. 68 he held:

"I have reached this conclusion not because the claims were unliquidated claims, but rather because irrespective of that status, there was no mechanism whereby the "value" of these claims within the meaning of s. 267(3) of the 1963 Act could have been objectively ascertained in these circumstances and for this purpose."

26. In the *Revenue Commissioners v. Ladaney Ltd (in voluntary liquidation)* [2015] IECA 62 the Court of Appeal considered whether the chairman of the creditors meeting was correct not to allow proof of the company's debt due to the Revenue Commissioners. At para. 30 of the judgment Finlay Geoghegan held:

"The 1963 Act does not expressly address the question as to which creditors are entitled to vote at a meeting called pursuant to s. 266. [the precursor to s. 587] However, s. 266(1) requires "a meeting of the creditors of the company" to be held. In the absence of any contrary indication it must mean a meeting of all creditors of the company. Section 267(3) deems a resolution as to the creditor's nominee as liquidator to be passed "when a majority, in value only, of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution". This also indicates an intention that all creditors so present may vote but also appears to require that there be a means of determining for voting purposes the value of their debt. However, the legislation does not indicate how such value should be determined for voting purposes. There is no provision enabling "a just estimate" of the value of a debt to be made for the purposes of voting at a creditors meeting similar to that in s.283 of the 1963 Act which expressly applies only to proof of debts."

27. The judgment went on to consider O. 74 rr. 68 and 71 which purport to exclude certain creditors from voting at a creditors meeting (and which do not apply in the case under consideration). At para. 32 she said:

"Given the apparent entitlement of all creditors to vote at a meeting held pursuant to s.266(1) any restriction on the right to vote by reason of the necessity to attribute a value to the vote must be narrowly construed and only insofar as is necessary to make workable the voting provision in s. 267(3).

In that context it appears that O. 74, rr. 68 and 71 must be construed as intended to enable the chairman of a creditors meeting to attribute a value to the debts of all creditors voting on a resolution to appoint a liquidator in two ways. Firstly, r. 68 (as the more drastic provision) excludes from an entitlement to vote, those creditors whose debt is of such a nature that it is not possible to objectively attribute or ascertain a value for voting purposes at the date of the meeting. Secondly, provision is made in r. 71 for the voting by those creditors whose debt is ascertained by either the debtor or creditor but the existence or amount or value of the debt is disputed."

28. She went on to conclude that r. 68:

"could not be construed in a manner consistent with the Companies Acts as intended to exclude from voting a creditor who has a liquidated debt the amount of which is capable of ascertainment by either debtor or creditor but where the amount or value of the debt is in dispute. The value for voting purposes of such creditors is governed by rule 71."

29. In determining whether the chairman was correct in declining to admit the proof of the claim of the bank for the purposes of voting on the appointment of a liquidator, the court is entitled to consider whatever admissible evidence on the issues the parties have placed before the court. The test enunciated by Hogan J. is whether by reference to that evidence the sum would appear, on the balance of probabilities, to be due by the company to that creditor.

30. In this case the evidence establishes that there was in fact no dispute as to whether the claim of the bank had been settled. In March 2016, as recorded in an email from Ms. O'Leary to Mr. Stack on 11th March, the respondent's agent, his brother, Mr. Michael O'Driscoll, acknowledged that the offer of 2015 had been withdrawn and that the respondent and the companies had no further offer to make to the bank in respect of their liabilities. There was no evidence of any offer made after that date. The bank demanded repayment of the three facilities in October 2016 to which there was no objection or reply. The company's accounts for the year ended 31st December, 2015, which were signed by the respondent in November 2016, acknowledged the debt of the bank and expressly acknowledged that as of that date the company was in negotiations with AIB i.e. that it had not concluded a settlement. When the statutory demand was sent on the 2nd June, 2017 demanding €1.5 million the response of the company solicitor was to ask how this figure was calculated. He did not respond to say that the sum had been compromised or that no money whatsoever was due and owing to the bank or that the parties were in negotiation. While there may in the future be a dispute as to the precise quantum of the claim, upon which I make no observation whatsoever, it was clear on the balance of probabilities that this very considerable debt had not been compromised, never mind reduced to a nil value, as was argued by Mr. Fitzpatrick.

31. The position of the respondent amounts to this. The fact that there were negotiations in the past in relation to the debt which did not lead to a settlement nonetheless means that the debit is disputed and therefore no value can be attributed to the claim with the result that the credit cannot vote in respect of any amount of that debt at the creditors meeting called pursuant to s. 587 of the Act. Such a result would be a travesty of justice and blatantly disregards the statutory rights of creditors.

32. While neither r. 68 nor r. 71 applies in this case, the analysis of Finlay Geoghegan J. in *Ladaney (in Voluntary Liquidation)* is clear. Any restriction on the right to vote by reason of the necessity to attribute value to the vote must be narrowly construed and only insofar as it is necessary to make workable the voting provision, in this case in s. 588 (6). The manner in which the voting provision may operate is illustrated by the former r. 71 which provided that if the chairman of the meeting was in doubt whether a proof should be admitted or rejected *"he shall market as being objected to and* ***allow the creditor to vote*** *subject to the vote being declared invalid in the event of the objection being sustained."* Finlay Geoghegan J. noted that this rule provided for the voting of those creditors whose debt may be ascertained **by either the debtor or the creditor even if the existence or amount or value of the debt is disputed**.

33. It follows that the respondent ought not have excluded the bank from voting at the creditors meeting to the full value of its claim of €1,508,122.60. It likewise follows that Mr. Barry Donohue and Mr. Conor Pyne of Mssrs. O'Connor & Pyne & Co. Chartered Accountants and Registered Auditors should have been appointed the liquidators of the company at the meeting. That being so it is appropriate that they now be appointed as joint liquidators of the company in place of Anthony J. Fitzpatrick notwithstanding the delay which has occurred in this case. While this may result in extra costs, as the largest creditor by far the company (holding 98% of the debt in June 2017) this will primarily be a matter of the bank and, in view of the fact it proceeded with the motion, I assume it is a cost it is willing to accept as the price of vindicating its statutory rights.

Technical objections by the second named respondent
34. Mr. Fitzpatrick argued that before the bank could bring an application under s. 638 of the Act of 2014 (or one assumed, the other sections upon which the application proceeded) it must first obtain leave of the court so to do under s. 678 (1) of the Act of 2014. This provides:

> *678. (1) When in relation to a company—*
>
> *(a) a winding-up order has been made,*
>
> *(b) a provisional liquidator has been appointed, or*
>
> *(c) a resolution for voluntary winding up has been passed,*
>
> *no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.*

The section prohibits a party commencing proceedings against the company except by leave of the court where either a winding up order has been made, a provisional liquidator has been appointed or a resolution for voluntary winding up of the company has been passed. These proceedings are not an action or proceeding against the company. The bank is not suing the company, it is firstly suing Mr. O'Driscoll, the chairman of the meeting. No relief is sought against the company. It seeks to rectify a wrong that occurred at a meeting of the creditors of the company, not a wrong of the company or indeed of the liquidator subsequently appointed at that meeting. This point is misconceived.

35. Secondly it was argued that the bank should have invoked the jurisdiction under s.588 (4). Subsection 4 provides that any director, member or creditor of the company may within fourteen days after the date on which the nomination or the liquidator was made by the creditors apply to the court for an order *inter alia* appointing some other person to be liquidator instead of the person nominated by the creditors. In this case Mr. Fitzpatrick was nominated as liquidator of the company at the creditors meeting on the 23rd June, 2017. The bank brought its originating notice of motion on the 5th July, 2017 pursuant to the provisions of s. 588, 637 and 689 of the Companies Act, 2014. Subsequently the title to the proceedings was amended by order of the court on the 24th July, 2017 so that the matter has been brought pursuant to ss. 588, 638 and 698 (9) of the Companies Act, 2014. This means that the proceedings were in fact brought pursuant to s. .588 (4) within the fourteen days established in subs. 4. Therefore, as a matter of fact the allegation that the application was brought pursuant to s. 588 or, if brought, was out of time, is incorrect.

36. The third objection was that the bank ought to have invoked the jurisdiction under s. 637 of the Act. The section provides:

> *"637. (1) This section applies at any time subsequent to the appointment of a liquidator of a company under section 588 in a creditors' voluntary winding up.*
>
> *(2) In paragraphs (a) to (c) of subsection (4) "liquidator"—*
>
> *(a) does not include a person whom the court has directed to be, or whom the court has appointed to be, liquidator of the company under section 588 (5),*
>
> *(b) shall be deemed to include the one or more liquidators appointed by the creditors in exercise of the powers under any such paragraph.*
>
> *(3) Where this section applies, the creditors may, at a meeting convened for that purpose, by resolution of a majority, in value only, of the creditors present personally or by proxy and voting on the resolution, exercise the following powers.*
>
> *(4) Those powers of the creditors are to—*
>
> *(a) remove the liquidator,*
>
> *(b) appoint a liquidator to replace or act with the existing liquidator, or*
>
> *(c) appoint a liquidator to fill a vacancy in the office of liquidator.*
>
> *(5) A meeting of the creditors of the company for the purpose of subsection (3) may be convened, on 10 days' notice to the creditors, by—*
>
> *(a) any creditor of it with the written authority of not less than one-tenth in value of the creditors, or*
>
> *(b) an existing liquidator.*
>
> *(6) The powers conferred on the creditors by subsection (3) shall be subject to any order the court may make with regard to the matter on application to it by any creditor or an existing liquidator.*

37. To convene a meeting pursuant to s. 637 the bank required the written authority of not less than one tenth in value of the creditors of the company. If a meeting is convened pursuant to s. 637, the creditors may appoint a liquidator to replace an existing liquidator by resolution of a majority in value only of the creditors present personally or by proxy and voting on the resolution. In either case, the bank could not exercise a jurisdiction if the company did not recognise the value of its claim. It is clear from the attitude of the respondent at the meeting of 23rd June, 2017 and the opposition to this application that any attempt to invoke this jurisdiction would have been fruitless. In light of the four affidavits sworn by Mr. Fitzpatrick stating that the bank was not a creditor of the company or in the alternative that its claim was nil, it is difficult to see why Mr. Fitzpatrick would have accepted the entitlement of the bank to call a meeting pursuant to s. 637 and would have accepted that the bank was entitled to vote in respect of its claim to be a creditor in excess of €1.5 million.

38. It is also worth noting what in fact occurred after 23 June, 2017. The bank's solicitors wrote to the Directors of the company on the 29th June, 2017 as follows:-

> *"Re Marlboro Holdings (DGT) Ltd*
>
> *Dear Sirs,*
>
> *We confirm that we act on behalf of AIB Bank. We refer to the creditors meeting held on the 23rd June, 2017. We note that at that meeting our client's claim was treated by the chairman as unascertained and accordingly our clients were denied a vote at the creditors meeting. Notwithstanding their nomination of Mr. Barry Donohue as liquidator of the company.*
>
> *Please note that it is our client's intention to make an application pursuant to the Companies Act to inter alia seek the appointment of Mr. Barry Donohue in place of Mr. Anthony J. Fitzpatrick as liquidator."*

The letter was copied to the solicitors who had acted for the company, Bailys Solicitors, and to Mr. Fitzpatrick. Messrs. Baily Solicitors responded on behalf of their client, Marlboro Holdings Ltd (in liquidation), which I take to be a reference to the company. Their letter of the same day stated:

> *We refer to the above matter and to yours of even date.*
>
> *Having discussed the matter with the directors they are willing to consent to the appointment of Mr. Barry Donohue as liquidator of the company replacing Mr. Anthony J. Fitzpatrick.*
>
> *My understanding is that a ten day notice period to the creditors is required however if your client is willing to waive the notice period then I believe that all other creditors will agree to same and the appropriate meeting of the creditors can take place next week in Cork for the purpose of appointing Mr. Barry Donohue as liquidator of the company replacing Mr. Anthony J. Fitzpatrick.*
>
> *You might consider the matter."*

39. The bank's solicitors replied on the 30th June confirming that in the event of a meeting of creditors being arranged the bank will attend and vote in favour of the appointment of Barry Donohue and/or Barry Donohue and Conor Pyne as joint liquidators to replace Anthony J. Fitzpatrick. The letter stated that in order to protect its position the bank intended to institute proceedings to set aside by way of appeal the decision of the chairman of the meeting not to allow proof of debt due by the company to the bank and an order directing the appointment of Barry Donohue and Conor Pyne as joint liquidators or Barry Donohue as sole liquidator of the company. In addition, on the 30th June the bank's solicitors wrote to Mr. Brendan Dooley on the basis that he had in effect acted as chair of the meeting on the 23rd June, 2017 notifying him of the bank's intention to apply to the High Court to set aside the decision not to allow proof of the bank's debt at the creditors meeting of the 23rd June, 2017.

40. Mr. Fitzpatrick objected to Baily & Co. Solicitors corresponding with the bank's solicitors allegedly on behalf of the company after the 23rd June, 2017 as he, the liquidator, had not appointed Baily & Co. to be his solicitors they acted without his instructions. The director creditors of the company, including Mrs. Olive O'Driscoll, called a meeting of the creditors of the company for the 20th July, 2017 to remove Mr. Fitzpatrick as liquidator of the company. It is thus clear that the matter could have been resolved by consent without much expense or delay. However, it was not to be. On the evening of 18th July, 2017 the solicitors instructed by Mr. Fitzpatrick, Herbert Kilclyne Solicitors wrote by registered post to Baily Solicitors and Ms. Olive O'Driscoll as follows:

> *"I act for the above company on the instructions of Anthony J. Fitzpatrick, the liquidator.*
>
> *I have been furnished with a notice, signed by your client/you, that a meeting of creditors is scheduled for 20th July, 2017 at 19 South Mall, Cork. The matters of this company are to be heard in the High Court under case no. 2017/239 COS on 24th July, 2017. Accordingly, my client requires an undertaking that this meeting will be postponed until after 24th July, 2017 (or whatever further date the matter is dealt with). If such an undertaking is not received by 5.30 pm today, my client will apply for a High Court injunction to restrain this meeting without further notice and this letter will be relied upon to fix you/your client with the costs of the injunction proceedings."*

41. In response to this threat of injunctive proceedings Messrs. Bailys' client, Ms. O'Driscoll was extremely concerned at the threat of injunctive proceedings and instructed him to postpone the creditors meeting until such time as the bank's motion had been heard. In the event, a meeting pursuant to s. 637 could not proceed under threat of an injunction to be sought by Mr. Fitzpatrick but instead this application was heard before the court and six further substantial affidavits were sworn, one by Mr. Carney, one by the respondent and four by Mr. Fitzpatrick.

42. In light of the submissions to this court that the bank ought to have proceeded by way of a meeting called pursuant to s. 637 of the Act, this is nothing short of extraordinary. No explanation for the contradictory positions adopted by Mr. Fitzpatrick which resulted in such considerable legal costs being incurred was advanced to the court. In the circumstances, this argument is deeply cynical and in any event there is nothing to suggest that it is mandatory that a creditor invoke this jurisdiction as opposed to the jurisdiction under s. 588 (4) of the Act. I therefore reject this argument.

43. The fourth technical argument was based upon the Supreme Court Judicature Acts. It was said that our court cannot make an order against a non-party and therefore it could not make an order against Mr. Fitzpatrick as he is not before the court. It followed that it was not open to the court to make an order removing him as liquidator of the company and appointing Messrs. Donohue and

Pyne as liquidators in his place. This argument too is misconceived.

44. Firstly, the court is expressly authorised to make such an order pursuant to the Act of 2014 under s. 588 (4), s. 637 (which is not relied on in this case) and s. 638. These express provisions govern the Court's jurisdiction rather than the general provisions of the Judicature Acts. The application is not based upon any actions or inactions of the liquidator but rather on the acts of the respondent at the creditors meeting prior to the appointment of Mr. Fitzpatrick as liquidator. Therefore, it cannot be said that the court is making an order against him. In any event, he is a party to the proceedings and has been since he applied to be joined as a party and was so joined on the 24th July, 2017. In the circumstances, I am not precluded from making an order which would otherwise be just to ensure that the nominee as liquidator of the creditor who is entitled to vote at the creditors meeting in respect of 98% of the company's unsecured debts is appointed liquidator in place of the nominee of the minority of the creditors of the company

45. I should also take this opportunity to deprecate the use by Mr. Fitzpatrick of correspondence headed without prejudice in his affidavits. It was neither appropriate nor necessary. The essence of the bank's claim did not concern the acts or behaviour of Mr. Fitzpatrick at all. The complaint related entirely to matters preceding his appointment. That being so, much of his evidence was not relevant. For the purpose of this application it is the role of the court to assess the evidence and to determine whether on the basis of that evidence the chairman was correct to disallow the bank's proof of debt at the creditor's meeting. Mr. Fitzpatrick's investigations simply replicate but do not relieve the task of the court. His investigations have no bearing on the issue that the court had to decide.

Conclusions

46. While the reliefs sought in the notice of motion are pursuant to ss. 588, 698 (9) and 638, for the reasons I have outlined above I believe that it is not possible to make an order in this case pursuant to s. 698 (9) and I prefer to make the order pursuant to s. 588 (4) and (5) of the Act, rather than s. 638 appointing Mr Barry Donohue and Mr Conor Pyne as joint liquidators instead of Mr Anthony J. Fitzpatrick.