

THE HIGH COURT

[2017 No. 58 COS]

IN THE MATTER OF IRISH ASPHALT LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Tony O'Connor delivered the 4th day of October 2017**Introduction**

1. This Court's judgment delivered on the 31st July 2017, [2017] IEHC 524, (*"the first judgment"*), at paragraph 64 outlined the revised directions which were devised to enable the Court to decide on whether the litigation advantages for the petitioner in the Deceit proceedings could be eliminated or minimised.

2. The 12th September 2017 date for oral submissions was changed initially to facilitate a duty judge roster change and then moved to the afternoon of the first day of Michaelmas term being Monday, the 2nd October 2017. This latter alteration was granted to allow for mediation, which was unsuccessful according to the confirmation given to this Court's registrar last Friday afternoon. The hearings leading to this judgment ended yesterday evening.

3. All of the terms and abbreviations in the first judgment are adopted in this judgment, (*"the second judgment"*).

Starting Point

4. The onus on JECL, having rightfully acknowledged an advantage in the Deceit proceedings from the making of a winding up order, is to assist the Court to establish equity, fairness and justice between the parties in the Deceit proceedings. The parties at the hearing of this petition and this Court, recognised at various stages as probable the decision of a liquidator not to defend the Deceit proceedings on behalf of IAL. Nevertheless, it has to be stressed that such an assumption does not preclude a liquidator from making a decision to the contrary in the future.

Mitigatory Terms

5. The following is a summary of the offers made on behalf of JECL to minimise disadvantages to the defendants in the Deceit proceedings.

(i) JECL is prepared to undertake in reply to the specific minimum requirements set out at paragraph 3.04 of the written submissions dated the 31st August 2017 delivered on behalf of the other Defendants:

(a) not to apply for a default judgment against IAL prior to the delivery of judgment in the Deceit proceedings or their earlier resolution;

(b) to apply without delay for the automatic stay of the Deceit proceedings to be vacated pursuant to Section 678 of the 2014 Act;

(c) to oppose any attempt to adjourn the commencement of the trial in the Deceit proceedings due to commence on the 14th November 2017;

(d) to copy all communications between JECL and its representatives of the one part with a liquidator of IAL or the liquidator's representatives on the other part relating to the litigation and liquidation.

(ii) JECL on Tuesday, the 3rd October 2017, through its solicitor's affidavit sworn on the 3rd October 2017, confirmed to this Court that it will discharge the fees of a liquidator to prepare for and attend at the application under Section 678 of the 2014 Act. This is in addition to JECL's earlier agreement to discharge estimated liquidator's fees of €25,000 plus VAT to include a Section 682 investigation and report to the DCE along with potential director restriction application legal fees of €10,000 plus VAT. Those latter details emerged in anticipation of the hearing which commenced on the 2nd October 2017.

Other disadvantages which can be minimised with a Liquidator**Contribution Claim**

6. It was submitted on behalf of the other Defendants that:

"Hitherto IAL, its current former directors and its former holding company have shared a common interest in defending the reputations against very serious allegations. A liquidator has no such interest. His exclusive interest is in the gathering in and distribution of the company's assets".

7. The submissions continued to suggest that a liquidator might pursue a claim for contribution against the other Defendants. This suggestion does not stand up to scrutiny and was not actively pursued in the oral submissions. Suffice to say, the parties and the Court are more recently working on the assumption that a liquidator of IAL is unlikely to participate in the Deceit proceedings. Moreover, if such a scenario arose it begs questions about the sincerity of positions advanced on behalf of all of the parties other than JECL to date.

Availability of Witnesses

8. The submissions about the availability of experts and witnesses identified by IAL were made without any concrete evidence that those experts or witnesses will not be available to the other Defendants for the trial of the Deceit proceedings. Mr. MacCann for the other Defendants, when asked to elaborate, confined his submission in the following way: *"It doesn't follow as night follows day that if the witnesses are willing to give evidence on behalf [of IAL] that they will in fact be permitted to give evidence"* by the liquidator.

9. In the end this Court is unable to determine the somewhat speculative argument that essential expert witnesses will not be

available to the other Defendants for the trial. Ms. Justice Costello, who is assigned to the estimated twenty-week trial of the Deceit proceedings, will be in a better position to apply a just and fair ruling in this regard bearing in mind the adage that there is no property in a witness.

Access to documents and evidence in the control of IAL

10. There has been collaboration between all of the Defendants in the Deceit proceedings which have allowed for access to documents and evidence. In fact, officers of the Defendant companies and a solicitor's firm for the Defendants in the Deceit proceedings have a significant degree of shared knowledge. It was submitted that the curtailment of this collaboration will be a litigation advantage for JECL if a liquidator is appointed at this stage.

11. Mr. Leonard for JECL, after acknowledging that a liquidator may have to be asked for access to documents, data or whatever, over which the liquidator may have control, rhetorically asked when pressed by me in relation to JECL's position about indemnifying a liquidator for the costs of handling such requests: "Why should those costs be paid by the creditors of IAL?" He said with some merit that if the other Defendants wanted the liquidator's assistance they should pay.

12. In conclusion on this aspect, I do not find that the litigation disadvantage for the other Defendants is anything more than they could have expected if they had complied with their own regulatory and legal requirements as described in the first judgment.

LHL Submissions

13. LHL is not a party to the Deceit proceedings but has a clear interest in them due to: *"The nature and extent of its security over the assets and undertaking of IAL, including any costs which might ultimately be awarded to IAL against JEC"*.

14. The written submissions set out how a liquidator and the Court could deal with the claim against IAL but urged the adjournment of the petition to avoid inappropriate or unworkable conditions in any order which the Court could now make to mitigate the effect of a winding up order on the Deceit proceedings.

15. The Court was impressed to an extent by the positive response of JECL to the conditions suggested by LHL if the Court was to grant leave to JECL to continue its claim in the Deceit proceedings against IAL. Those conditions are:

(i) JECL should be restricted to establishing liability only against IAL on foot of the various claims and allegations made by it against IAL in the Deceit proceedings;

(ii) The question of quantum of any claim JECL has against IAL, if it arises, should be deferred to the conclusion of the proceedings as against the other Defendants or reserved for a separate determination by a liquidator under the proof of debt procedures in liquidation;

(iii) If IAL does not defend the Deceit proceedings, JECL will not pursue any application for costs against IAL in relation to the trial, save that it may apply for costs incurred by JECL in its claim against IAL up to the date of the presentation of the petition on the 14th February 2017;

(iv) LHL will be at liberty to apply at the conclusion of the Deceit proceedings trial for the costs incurred by IAL if JECL is unsuccessful or in similar circumstances.

16. The Court understands that JECL will abide by those conditions by way of undertaking to achieve same on the initiative or with the cooperation of all of the relevant parties.

Remaining Litigation Advantage

17. Paragraph 10 of JECL's submissions delivered on the 7th September 2017 portrayed one view, as follows:

"The only real litigation advantage which will be conferred on JECL by the appointment of a liquidator on any of the dates canvassed by this Honourable Court is likely to be limited to a shortening of the trial in the Deceit proceedings insofar as one legal team as opposed to two legal teams will be cross examining the Plaintiff's witnesses and the non IAL Defendants may choose not to call certain witnesses in defence of the action. This shortening of the trial will reduce the legal costs payable by all sides and lead to a more effective use of Court resources".

18. Paragraph 12 submitted that it would be unhelpful to the efficient running of the trial for a winding up order to be made in the middle of the case.

19. I engaged with counsel about the common situation which arises when a petition is presented that is to say that the insolvent company inevitably has other litigation to defend. Is it to be the case that such a company can always plead litigation advantage successfully in defence to a petition and particularly where the petitioner may have other litigation outstanding against the insolvent companies involving other parties? That prompted the Court to query the absence of a security for costs procedure in such a scenario where there is an insolvent defendant. The Court must remain attentive to the potential for abuse of the litigation advantage defence in petition proceedings. In that regard each petition until a specific security for costs procedure for the defendant is available, must be dealt with on its own merits. The submissions that the evolving jurisprudence on the exposure of funders of litigation whether for claimants or defendants is a backstop, is a tentative brake of modest value.

20. Mr. O'Moore for the other Defendants, on Monday, 2nd October, referred to *"a humongous litigation advantage"* and described the lack of time available to counsel for the other Defendants to take over the role of Mr. Gleeson and his fellow team members for IAL in tackling highly technical evidence which they have been undertaking. He explained that the other Defendants have incurred considerable expense in preparing for a trial in the expectation that JECL's witnesses will be subject to cross examination by two sets of lawyers.

21. One common theme of the submissions is that it would not be helpful to make a winding up order in the middle of the trial or at least until a determination of a direction application in favour of one or other of the Defendants.

22. Mr. Gleeson for IAL, initially used an analogy of playing football against a team without a goalie and then referred to a walkover scene when characterising how the trial of the Deceit proceedings would unfold if IAL in liquidation did not participate. The Deceit proceedings do not include two teams, but the gist is indeed conjured up by reference to a sporting event which suddenly loses a

challenging team.

23. Yes, the Defendants, and particularly the directors of various relevant companies, could have identified the real risk of IAL's winding up at some time since 2011. On the other hand JECL commenced the Deceit proceedings in February 2014 having learned from Ms. Cassidy's affidavit sworn on the 4th July 2011 that IAL had net assets only of €13.5 million and secured loans of €15 million. Therefore all parties knew of the risks. The suggestion on behalf of the other Defendants that they could always rely on defeating a petition by reference to a litigation advantage in the Deceit proceedings accruing to JECL is rather calculating if not cynical.

Conclusion

24. As explained in paragraph 33 of the first judgment, the statutory discretion of the Court should be exercised in a principled and reasoned manner. Considerable time was spent during oral submissions on the alleged lack of candour of JECL in its briefing of the proposed liquidator and the apparent inconsistent stance taken in the affidavits sworn in support of the petition. Bluntly put, it was said that JECL lacked bona fides in its petition because of the acknowledged elimination of IAL from the trial very close to the scheduled commencement of same on 14th November 2017. The estimated fees produced by the proposed liquidator did not reflect any anticipated investigation of the corporate restructuring and the Court does indeed recognise that the proposed liquidator may not have had the detail of transactions and restructuring summarised in the first judgment.

25. Overall I find that JECL, and through its counsel particularly, have acted with good faith during the hearing days of this petition in July and this month. The apparent inconsistencies between the briefing of the proposed liquidator and the stance taken about an independent review by a liquidator in grounding affidavits might be characterised more as unfortunate rather than lacking in good faith. There is little merit in repeating the views of the first judgment concerning the noncompliance of IAL with its obligations, save to say that the Court remains somewhat exercised about allowing an insolvent company to remain without a liquidator as IAL remains.

26. I conclude that the loss of the opportunity for IAL to defend itself in an imminent complex and technical trial, having serious effects for all involved, has not been mitigated sufficiently despite the *bona fide* and serious concessions made by JECL. Nevertheless I do not want the Court, nor the parties to escape their obligations. I therefore adjourn this petition on the following conditions: -

- (1) Liberty to any party to re-enter the petition on seven days' notice to all of the other parties involved to date, with further liberty to file affidavits concerning inter alia the briefing and funding of the proposed liquidator.
- (2) The petition should come back to this Court on a date which counsel might now indicate so that the Court of its own motion can arrest the lack of supervision of this insolvent company by giving further directions to conclude matters.
- (3) The undertakings already given by the directors of IAL and then by LHL concerning the confinement of activity, losses and costs of IAL will continue until further order of this Court.

"On the 26th October 2017 the Court having been assured by the Company that LHL was now the only other creditor of the company, granted leave to the Petitioner (JECL) to withdraw the Petition with the consent of all other parties including LHL represented at the hearing of the Petition."