Neutral Citation Number: [2009] IEHC 571

THE HIGH COURT

2009 684 COS

IN THE MATTER OF MILLSTREAM RECYCLING LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

AND

IN THE MATTER OF AN APPLICATION BY MILLSTREAM RECYCLING LIMITED PURSUANT TO SECTION 201 OF THE COMPANIES ACT 1963

MILLSTREAM RECYCLING LIMITED

APPLICANT

Judgment of Miss Justice Laffoy delivered on the 23rd day of December, 2009.

The application

This is an application by Millstream Recycling Limited (the company) for an order pursuant to s. 201(1) of the Companies Act 1963 (the Act of 1963) and for further directions. Before outlining the specific reliefs sought on the application, I consider it appropriate to outline the history of the application briefly.

This matter first came before the Court on Tuesday, 3rd November, 2009, on an *ex parte* application on which the company sought directions as to the proceedings to be taken on foot of the original originating notice of motion, which had been issued on 2nd November, 2009 and which was returnable before the Court on 16th November, 2009. On that occasion, the Court (Murphy J.) made orders that –

(a) the notice of motion and grounding documents be served on the parties set out in Appendix V to the notice of motion (being creditors) insofar as their addresses were known or could reasonably be obtained,

(b) that the notice of motion be advertised in certain publications, namely, the Irish Independent, the Farmers Journal, the Financial Times, the Belfast Telegraph and Iris Oifigiúil, and

(c) that until Monday 16th November, 2009 all proceedings instituted against the company be stayed and that the institution of further proceedings against the company be restrained.

When the matter came before the Court on the return date, 16th November, 2009, counsel for the company sought an adjournment for one week to consider affidavits which had been filed by creditors of the company. On 23rd November, 2009 the Court (Laffoy J.) acceded to an application by the company for a further adjournment and adjourned the matter for two weeks. The stay on proceedings was continued subject to the condition that any existing litigant in the Commercial Court should be at liberty to prosecute any motion before that Court and should be at liberty to comply with any existing directions given by that Court. It was further directed that any revision of the scheme referred to in the notice of motion was to be furnished to the creditors referred to in the order of 3rd November, 2009 together with any supporting affidavit by close of business on 2nd December, 2009. A revised scheme was in fact before the Court when the matter came on for hearing on 8th December, 2009 and the company sought leave to amend the originating notice of motion.

As I have stated, the relief now sought by the applicant is an order pursuant to s. 201(1) of the Act of 1963, specifically directing the summoning of a meeting of the creditors of the company who have made claims against the company arising out of the contamination of food products manufactured by the company (the contamination creditors) to be held on 1st July, 2010 to consider, and if thought appropriate, to approve (with or without modification) a scheme of arrangement the subject of the application. I will refer to this as the primary direction. Additionally, the company seeks directions, which I will refer to as ancillary directions, as to the notification and holding of the creditors' meeting including:

(i) that Mr. Jim Luby, of McStay Luby, Chartered Accountants, or a named substitute, be appointed as chairman of the meeting,

(ii) that Mr. John McGee, a loss adjustor, of OSG Outsource Services Group Ltd., (the Expert) be appointed "as Expert" and that Ronan Dolan, Senior Counsel, be appointed as legal assistant in order to assess the claims made by the contamination creditors,

(iii) that the decision of Mr. McGee be final and binding on all contamination creditors who have made a claim against the company for the purposes of valuing the claim under the scheme, and

(iv) various other directions as to advertising for claims, furnishing information to claimants, the prescribed form of claim, the timeframe within which the Expert could request information and when it should be supplied and the timeframe within which the Expert should determine the value of the claims of the contamination creditors for voting and dividend purposes (14th May, 2010),

(v) that at the creditors' meeting that the voting be determined by the value of the claim of each contamination creditors and that the votes might be given personally or by proxy, with details of when proxies were to be received and the form of the proxy and

(vi) that the entitlement to attend and vote at the meeting or any adjournment thereof should be determined by reference to the value of each of the contamination creditors' claims as assessed by the Expert.

Apart from variations in the timeframe, the principal change sought by the company in relation to the ancillary directions relates to the identity of the Expert, the Expert originally nominated by the company having been objected to by some of the creditors.

Further relief is now sought, which had not originally been sought, namely, an order for specified directions in relation to the construction of the meaning of the policy of insurance which is at the heart of the scheme, which I will refer to as the construction proceedings directions, namely that –

(a) the contamination creditors or one of them, shall have two weeks to notify the company's solicitors in writing of their wish to have the High Court determine the interpretation of the policy, setting out the facts upon which they say the policy has been wrongly interpreted by FBD Insurance Plc. (FBD), the insurer,

(b) the company shall "within seven days of such written notification (if any)" issue a Special Summons (or such other proceedings as they be deemed necessary) with FBD named as respondent, and the said notifying party, or parties, named as third party or parties and being the effective moving party, and

(c) that the company shall seek directions from the Court in respect of exchange of pleadings with a view to having the Special Summons, or such other proceedings that might be issued, determined prior to the meeting of the creditors on 1st July, 2010.

Finally, the company seeks a stay on the further prosecution of all claims to which the scheme relates against the company and/or the issuing of any further proceedings against the company.

Proposals for a scheme of arrangement

The proposals for a scheme of arrangement, as modified, have been prepared by Mr. Luby. In explaining the background to, and the reasons for, the scheme it is disclosed that the company was engaged in the collection of food by-products, which were processed by it and sold in bulk as pig and cattle feed ingredients. On 4th December, 2008, the Department of Agriculture, Fisheries and Food (the Department) found that certain of the company's feed products were contaminated with dioxins and polychlorinated biphenyls (PCBs) and issued an order restricting the movement of cattle and pigs on all farms which used feed products supplied by the company. In Northern Ireland, the Department of Agriculture and Rural Development (the N.I. Department) issued a similar order. In both jurisdictions it was ordered that pigs and some cattle on farms which used the company's feed products between September 2008 and November 2008 be slaughtered. In each jurisdiction, government funded *ex gratia* compensation arrangements for parties affected by the orders were put in place, which dealt with some material losses suffered by affected parties. However, claims are being made against the company for material loss and also for consequential loss and third party claims arising from the use of the contaminated feed products. Taking into account such claims which have been notified and also potential further claims, it is currently estimated that the claims against the company will exceed €40m and will render the company insolvent.

The scheme is designed to make provision for what are referred to in the proposals for the scheme as "Scheme Creditors", that is to say, parties entitled to compensation arising from a contamination event, defined as the discovery of dioxins and PCBs in animal feed supplied by the company. It is not designed to make any provision for the ordinary creditors of the company. As I understand it, "Scheme Creditors" is synonymous with "contamination creditors" referred to in the notice of motion.

The proposals for the scheme envisage two sources of funding to meet the claims of the contamination creditors: the proceeds of insurance cover which the company had in place with FBD; and the proceeds of a pending action by the company against Gerard Tierney and Newtown Lodge Limited (the Tierney/Newtown Lodge proceedings), which have been admitted to the Commercial Court.

In relation to the first source of funding, the proceeds of the FBD policy, the position of the company and FBD is that there is a limit of liability in the sum of €6.5m on the policy. That has been questioned by some of the contamination creditors. Hence the reliefs sought on this application in relation to the initiation of proceedings to have the policy construed by the Court. Aside from that issue, what is envisaged is that the insurance fund will be artificially divided into two sub-funds, so that approximately five-sixths thereof will meet what are described as material loss claims, that is to say, claims arising from a contamination event which fall within the product liability section of the FBD policy, and the remaining one-sixth will meet what are described as non-material loss claims, which fall outside the product liability section of the FBD policy. As regards the insurance fund, the function of the Expert will be twofold: to determine the quantum of each contamination creditor's claim and to categorise it as a material loss claim or a non-material loss claim or, presumably, to apportion it on that basis. The decision of the Expert both as to quantum and categorisation will be final and binding and will have effect both as to the entitlement of each contamination creditor to vote at the creditors' meeting and as to the calculation of the dividend payable to each contamination creditor out of the insurance fund, if the scheme is passed at the creditors' meeting.

There were ongoing discussions between some of the contamination creditors and the company's advisers following the circulation of the amended proposals, which resulted in some further changes to the amended proposals, which are favourable to the general body of contamination creditors. The principal change is that FBD has agreed to bear the estimated applicable scheme costs which amount to €182,250, inclusive of VAT. Therefore, this sum will not be deducted from the insurance fund, as was envisaged in the amended proposals, in consequence of which some of the figures in the amended proposals have to be varied. However, there has been no change in the provision contained in clause 11.4 that, in the event of the company securing judgment in the Tierney/Newtown Lodge proceedings but being unable to execute on foot of the judgment, the fund will be reduced by €182,250 to meet the costs of those proceedings, including VAT. A revised proposal incorporating the change which has been acceded to by the company and the consequential changes in the apportionment of the fund between material loss claims and non-material loss claims needs to be exhibited in a supplemental affidavit, so that the Court record is correct.

What the proposals for the scheme envisage in relation to the distribution of the insurance fund is that, as regards each

category of claim, each of the contamination creditors will participate in the relevant sub-fund of the insurance fund on a pro-rata basis and be paid an insurance dividend on that basis.

The proposals envisage the insurance fund being increased in the event that, if proceedings for construction of the FBD policy are prosecuted and it is found that the limit of indemnity on the policy is higher than the sum of €6.5m, funds to bring the insurance fund up to the higher indemnity limit will be made available.

The availability of the second source of funding, the litigation fund, is entirely contingent on the Tierney/Newtown Lodge proceedings being successful and the company being in a position to execute on foot of the judgment obtained. The factual foundation of those proceedings is an allegation that the source of the contamination, in very general terms, was oil supplied by the defendants in the Tierney/Newtown Lodge proceedings, which was used in an oil burner which fired a rotating triple-pass dryer into which the by-products were fed to be dried in the process of converting the by-products into animal feed. If the Tierney/Newtown Lodge proceedings proceed (and it is noted that the Court was informed that an application by the defendants for security for costs is to be brought in the Commercial Court) and, if the company is successful, the monies which in consequence accrue to the company will form the litigation fund, which will be used, in the first instance, to pay the company's taxed costs, which shall be paid as a priority. The balance, if any, of the litigation fund will be made available to provide a further dividend, the litigation dividend, to the contamination creditors, which will be paid on a pro-rata basis without any distinction between material loss claims and non-material loss claims.

As the foregoing broad outline of the proposals for the scheme indicates, the creditors' meeting cannot take place until two events which are largely outside the control of the company and its advisers take place: the proceedings to construe the FBD policy have been concluded, if such proceedings are initiated; and the Tierney/Newtown Lodge proceedings are concluded. The company and its advisers have assumed, whether realistically or not remains to be seen, that proceedings will be concluded and the insurance fund and the litigation fund identified in advance of 1st July, 2010, the date they propose for the creditors' meeting.

In clause 10 of the proposals for the scheme, the outlook for the creditors in the absence of the proposed scheme is analysed. By reference to an estimated statement of the affairs of the company on a winding up basis as at 31st August, 2009, which is appended to the proposals for the scheme, it is stated that there is no prospect of a distribution to ordinary unsecured creditors or contamination creditors from the company's assets in the event of a winding up. Throughout the hearing of the application it was made clear that, in the event of the Court refusing the reliefs sought, the company would have no option but to bring a petition to wind it up and that this would probably be initiated in January 2010. The likely less advantageous outcomes for the contamination creditors in the event of a winding up than if the scheme were implemented are outlined in the proposal. As regards the insurance fund, on the basis of a limit of liability of €6.5m, it would be insufficient to satisfy all claims, which the evidence suggests aggregate in excess of €40m. However, it is recognised that proceedings to construe the policy might vary the limit of liability upwards. Further, the insurance fund would be subject to s. 62 of the Civil Liability Act 1961 (the Act of 1961). It is stated that FBD has confirmed that it will not make any payment to contamination creditors in the event of liquidation until all claims have been made known to it and until such claims are assessed to determine that they fall within the policy of insurance. As regards the litigation fund, throughout the hearing of the application, counsel for the company stressed the likelihood of the Tierney/Newtown Lodge proceedings not being brought to conclusion in the event of the company going into liquidation.

The position of the company as set out in the proposals for the scheme is that the contamination creditors would be best served by the scheme, in that there are advantages embodied in it over the application of s. 62 of the Act of 1961 to the insurance fund, which would arise if the company were to go into liquidation, because of the attenuation of the legal costs of the contamination creditors' actions and the relative speed with which the dividend would be paid to the contamination creditors, and the possible enlargement of the funds available for dividend by the successful conclusion of the proceedings to construe the FBD policy or the Tierney/Newtown Lodge proceedings or both.

The legislation

Section 201 of the Act of 1963 deals with a compromise between the company and its members or creditors. In relation to compromise with creditors, subs. (1) provides for the Court's first involvement in the process and, insofar as is relevant, provides as follows:

> "Where a compromise or arrangement is proposed between a company and its creditors or any class of them …, the court may, on the application of the company … order a meeting of the creditors or class of creditors, … to be summoned in such manner as the court directs."

Sub-section (2) sets out the court's jurisdiction under subs. (1) and provides as follows:

> "Whenever such an application as is mentioned in sub-section (1) is made, the court may on such terms as seem just, stay all proceedings or restrain further proceedings against the company for such period as to the court seems fit."

As will be clear from the factual circumstances which will be outlined later, a crucial element in the reliefs sought by the company is that existing proceedings by contamination creditors against the company be stayed and further proceedings be restrained. It is unquestionably the case that, in the absence of such a stay, the proposed scheme would simply not work. The contamination creditors who, on this application, strongly resisted the application for relief, are creditors who have proceedings pending in the Commercial Court and who have obtained dates for hearing of their claims in that Court in January and February 2010.

The final involvement in the process from the Court's perspective is dealt with in sub-section (3) of s. 201 which provides:

> "If a majority in number representing three-fourths in value of the creditors or class of creditors … present and

> voting either in person or by proxy at the meeting, vote in favour of a resolution agreeing to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all of the creditors or class of creditors … and also on the company ….”

There is a helpful analysis by the Court of Appeal of England and Wales of the corresponding provision in the company’s legislation in the United Kingdom (s. 425 of the Companies Act 1985) in *Re Hawk Insurance Company Ltd.* [2002] B.C.C. 300. Chadwick L. J., having identified the three stages in the process by which a compromise or arrangement becomes binding on the company and all those within a class of creditors (first, the application to court for an order that a meeting or meetings be summoned, at which stage a decision – which I understand to mean, by the company – needs to be taken as to whether or not to summon more than one meeting; second, the putting of the scheme proposals to the meeting; and third, if approved at the meetings, the application to court to sanction the compromise or arrangement), stated as follows (at para. 12):

> “It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present, or, being present, did not vote in favour of the proposals) receive impartial consideration. As it was put in [*Re B.T.R. plc.* [2001] 1 BCLC 740] at p. 747 g-h:
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> > ‘… the court is not bound by the decision of the meeting. A favourable resolution of the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court.’”

Later, at para. 17, Chadwick L.J. stated that, if the correct decision as to the summoning of one or more meetings is not made at the first stage, the court may find, at the third stage, that it is without jurisdiction. That was the view taken in this jurisdiction by Costello J. in *Re Pye (Ireland) Ltd.* (High Court, Unreported, 11th March, 1985). In that case, on an application under subs. (3) of s. 201 to sanction a scheme, Costello J. accepted a submission that there should have been a separate class of creditor comprising unsecured creditors who were also shareholders of the company and he refused to sanction the scheme on that basis. He had earlier quoted a passage from *Palmer’s Company Law* (23rd Edition) to the effect that the Court does not consider, at the first stage, the application to convene meetings, what classes of creditors or members should be made party to the scheme, which was a matter for the company to decide and he also quoted the admonition in *Palmer* that “great care must be taken in considering what for the purpose of the scheme constitutes a class”, because, if meetings of the proper classes have not been held, the Court may not sanction the scheme. Costello J. remarked that, indeed, it would seem that a failure to hold proper class meetings “will generally speaking be fatal to a s. 201(3) petition”.

> In the *Hawk Insurance* case the Court of Appeal recommended that the long-standing practice in the United Kingdom – whereby the Court ordered meetings to be held at the first stage without considering whether those were the meetings which the scheme proposed actually required before sanction could be given by the Court – should be reconsidered. In fact, a revised practice was introduced in the United Kingdom in *Practice Statement* [2002] 3 All E.R. 96 following the *Hawk Insurance* decision under which, as is pointed out in the judgment of David Richards J. in the decision of the High Court of England and Wales in *Re T. & N. (No. 3)* [2007] 1 All E.R. 851, the applicant is required to draw the attention of the Court as soon as possible to any issues which may arise as to the constitution of the meetings, or which may otherwise affect the conduct of the meetings, and to notify any person affected by the scheme of the intention to promote the scheme and of its purpose and of the proposed composition of classes. Under the *Practice Statement* the Court will, if necessary, give directions for the resolution of any such issues and, in particular, will hear interested parties. The statement concludes by stating that the Court will expect any creditor who raises any such issue at the third stage to show good cause why it was not raised at an earlier stage (per David Richards J. at p. 862).

What has happened on this application is that, on foot of the *ex parte* application of the company made on 3rd November, 2009, the company was directed to serve the contamination creditors listed in Appendix V to the notice of motion with the relevant documents in relation to this application and to advertise the application. There were eighteen creditors listed in Appendix V, of whom eight appeared on the application and were heard by the Court, as was one other creditor who appeared. In addition to the two contamination creditors to whom I have already referred, whose actions are listed for hearing in the Commercial Court in January and February next respectively, two other contamination creditors who have actions listed for hearing in the Commercial Court in April also appeared. It is difficult to see how the Court could make an order under subs. (2) of s. 201 without hearing the plaintiffs in pending litigation. The difficult question which arises on this application is whether, in the light of the existing jurisprudence, it is any part of the function of the Court on an application under subs. (1) of s. 201 to pronounce on the categorisation in classes of creditors proposed to be the subject of the scheme, in this case, the contamination creditors. I will return to this issue later.

The Rules of the Superior Courts are fairly terse as to the procedure governing applications under s. 201. Order 75, rule 5(x) provides that an application for meetings of creditors of a company under s. 201(1) is to be brought by way of originating notice of motion. Rule 21 provides that every application under rule 5 shall be grounded upon an affidavit of the party making such application and shall be heard and determined on affidavit unless otherwise as the Court orders. Rule 22 envisages that, where necessary, the Court may direct a plenary hearing. Rule 23 provides that, on the hearing of an application under rule 5, the Court may make such order or give such directions as it thinks fit and may adjourn the further hearing of the motion until any other party or parties have been notified of the making of the application.

Counsel for the company also referred the Court to O. 74, r. 135(1), which provides that an application by an official liquidator for an order under s. 201 may be made by motion *ex parte* and that, on the application, the Court may give such directions as it thinks proper in regard to the manner in which the meeting or meetings shall be summoned and in relation to the conduct thereof. It was submitted that the Court should apply that rule by analogy to this application. That rule, of course, applies in a winding up under the supervision of the Court which is not analogous to an application under s. 201 in the circumstances which prevail here.

The other statutory provision which received considerable consideration at the hearing of the application was s. 62 of the Act of 1961 which provides, insofar as is relevant, as follows:

> "Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability or a wrong, …if a corporate body, is wound up … moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured … in the winding-up …, and no such claim shall be provable in the … winding-up …."

The contamination creditors

The applicant put before the Court a claims summary as at 2nd December, 2009 in which the claims of the contamination creditors are summarised. There are twenty claimants named, the value of the claims not being set out in some cases. The total amount of the claims, excluding unquantified claims, as *per* the summary is €36.622m. However, in the course of the hearing it became apparent that the claims of some of the contamination creditors who appeared on the application would, when quantified and added to that total, bring it considerably in excess of the sum of €40m., which was the original assessment of the total liability from a contamination event made by the company and FBD.

It is convenient to classify the contamination claimants who appeared as being either against or for the proposals for the scheme, or somewhere in-between, which has been variously described as "reluctantly for" or "conditionally for".

The contamination creditors who objected to the reliefs sought on this application are:

(1) William Fulton, who carries on business in Northern Ireland, the indicative amount of whose claim (rounded) is given as €1.757m. Mr. Fulton's proceedings (Record No. 2009 No. 3741P) are listed for hearing in the Commercial Court on 26th January, 2010 as an assessment, the company, which is defending the proceedings through its indemnifier, FBD, having admitted liability for breach of contract but denied liability for negligence.

(2) D.C. Cattle Limited (Damian Conlon), which also carries on business in Northern Ireland, the indicative value of whose claim (rounded) is given as €2.700m. The proceedings of D. C. Cattle in the Commercial Court (Record No. 2009 No. 4103P) are listed for hearing in February 2010, also as an assessment, on the basis of an admission of breach of contract but a denial of negligence.

The contamination creditors who appeared and were "reluctantly" or "conditionally" in favour of the proposals for the scheme were:

(1) Gilligan Fresh Farm Meats Ltd., who carry on business in the State, the indicative claim amount being €1m. No proceedings have yet been instituted by Gilligan.

(2) A.J.D. Farms Ltd., and

(3) Mona Sawers, who, while independent contamination creditors, are connected. Both carry on business in Northern Ireland. Each has an action pending in the Commercial Court. The two actions (Record No. 2009 No. 7514P and Record No. 2009 7515P) are listed for hearing together on the 21st April, 2010 on the basis of an assessment, the company having admitted breach of contract but denied negligence. The indicative claim amount in the case of A.J.D. Farms Ltd. (rounded) is €2.458m and in the case of Mona Sawers is €2.604m.

(4) Carrigroe Feeds, which carries on business in the State. The indicative claim amount is €180,000 and proceedings have been instituted in this Court (Record No. 2009 No. 7673P). Counsel for Carrigroe also appeared for Tierney Farms, who do not appear on the summary and who have not issued proceedings yet.

The contamination creditors who appeared and were in favour of the scheme are:

(1) Michael Monagle and what I will loosely refer to as his associates, in respect of whom there are three notified claims with an aggregate indicative claim amount (rounded) of €23.790m. These parties do business in the State. They have not issued proceedings yet.

(2) McCarren & Company Ltd., which carries on business in the State. Its indicative claim is €888,250, but the Court was told that this figure requires to be revised upwards having regard to the obligation of McCarren to include a claim to facilitate the recoupment by the Department of compensation paid to McCarren. A figure of €3.8m was indicated as being the value of the claim at the hearing.

(3) Patrick J. O'Keeffe, who also does business in the State, and the value of whose claim does not appear on the claims summary. The Court was told that the claim was in the region of €5.5m together with a sum of €3.25m by way of recoupment to the Department of compensation paid by it.

The summary also lists a claim by Hogg's Hogs Ltd./Hoggs Enterprise Ltd.,(the Hogg companies) which have issued proceedings (Record No. 2009 No. 6073P), although the Court was not apprised of the current state of play in those proceedings. The indicative claim amount of these claimants as per the summary (rounded) is €1.213m. The significant point about these contamination creditors is that they are companies which are connected to the company. It is disclosed in the grounding affidavit that they are subsidiaries of Clohamon Holdings Ltd., the shareholders of that company being Derek Hogg, Doreen Hogg and Robert Hogg, who are the owners of the entire share capital in the company and are the directors in the company.

I will now outline the objections made by the contamination creditors who opposed the Court granting the relief sought and also the variations to the scheme sought by the contamination creditors who describe themselves as being broadly in favour of the scheme. Separately, I will outline the submissions made by the creditors who supported the application and the scheme.

Objections/variations

What the two opposing contamination creditors, Mr. Fulton and D. C. Cattle/Mr. Conlon, have in common is that they have proceedings against the company listed for hearing in the Commercial Court in January and February respectively of 2010 and the proceedings will be dealt with on the basis which I have already outlined, which means that, in the ordinary course of events, they could expect judgment considerably in advance of 1st July, 2010, the date suggested for the creditors' meeting. In the case of Mr. Fulton, he has put an affidavit before the Court in which he has outlined the loss and hardship he has suffered as a result of the order of the N. I. Department on 9th December, 2008 that his herd of 850 cattle, valued at £700,000, be quarantined and the ultimate slaughter of the cattle in April, 2009 following positive testing for dioxin. Although Mr. Fulton received hardship payments under the scheme in Northern Ireland in May 2009, the payments did not cover his total losses and he is under an obligation to reimburse the N.I. Department, if he receives compensation from a third party. However, Mr. Fulton placed most emphasis on the fact that, because of the scale of his investment in his business and the cash flow difficulties which resulted from the contamination, his business has been placed under extreme financial pressure. Specifically, in the context of the effect of a stay on the proceedings pending in the Commercial Court, counsel for Mr. Fulton emphasised that his bank has provided him with a temporary increase in his loan facilities on the basis that the assessment of damages in the Commercial Court proceedings is due to be heard on 26th January, 2010. The loan facilities are secured by personal guarantees provided by Mr. Fulton, his wife, his brother, Robert Fulton, who is also a contamination creditor, and Robert Fulton's wife and charges over their respective properties.

The core objections made by counsel for Mr. Fulton, which were adopted by counsel for D. C. Cattle/Mr. Conlon, were as follows:

> (a) that the Court does not have jurisdiction to make the orders sought under s. 201(1);
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> (b) that, even if the Court does have jurisdiction, it would not be fair and equitable to make the orders sought; and
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> (c) that, in the event of a liquidation, the application of s. 62 of the Act of 1961 would not preclude a contamination creditor who has judgment having his judgment debt discharged in full out of the insurance fund on a "first past the post" basis.

The objection on the jurisdiction ground was that, under the scheme as proposed, the Court is asked to order the appointment of a person, the Expert, to determine the creditors' claim both as to value and as to classification as material or non-material, on a basis that would be final and unappealable, so that the creditor would be deprived access to the Court in relation to his claim. The Court has no jurisdiction to make such an order, it was submitted, because, *inter alia*, the scheme would deprive the creditors of the right to an oral hearing and of the right to challenge other creditors' determinations and provisions and suchlike, so that the proposed procedure would involve the purported delegation of a power to the Expert which the Court itself does not have. Although the Court is given jurisdiction in subs. (1) to order a meeting of the class of creditors to be summoned "in such manners as the Court directs", such a substantial power could not be derived from s. 201. Further, it was submitted, the adoption of the procedure envisaged could not meet the requirement of subs. (3) of s. 201 that "a majority in number representing three-fourths in value of the … creditors" vote in favour of the resolution. Counsel submitted that this difficulty is fatal to the arrangement being proposed.

Counsel for Mr. Fulton made two supplemental objections on jurisdictional grounds. First, he submitted that the ordinary meaning and the scheme of the provisions in relation to schemes of arrangement in the Act of 1963 were such that it envisaged the procedure taking place over a relatively short timeframe, suggesting a maximum of eight weeks before the scheme would return to Court. He submitted that, intuitively, the proposal on this application fell outside the timeframe envisaged by the statutory scheme. Secondly, referring to s. 202(1)(a) of the Act of 1963 which outlines the information as to a proposed compromise which must be given to a class of creditors, it was submitted that the requirements of s. 202 could not be complied with because, by reason of the many imponderables in this case, the effect of the proposed scheme cannot be explained. It was submitted that this supports the contention that there is not jurisdiction under s. 201 to grant the reliefs sought on this application.

In submitting that the Court should form a view at this stage that it would not be fair and equitable to make the order sought, counsel for Mr. Fulton submitted that the Court should have regard to a number of factors: the effect of staying the Commercial Court proceedings on Mr. Fulton, having regard to his financial position as outlined in his affidavit; the classification of creditors as envisaged in the scheme; the effect of the scheme on Mr. Fulton; the effect of the scheme on contamination creditors like Mr. Fulton who have been diligent and have brought their proceedings to a point in the Commercial Court where they have a date for hearing; and, in particular, the prospect of liquidation of the company and the application of s. 62 of the Act of 1961 in the event of liquidation. That submission was premised on the assertion that the Court has jurisdiction to assess whether the scheme is fair and reasonable at this stage, because, it was asserted, if it is not considered until the third stage, the sub-section (3) stage, the Court's discretion might never be exercised. In this connection counsel relied on the decision of the Supreme Court in *Re John Power & Sons Ltd.* [1934] I.R. 412. In terms of principle, the decision of the Supreme Court in that case, and in particular the portion of the judgment of FitzGibbon J. at pp. 423-425, lays down no more than that at the third stage, when the matter is back before the Court for sanction of the scheme passed by the creditors or shareholders affected, the Court determines whether it is fair and equitable so as to bind the minority who did not approve of the scheme. I see nothing in that decision which suggests that the Court has jurisdiction on an application under subs. (1) of s. 201 to consider whether the scheme is fair and equitable. Indeed, it would be otiose to embark on such a consideration given that the scheme might never be approved. More fundamentally, in my view, it would be entirely inappropriate for the Court to express a view as to whether the scheme is fair and equitable on an application under subs. (1) when all of the potential parties affected, in this case all of the potential contamination creditors, have not had an opportunity to express their views either by voting at a meeting of the class or, if in a minority opposed to the scheme, by having an opportunity to express their objection to the Court in a context in which the function and jurisdiction of the Court is to sanction or not sanction the scheme.

While I have absolutely no doubt that the Court has no jurisdiction at this juncture to embark on a general assessment as to whether the scheme is fair and equitable, given that the express jurisdiction of the Court on this application under subs. (1) is to "order a meeting of the … class of creditors" to be summoned, it obviously is the case that whether the Court may pronounce at this stage on the constitution of the class or classes is a jurisdiction issue. I propose outlining the objections voiced by the contamination creditors who appeared on the application to the classification of creditors as "Scheme Creditors" in the proposals for the scheme. Counsel for Mr. Fulton submitted that the scheme is doomed to failure because the composition of the class is inequitable. The various objections made as to the composition of the class may be summarised as follows:

> (1) It was submitted that the companies connected to the company, the Hogg companies, should not be included in the class. In this connection, counsel for Mr. Fulton relied on the decision of Costello J. in the *Pye* case and submitted that because of their inclusion, the class was not properly constituted, and the scheme was bound to fail. Counsel for Gilligan explained that his client's reluctance to support the scheme was based, *inter alia*, on the inclusion of the connected companies within the class, although, as I understand the position, that reluctance has been overcome. Counsel for Carrigroe Foods also submitted that his client considered that the connected companies should not be part of the class, although, again, as I understand the position, that objection has been overcome.
>
> (2) Counsel for Mr. Fulton also submitted that it was inequitable to treat the contamination creditors of the company differently from the other creditors of the company, who suffered no adverse effect. That argument, it seems to me, goes to the general question of whether the scheme is fair and equitable, not to the issue of classification.
>
> (3) The argument which seems to me have been most forcibly advanced on the composition of the class on behalf of Mr. Fulton and D.C. Cattle/Mr. Conlon was that it does not distinguish between those contamination creditors who have acted diligently in pursuing their claims through litigation and whose actions are listed for, and guaranteed, a hearing in the Commercial Court in the very near future and claimants who either have no proceedings in being or are unlikely to get a hearing of existing proceedings for some time. It seems to me that the Court has to have regard to that distinction in the context that the Court has to decide whether to exercise its discretion to grant a stay under subs. (2) of s. 201. However, whether it is relevant to the Court's jurisdiction, if it exists, to vary the composition of the class at this stage is a different issue.
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> (4) Counsel for Mr. Fulton also submitted that, unlike certain other contamination creditors, his client had no separate insurance cover from FBD, and on that basis he submitted that other creditors, because of the existence of separate insurance with FBD, have a conflict of interest, whereas Mr. Fulton has not.

> FBD was represented at the hearing of the application by solicitor and counsel, as I understand it, at the behest of the company, to assist the Court as necessary. While I raised a question as to whether FBD had any standing in the matter, and counsel for FBD did not dispute that it was questionable whether it had, I allowed counsel for FBD to address the Court. On the basis of the information furnished to the Court, it appears that ten of the contamination creditors hold insurance policies with FBD. However, apart from Mr. Monagle, none of those contamination creditors will receive any monies under their policies in relation to any losses currently claimed in relation to a contamination event, because, as I understand it, they have various types of insurance cover, perhaps, motor insurance cover but not product liability cover. In the case of Mr. Monagle, the Court was informed that Mr. Monagle and his associates have insurance with FBD which indemnifies them against product liability claims from third parties for two separate enterprises with cover to a limit of €1.3m in respect of each enterprise. To date, only one claim has been advanced against Monagle, that is by a Dutch Co-operative, Vion Pork, and a Northern Ireland company, Grampian Country Pork Ltd.
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> As I understand it, the contention that a conflict of interest arises in the case of Mr. Monagle, is based on the fact that it is the expressed intention of FBD to rely on any right of subrogation it has under the Monagle policies.

Lest there be concern that I have overlooked this aspect of the matter, there were many grievances aired as to the absence of any contribution to the scheme by the company itself. For example, counsel for Gilligan pointed out that it was not even proposed to set off a small sum of €30,000, which the Hogg companies owe to the company, against their claim and that it appears that the company is not putting anything into the scheme, although it stood to gain if the scheme proceeded. These are matters which may be relevant at the third stage, if the process gets that far, but they are not relevant now.

An essential plank in the objection of Mr. Fulton and D.C. Cattle/Mr. Conlon was that, even if the company went into liquidation and s. 62 of the Act of 1961 applied, these contamination creditors, having advanced their proceedings against the company to the stage to which they have been advanced, would on a first and second "past the post" basis have their respective judgments satisfied in full out of the insurance fund. Obviously, in the event of the company being wound up before 26th January, 2010, that would be contingent on these contamination claimants making a successful application under s. 222 of the Act of 1963 for leave to continue their proceedings. Counsel for Mr. Fulton referred the Court to a decision of the Court of Appeal in England and Wales in *Cox v. Bankside Members' Agency Ltd.* [1995] LLR 437, in which a provision of a United Kingdom statute, the Third Parties (Rights Against Insurers) Act 1930, was under consideration. In that case, the Court of Appeal found in favour of the ordinary rule of chronological priority. Counsel for Mr. Fulton argued that the same approach should be adopted in the application of s. 62 in this jurisdiction because, otherwise, adopting the terminology of Sir Thomas Bingham, M.R. (at p. 459), Mr. Fulton, whose action is fully prepared and ready for trial will, in effect, be "shunted into a siding" if his proceedings were stayed.

I have already recorded that in the proposals for the scheme it is stated that FBD has confirmed that it will not make any payment to contamination creditors in the event of liquidation until all claims have been made known to it and until the claims are assessed to determine whether they fall within the policy of insurance. It was made clear at the hearing that,

in the event of liquidation, FBD would apply to Court for approval of that approach, although it was not made clear what jurisdiction of the Court would be invoked. In any event, in my view, as I will explain later, it is not necessary and, aside from that, it would not be appropriate to express any view on the proper construction of s. 62 in the context of this application because, at this point in time, its application does not arise and whether it will ever arise is speculative. In short, any view expressed by the Court on s. 62 would be founded on a hypothesis and not grounded in reality. If the hypothesis were to become a reality, the view would have been expressed without all of the parties who would have an interest in the proper construction of s. 62 having been heard.

Counsel for A.J.D. Farms and Ms. Sawyers indicated his clients' support for the scheme subject to certain variations of the scheme, the variation sought which is unique to these contamination creditors being that the scheme would provide that the sub-fund for non-material loss should become an emergency hardship fund, which would allow some means of making early payments to these creditors. The basis on which counsel argued for this variation related to the considerable hardship which his clients are currently suffering because of the manner in which the contamination event has impacted on them. These contamination creditors are related, Derek Sawyers, the father in law of Ms. Sawyers, being the owner of A.J.D. Farms. Moreover, their claims as contamination creditors are related because, by agreement between them, Ms. Sawyers' sheds were used for the purpose of feeding the cattle of both enterprises and she was responsible for the removal of slurry. The particular source of hardship which was cited was the build up of slurry on Ms. Sawyers' farm as a result of the orders made by the N.I. Department, which eventually led to the slaughter of the cattle of both enterprises. However, the slurry on the farm tested positive for dioxins and Ms. Sawyer has been ordered not to spread it on the land and is required to keep it in storage until it can be disposed of in a proper manner. Disposal has proved impossible to date and the cost of renting additional tanks for storage purposes is costing around £4,250 per month. That cost is increasing and has been aggravated by the recent bad weather. The farms of both contamination creditors are under threat of closure on environmental grounds. As a result, these creditors are currently under critical financial pressure, which it was submitted, should be alleviated by treating the non-material loss sub-fund as a hardship fund and providing for some form of immediate payment to them to enable them to deal with their current financial circumstances.

While the company, with the concurrence of FBD, prior to seeking to amend the originating notice of motion, agreed with the contamination creditors to address some of the issues raised by them, for example, the issue of the construction of the FBD policy, obviously, the company was not prepared to accommodate A.J.D. Farms and Ms. Sawyer by creating a hardship fund which could be accessed in advance of the creditors' meeting.

Counsel for A.J.D. Farms and Ms. Sawyers also submitted that there should be two meetings in the course of the scheme for the purposes of determining the contamination creditors' claims. I assume that the thrust of this submission was that there should be two classes of creditor, namely, creditors who would be entitled to participate in the contended for emergency hardship fund and other creditors.

Support for the scheme

The views of contamination creditors who expressed support for the scheme and for the Court granting the relief sought on this application are broadly reflected in the submissions made by the solicitor who appeared on behalf of Mr. Monagle and associates. His clients favoured the amended scheme in that it facilitated adjudication of the issue of the scope of the FBD policy, if any creditor so desired, and it precluded a "first past the post" distribution of the insurance fund, which, it was submitted, would be inherently unfair vis-à-vis the contamination creditors as a whole. If a stay was granted, then all proceedings would be stayed until the scheme was voted on. Absent the scheme, the company would go into liquidation and that would not be in the interest of any of the contamination creditors.

Similar views on the undesirability of the company going into liquidation from the perspective of the contamination creditors were expressed by counsel on behalf of Carrigroe Foods and Tierney Farms, who were also in favour of the scheme because of the possibility of the litigation fund coming into existence. Counsel also made the point, which was unique to the claim currently being litigated by Carrigroe Foods, that, because of the quantum of the claim, his client could not avail of the fast track procedure of the Commercial Court. It was submitted that his client should not be penalised on that ground.

Counsel for McCarren and counsel for Mr. O'Keeffe, both submitted that the scheme was properly structured by providing for one class of creditors only, the contamination creditors, and made helpful submissions on that point, which I have taken into account in determining that issue.

Finally, counsel for Mr. O'Keeffe made the point that Mr. Fulton and D.C. Cattle/Mr. Conlon would not lose any priority if the stay sought were granted but would merely be faced with the maintenance of the status quo.

The issues

Very difficult issues were raised by the parties who appeared on this application and they were raised in a very unstructured process which was unsatisfactory. However, in outlining the position of the parties, I have eliminated some of the issues which arose. It seems to me that the issues which remain to be adjudicated on are the following:

(1) whether the Court should grant the primary direction as sought or whether the Court has jurisdiction to, and should, vary the proposal by the division of the contamination creditors into two or more classes or otherwise vary the scheme;

(2) whether the Court has jurisdiction to grant, and should grant, the ancillary relief;

(3) whether the Court has jurisdiction to grant, and should grant, the construction proceedings direction; and

(4) whether the Court should grant the stay sought on existing proceedings and further proceedings.

Determination of class/classes?
In recommending that the existing practice in the United Kingdom should be re-examined in the *Hawk Insurance* case, Chadwick L.J. was reacting to the position in which the Court of Appeal had found itself. What had happened was that, in accordance with the usual practice, a single meeting of creditors had been directed at the first stage without consideration of whether the terms of the scheme required only a single meeting of creditors. The scheme was approved, without dissent, at the meeting of creditors. At the third stage, when the sanction of the High Court was sought, it was held that the creditors could not be treated as a single class and, accordingly, the Court had no jurisdiction to sanction the scheme. The Court of Appeal took a different view to the High Court as to whether the creditors could be treated as a single class and the appeal was allowed. If it had not been allowed, the fact that the applicant had made a wrong decision at the outset in relation to the class or classes of creditors would not have been determined until the third stage, which would have resulted in a considerable waste of time and expense. Having stated that he found it unacceptable that the existing practice had led in that case to the Court reviewing of its own motion, at the third stage, the utility of the order which it made at the first stage, he continued (at para. 21):

> "In my view an applicant is entitled to feel aggrieved if, in the absence of opposition from any creditor, the court holds, at the third stage and on its own motion, that the order which it made at the first stage was pointless. It is, to my mind, no answer to say that that is a risk which the applicant must accept. It may be inevitable that an applicant must accept the risk that a dissentient creditor will persuade the court at the third stage that the order which it made at the first stage (without hearing that creditor) was the wrong order. But that is not to say that the applicant must be required to accept that, when exercising what is plainly a judicial discretion at the first stage, the court will not address the question whether the order which it makes serves any useful purpose; or that, if it has addressed that question at the first stage, it will change its mind, of its own motion, at the third stage."

The foregoing observations illustrate that, as a matter of common sense, the first stage of the exercise of the useful and beneficial discretion which the entirety of s. 201 confers on this Court to sanction a scheme of arrangement may be rendered useless and a waste of money if the Court postpones consideration of whether separate classes of meetings are required until the third stage. Sub-section (1) of s. 201 gives a very broad discretion to the Court in directing the creditors' meeting or meetings. Obviously, the discretion can only be exercised if the parties who are likely to be affected by the Court's determination have an opportunity to be heard on the issue, which necessitates the Court being satisfied that they are on notice of the application under s. 201 either by having been served or by advertisement. In this case, compliance with the notice and advertising requirements of the order of 16th November, 2009 has been proven. Therefore, in my view, the Court has jurisdiction to determine whether separate class meetings are required and, having regard to the procedure adopted on this application, can properly exercise the jurisdiction.

I turn now to the test to be applied when determining whether separate meetings are required. This was addressed in the *Hawk Insurance* case in which the decision in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573 was applied. Chadwick L.J. (at para. 26) emphasised the following passage from the judgment of Bowen L.J. in the *Sovereign Life Assurance* case on the construction of the word "class" in the analogue of s. 201 at issue there:

> "The word 'class' is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

As Chadwick L.J. pointed out (at para. 31), the test formulated by Bowen L.J. had been consistently adopted in later cases and he cited a number of recent authorities in which it had been adopted, one being *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182. I mention that case because in *Re Colonia Insurance (Ireland) Ltd.,*[2005] 1 I.R. 497, this Court (Kelly J.), in sanctioning a scheme under subs. (3) of s. 201, stated that he found the judgment of Neuberger J. in that case particularly helpful. However, Kelly J. was not concerned with an issue as to the determination of whether the classes of creditors were properly constituted, although he identified that as part of the function of the Court in approving a scheme under subs. (3).

Chadwick L.J. made some other general observations as to the test of Bowen L.J. He stated (at para. 32) that it is important to keep in mind the underlying question to which the test must be directed, which is that posed by the statutory language: with whom is the compromise or arrangement to be made? Or, put another way: are the rights of those who are affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought to be regarded, on a true analysis, as a number of linked arrangements? When applying the test to that last question he stated (at para. 33) that it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements and have their own separate meetings, but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do. He cautioned that the test should not be applied in such a way that it becomes an instrument of oppression by a minority.

That test was applied, following the introduction of the Practice Statement, on a first stage application for directions in *Re T. & N. (No. 3)* by the English High Court in the context of a proposed scheme of arrangement in relation to the creditors of T. & N Ltd., which was under administration. The creditors were, primarily, employees and former employees of *T. & N.,* who had, or might in the future have, claims for damages for personal injuries arising out of exposure to asbestos. The source of the funding for the scheme was the proceeds of a settlement of proceedings brought by the administrators against *T. & N.'s* insurers on the employers' liability insurance which was in place for a specified period to which the claims were restricted. The Court was referred to that case, but, in my view, there is a fundamental difference between that case and this case, in that, *T. & N.* was under administration and, in consequence, the provisions of the Act of 1930 referred to in *Cox v. Bankside* had come into operation, so that the rights of the insured (*T. & N.)* against the insurer had been transferred to the creditors. Therefore, it was the rights of the creditors against the insurers which were being compromised by the scheme. The position in this case is that it is the rights of the contamination creditors against the company which are being compromised.

The rights of the contamination creditors which are the subject of the scheme are their rights in contract and tort against

the company arising out of the contamination event. With one exception, the rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. The exception is the Hogg companies. In *Re Pye Ireland Ltd.*, as I have already stated, Costello J. refused to sanction a scheme under subs. (3) of s. 201 on the basis that there should have been a separate class of creditor comprising unsecured creditors who were also shareholders of the company. The basis on which he reached this decision is explained in his judgment as follows:

> "[Phillips Electrical (Ireland) Ltd.] owns … a significant and substantial proportion of the entire issued ordinary capital of the company. It is owed as an unsecured creditor a sum of £379,000 (excluding interest) and it voted at the meeting by proxy in support of the scheme. Without its vote the statutory majority would not have been obtained. There is no doubt that if the scheme is successful that the prospect for the ordinary shareholders is very much better than in a liquidation (which is the alternative if the scheme is not adopted) in which it would appear the ordinary shareholders are likely to do very badly. So it seems to me that the interests of a substantial unsecured creditor who is also a substantial shareholder are very different to those of the general body of unsecured non-shareholding creditors and that there is in reality no common interest between them – the creditor/shareholder is almost certain to support the scheme, whilst the ordinary unsecured creditor may have … what is considered as valid reasons for opposing it. I think therefore that there should have been a separate class created comprising unsecured creditors who are also shareholders in the company."

In my view, that reasoning equally applies to the position of the Hogg companies on this application, in that, in essence, the company and the Hogg companies have common ownership. Moreover, while the level of the Hogg companies' debt relative to that of the other contamination creditors is not as substantial as was the case in *Pye*, because of this common ownership, it would not be possible for the other non-connected contamination creditors to consult with the Hogg companies with a view to their common interest.

In concluding that there is only one exception to the requirement for one class meeting, in particular, I reject the submission that, because they have obtained dates for their respective hearings in the Commercial Court, in the case of Mr. Fulton and D.C. Cattle/Mr. Conlon, their rights are so dissimilar from the rights of the other contamination creditors as to make it impossible for them to consult together with a view of their common interest. Their rights are precisely the same as the rights of the other contamination creditors and, if the company were to go into liquidation, the application of s. 62 of the Act of 1961 to them would be exactly the same as its application to the other contamination creditors, whatever that application is on the correct construction of the section. It is because of that that I consider that it is not necessary to express a view on the construction of s. 62. Just because these contamination creditors are in first and second place in the queue for a hearing, in my view, does not distinguish them from the other contamination creditors.

Moreover, just because Mr. Monagle and his associates have separate insurance with FBD covering third party claims for product liability, and FBD proposes to rely on its right of subrogation under those policies, does not mean that the position of Mr. Monagle is so dissimilar from that of the other contamination creditors as to require that he and his associates be consigned to a separate class of creditor. It complicates matters undoubtedly, but it does not render the rights of Mr. Monagle and his associates dissimilar *vis-à-vis* the other contamination creditors, which is the issue. All it does is suggest that the ultimate destination of any dividend Mr. Monagle and his associates receive, if the scheme is approved, may be FBD.

Finally, notwithstanding the peculiarly difficult situation in which they find themselves, in the case of A.J.D. Farms Ltd. and Ms. Sawyers, their rights are identical to the rights of the other contamination creditors. In my view, the Court has no jurisdiction on this application to make provision for an emergency fund from which their immediate difficulties might be addressed.

While there are inevitably distinctions in the detail of the claims of the contamination creditors (such as their precise value, procedural progress and so forth), in their basic form, these claims are characterised by an overriding similarity: the claims themselves are of a similar nature; they fall to be determined on similar bases; they arise from the same incident; and, in all cases, the creditors have suffered considerable hardship.

Ancillary relief

It is items (ii) to (vi) of the ancillary relief claimed, which I have summarised at the outset, which give rise to difficulties. The fundamental question which arises is whether the Court has jurisdiction to give directions for the putting in place of a process for measuring the value of the contamination creditors' claims for two purposes: establishing weighting for the purposes of voting at the meeting of creditors; and for the purposes of payment of a dividend, if the scheme is approved.

Counsel for Carrigroe Feeds Limited was able to inform the Court that in the *Colonia Insurance* case there was provision for measuring the claims of the creditors in the scheme. However, there is a fundamental difference between the facts at issue there and the facts here, in that *Colonia Insurance* was a solvent company and, presumably, the expectation was that all of the claims, which related to runoff liabilities in relation to reinsurance of non-life insurance which the company had written, would be met.

Even in the case of an application under s. 201 in relation to an insolvent company, it seems to me that the section must envisage that the scheme will provide for a mechanism for valuing unliquidated claims because the three-fourth majority required by subs. (3) is based on claim value. Therefore, I am of the view that the Court has jurisdiction under s. 201 to direct a meeting or meetings to be summoned to consider proposals for a compromise or arrangement which embody mechanisms for quantifying unliquidated claims of creditors both for the purposes of voting at the meeting or meetings and, if approved, the implementation of the scheme. The responsibility for preparing the scheme and explaining it lies on the company and its advisers. It is not the function of the Court, at this stage of the s. 201 process, to give its *imprimatur* to the content of the scheme. Therefore, I do not propose to give ancillary directions in relation to the submission and evaluation of claims. Those matters will be covered by the terms of the proposals for the scheme, in relation to which the company and its officers must comply with the provisions of s. 202 in relation to furnishing information about the scheme on pain of the penal sanction contained in subs. (4) of s. 202. In relation to the submission that the terms of the scheme deprive the contamination creditors of access to the courts, the Court was referred to a decision of the English High Court in *Re Pan Atlantic Insurance Co. Ltd.* [2003] B.C.C. 847 in which it was held, at the third stage in the process, the sanctioning of the scheme, that an independent adjudicator procedure in a scheme which

was final and binding insofar as the law allowed did not infringe Article 6 of the European Convention on Human Rights. Although it is the constitutional right of access to the courts which counsel for Mr. Fulton invoked, if the terms of the scheme in relation to quantification of the contamination creditors' claims were subject to scrutiny at this stage, considerations similar to the considerations which underlie the decision in the *Pan Atlantic Insurance* case would, no doubt, carry weight.

So that it is absolutely clear, I reiterate that, while I consider that on this application the Court does have jurisdiction to give the company liberty to put a scheme which contains a mechanism for determining the value of unliquidated claims to creditors' meetings, the Court is not expressing any view on the relevant terms of the scheme. It is for the company to ensure that the terms will stand up to scrutiny by the Court in the event of the scheme being approved at the creditors' meeting.

The construction proceedings directions
Many issues were raised at the hearing of this application by the contamination creditors in relation to the proper construction of the FBD policy and, in particular, the limit of liability on the policy. It is unnecessary, and it would be inappropriate, to express any view on those issues. One controversy which arose was whether, as the construction proceedings directions suggest, the proper procedure for dealing with the construction issue is by way of special summons.

The concession made by the company to the contamination creditors with the co-operation of FBD that, if sought by any contamination creditors, proceedings would be initiated to have the FBD policy construed is, in effect, an agreement on the part of the company to vary the terms of the scheme. Therefore, in my view, the terms of the scheme should have been amended and the amended scheme put before the Court so that the Court would be giving liberty to summon creditors' meetings to approve of the amended scheme.

Aside from that, I consider that it is premature for the company to seek directions from the Court in relation to the construction proceedings in advance of those proceedings having been initiated because, in reality, it is impossible for the Court to give directions until the form of the proceedings and the issues which the proceedings raise are decided on by the relevant parties. However, in principle, I do not see a difficulty in giving liberty under s. 201(1) to hold creditors' meetings to approve a scheme which reflects the concession made by the company in paragraph 10 of the second grounding affidavit of Robert Hogg sworn on 2nd December, 2009 and reflected in the construction proceedings directions.

Stay
I consider that it is a proper exercise of the jurisdiction of the Court under s. 201(2) to grant a stay in the terms sought by the company, primarily, because I am satisfied that it is essential to achieving one of the underlying objectives of the proposal, which is to limit the cost of the determination of the contamination creditors' claims against the company and thus provide a greater fund for distribution by way of dividend.

As the stay will affect all contamination creditors in the same way, it is not unfair or unjust. As regards duration, it accommodates the steps which require to be taken in accordance with the scheme – the prosecution of the Tierney/Newtown Lodge proceedings and the construction proceedings, if they are initiated. Moreover, having regard to what is likely to happen if the company goes into liquidation, which is the alternative scenario canvassed on behalf of the company, it could not be regarded as being disproportionate. That is because, in the event of the company going into liquidation, any contamination creditor already before the Court is going to have to bring an application under s. 222 of the Act of 1963 and it is the express intention of FBD to obtain Court approval for the course it proposes to adopt having regard to its interpretation of s. 62 of the Act of 1961. Finally, the fact that the proceedings brought by Mr. Fulton and by D.C. Cattle/Mr. Conlon are much more advanced than the proceedings, or processing of claims, of other contamination creditors does not warrant refusing to stay those proceedings. The Court, in exercising its discretion, must have regard to what is fair and just as regards all of the creditors the subject of the scheme. At the risk of unnecessary repetition, the scheme cannot work unless all of the pending proceedings are stayed.

In arriving at that decision, I had regard to the submission made by counsel for Mr. Fulton that a matter to be considered in the exercise of the Court's discretion is that, as was submitted, it was inappropriate for the applicant to have applied ex parte to this Court for a stay on the proceedings in the Commercial Court. I am satisfied that on this application Mr. Fulton has had ample opportunity to argue against the grant of a stay in relation to his proceedings and that he did not suffer any prejudice arising from the stays previously granted.

Venue
Counsel for Mr. Fulton made the point that this application should have been brought in the Commercial Court. I see a lot of merit in that argument, given that the proceedings which are imminently for trial are pending in the Commercial Court and that the action by the company against Tierney/Newtown Lodge has been admitted into the Commercial Court. However, the company chose not to apply to have the application admitted to the Commercial Court and, that being the case, it would not seem to be open to this Court to compel it to do so.

Order
Subject to the company filing a supplemental affidavit exhibiting the amended scheme to include the amendments agreed in relation to the proceedings to construe the policy, the following orders will be made:

(1) An order pursuant to s. 201(1) of the Act of 1963 that the following meetings be summoned:
(a) a meeting of the Scheme Creditors (as defined in the Scheme) other than Scheme Creditors connected to the company through common shareholders (the first Court meeting); and

(b) a meeting of Scheme Creditors who are connected to the company through common

shareholders (the second Court meeting)

to consider the proposals for the amended Scheme of Arrangement exhibited in an affidavit sworn on the … day of …… by …….(the Scheme), both meetings to be held on Thursday, 1st July, 2010, stating where the meetings are to be held and the time of each meeting and containing directions in relation to both meetings in the terms of sub-paragraphs (i), (iv), (v), (x), (xi), (xii), (xiii) and (xiv) of paragraph 2 of the originating notice of motion.

(2) If the scheme is approved by the requisite majorities at the first Court meeting and the second Court meeting, an order that the petitions seeking the sanction of the Court for the scheme pursuant to subs. (3) of s. 201 be heard on Monday 19th July, 2010 at 2pm and that notice of the hearing of the said petition be sent to each scheme creditor and be advertised by publication in the publications referred to in sub-paragraph (iv) of paragraph 2 of the notice of motion at least seven clear days before the hearing date for the petition.

(3) An order pursuant to subs. (2) of s. 201 staying all proceedings and restraining further proceedings against the company for damages in relation to claims against the company arising out of a contamination event as defined in the Scheme until further order of the Court.

(4) An order giving liberty to apply.