THE HIGH COURT

367 COS 2014

IN THE MATTER OF BEREHAVEN CREDIT UNION LIMITED

AND IN THE MATTER OF THE CENTRAL BANK AND CREDIT INSTITUTIONS (RESOLUTION) ACT 2011

AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Mr. Justice Max Barrett delivered on the 7th day of November 2014

1. This is an application made under s.231 of the Companies Act, 1963, pursuant to which the liquidators of Berehaven Credit Union Limited seek various directions of the court. One of the directions sought involves a novel approach to the process whereby, under s.231(1) of the Act of 1963, the sanction of the court or of a committee of inspection (if appointed) is required to the bringing or defending by a liquidator of any action or other legal proceeding in the name and on behalf of a company in liquidation. The liquidators are concerned that if the prior approval of the High Court is required to every set of debt proceedings that the credit union may issue against defaulting borrower-members during the period that it is in liquidation, this could result in very significant legal fees arising. The liquidators have therefore proposed a process whereby the court can exercise its supervisory role in a manner that ensures the effective exercise of that role but in the most cost-efficient manner possible. As the application made in this regard appears to be the first of its kind, it is appropriate that the court identify in writing its consideration of the issues arising and its reasons for acceding, subject to conditions, to the application made. In addition, the court gives judgment on certain other matters that have arisen in the course of the liquidation process and in respect of which its sanction has also been sought.

Facts

2. By order of the court dated 23rd July, 2014, Mr. Jim Hamilton and Mr. David O'Connor were appointed joint provisional official liquidators of Berehaven Credit Union. The order was made following an application by the Central Bank of Ireland, which presented a petition for the winding-up of the credit union pursuant to the Central Bank and Credit Institutions (Resolution) Act, 2011, and the Companies Acts, 1963 to 2012. The appointment of the joint provisional liquidators as official liquidators of the credit union was subsequently confirmed by order of the court dated 31st July, 2014.

3. As one would expect of any credit union, Berehaven Credit Union has a substantial number of outstanding loans to its members. On their appointment, the liquidators conducted a high-level review of the credit union's loan-book, including so called "*live*" loans, by which the court assumes the liquidators to mean loans that are extant and which have not yet been repaid, and loans that have been "*written off*", the meaning of which phrase requires some explanation and is considered hereafter.

4. The liquidators' review suggests that most of the loans of the credit union: have been provided to members for specified purposes in accordance with the credit union's rules and objectives; and are "*performing*" loans, *i.e.* loans in respect of which the borrowers are fully meeting the relevant repayment obligations. However, the liquidators' review has also identified a large number of "*non-performing*" loans and loans identified as "*written off*" on the credit union computer system. Notwithstanding that certain loans are designated as "*written off*", a term which might suggest that the relevant loan amounts are irrecoverable, it turns out that when a loan is so designated by the credit union, this is in fact the beginning of the recovery process, not the end of it. Following such designation, it has been the credit union's practice to undertake a number of procedures, *viz.* the set-off of any available deposit amounts against the loan amount, the negotiation and agreement of revised payment arrangements, and in a number of instances the commencement of legal proceedings to recover outstanding monies. The amount due from these so-called "*written off*" loans is more than €3m, a substantial sum of money. It turns out that there are also a large number of "*live loans*" in arrears but which have not yet progressed sufficiently along the sliding scale that would lead to their being designated as "*non-performing*" loans.

5. In the usual course of events, a liquidator seeking court sanction under s.231 of the Act of 1963 to the bringing or defending of legal proceedings by a company in liquidation would approach the court on a 'per case' basis, armed with a report from counsel as to the likelihood of success in such proceedings. However, the liquidators in this matter are concerned that if even a fraction of the more than 380 loan accounts that Berehaven Credit Union operates were to require one or more s.231 applications, it would not be long before the process became, to use the liquidators' phraseology, "*prohibitively costly*", particularly in the context of smaller loan amounts. The liquidators have therefore engaged in discussions with M.D. O'Loughlin & Co., a firm of solicitors, as to the most efficient means of recovering outstanding loan monies that are owed to the credit union by borrowers in default. M.D. O'Loughlin & Co. were previously engaged by the Irish League of Credit Unions in relation to some of the non-performing Berehaven loans prior to the liquidators being appointed and, according to the liquidators, have something of an expertise in dealing with such credit union loans. As mentioned above, the liquidators' particular concern has been to devise a means of debt collection that would enable outstanding loan monies to be recovered at minimum cost in order to maximise the return to the credit union's creditors. The State, in one guise or another, is a significant creditor. In a letter of 8th August last, M.D. O'Loughlin & Co. detail the anticipated fees that they would charge in respect of all debt recovery matters. In their affidavit evidence before the court, the liquidators indicate that they consider the letter of 8th August to represent "*a very competitively priced proposal, which includes for the most part, fixed fees for counsel".*

The proposed arrangement

6. When this matter first came before the court for mention on 13th October, the liquidators indicated that when their application came to hearing they would be seeking, *inter alia,* an order of the court granting them the power:

> *"[u]pon the written recommendation of M.D. O'Loughlin…to bring or defend any action or other legal proceeding in the name and on behalf of Berehaven Credit Union Limited (In Liquidation) (including, but not limited to, any proceedings which are already in being) and to compromise any claim or action arising out of or relating to the loan amounts with Berehaven Credit Union Limited (In Liquidation)".*

At that time the court indicated its concern that such an order would involve an unqualified 'farming out' of the court's supervisory responsibilities under s.231 and that a more calibrated approach with suitable checks and balances would need to be proposed before the court could consider acceding to same.

7. At the hearing of this matter on 20th October, the liquidators brought forward a more nuanced proposal, *viz*:

(1) in respect of proceedings that would in any event need to be commenced before the High Court, the usual practice of seeking prior s.231 sanction to the commencement of such proceedings would be retained; and

(2) in respect of proceedings that could be commenced before a lower court, the process identified at points (i) to (iii) hereafter would apply, so

(i) an individual case-report would be prepared by M.D. O'Loughlin & Co. for the liquidators regarding the proposed proceedings, which report would identify the prospects for success of those proceedings and also indicate whether or not M.D. O'Loughlin & Co. recommended that such proceedings should be commenced;

(ii) the liquidators would not in each instance seek specific sanction of the court pursuant to s.231 in respect of the bringing of the commencement or continuation of such proceedings but would typically proceed in accordance with the professional opinion of M.D. O'Loughlin & Co. and would, by so proceeding and also insofar as they (if they) later compromised or settled such proceedings, be deemed to be acting with the sanction of the court for the purposes of s.231 of the Act of 1963; and

(iii) at intervals to be specified by the court, the liquidators would report to the court on (a) all such proceedings as had been commenced in accordance with the proposed process, and (b) on the efficacy or otherwise of the process and any concerns arising.

The law

8. As mentioned above, s.231(1) of the Act of 1963 provides that:

> *"The liquidator in a winding up by the court shall have power, with the sanction of the court or the committee of inspection–*
>
> *(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company…"*

In practice, it is normal for a liquidator to seek court sanction to the bringing of proceedings. Section 231(1) does not prescribe how the necessary sanction is to issue, whether by way of individual court application on a 'per case' basis or otherwise. Nor does it require that prior sanction should issue. It merely requires that there should be court sanction. The provision clearly seeks to ensure that insofar as the bringing or defending of proceedings by a company in liquidation is concerned there is a safeguard in the system to ensure that there is proper regard to the interests of the ultimate beneficiaries of the fruits of such litigation, in particular the interests of the company's creditors and contributories. That the court is competent under s.231 to approve a process such as that which has been proposed by the liquidators in the instant proceedings seems beyond doubt. Indeed it is something of a tribute to the parliamentary drafters of half a century ago that the provision achieves the purpose which the Oireachtas appears to have sought to achieve, being the establishment of the aforementioned systemic safeguard, without unduly trammelling the court as to the form which that safeguard is to take in any one instance.

Relevant issues

9. To what issues should the court have regard in deciding whether or not to accede to an application for a sanction process such as that proposed in the instant proceedings? It appears to the court that it should, at the least, have regard to the following considerations:

- first, is what is proposed permitted by law?

- second, notwithstanding that what is proposed may be permitted by law, does it in any way compromise the supervisory safeguard that s.231 seeks to establish?

- third, is there an in-built process of review whereby there is regular reporting to the judge in court as to how matters are proceeding?

- fourth, insofar as the court can determine, are the parties who are central to the proposed process competent to join in same?

- fifth, in the event that a party to the process misbehaves, is there an effective means of sanction available?

- sixth, do the anticipated advantages of the proposed process outweigh its perceived disadvantages?

The apparent advantages of the proposed process

10. There appear to be a number of advantages to the process proposed in these proceedings:

- first, it appears from the liquidators' evidence that the proposed process should significantly reduce the costs associated with the debt recovery process and thereby maximise creditor returns; here a significant creditor in one guise or another is the State and thus, by maximising creditor return, taxpayer exposure is necessarily reduced.

- second, counsel for the liquidators indicated that the proposed process should facilitate a certain desirable swiftness of action whereby operational decisions as to debt recovery can be taken without directly involving a judge in court on each occasion but in a manner that seeks not to compromise the oversight mechanism that s.231 seeks to establish.

- third, given that solicitors are officers of the court, it involves an allocation of administrative responsibility within the wider apparatus of the justice system, subject ultimately to regular reviews by a judge in court, rather than an improper 'out-sourcing' of the court's role under s.231.

The apparent disadvantages of the proposed process

11. There appear to be a number of disadvantages to the proposed process; however, it appears to the court that there are also

significant mitigating factors that present or can be introduced in respect of each ostensible disadvantage. Both the disadvantages and the mitigating factors are considered hereafter:

- first, the proposed process represents a deviation from the typical arrangement that has applied under s.231 whereby sanction to each individual set of proceedings has historically tended to be sought of the court. However, just because something is typically done does not mean that it need necessarily be done, or that in a particular case there may not be a better way whereby things might be done. The life of the law is experience, and experience teaches that even ostensibly similar circumstances can require entirely dissimilar treatment when viewed through the prism of context.

- second, the proposed arrangement entails something of an incentive for the lawyers involved always to recommend the bringing of proceedings so as to generate fees. The court has no reason to question the good faith or professionalism of M.D. O'Loughlin & Co. in this respect. Indeed the fact that it is a firm of some renown is a matter to which the court has had regard in deciding whether or not to accede to the instant application. However, for the sake of completeness the court notes that (a) it would expect the liquidators in their regular feedback reports to the court to flag any perceived abuse arising, and (b) if, consequent upon such report or otherwise, the court considered that there had been any such abuse, any solicitor who perpetrated same could expect the sternest of censure, including, at the least, that his or her actions would be referred to the Law Society for its consideration as to whether, in light of any findings the court might make, disciplinary proceedings should ensue. The court reiterates that its observations in this respect are by way of general point only; they are not prompted by any concerns presenting in respect of M.D. O'Loughlin & Co.

- third, it seems to the court that the proposed arrangement would likely work as regards 'ordinary' debt recovery proceedings, *i.e.* actions for recovery of an outstanding loan amount plus interest and costs. It is not so clear that it would be appropriate as regards more sophisticated proceedings such as, for example, whether a liquidator should defend an allegation of financial product mis-selling. However, the court understands from counsel, and it would seem perhaps intrinsic to the operations of a relatively small credit union, that almost all, if not all, the proceedings that will be the subject of the proposed process will be 'ordinary' debt recovery proceedings or, presumably, associated proceedings such as proceedings for the enforcement of related guarantees or security. To the extent that other actions might arise, the court considers that the customary practice under s.231 should apply, *i.e.* that the liquidators would seek the sanction of the court pursuant to s.231 on a 'per case' basis.

- fourth, the court must admit to some concern that the proposed process could, if operated inappropriately, become a coldly rational decision-making process removed from the realities of life, pursuant to which a firm of solicitors would make a legal assessment as to whether or not debt recovery proceedings would succeed and the liquidators would unfailingly act in accordance with such assessment without due consideration of any wider issues arising. Anyone with experience of working within a credit institution will know that such institutions often do not enforce their full legal rights even when enforcement proceedings would likely succeed. The motivations for an institution to stay its hand in this way can be various. There may, for example, be a sense that the continuing relationship with an individual is more important than the pursuit of victory at all costs in respect of a discrete issue arising. There may be an expectation that a customer's financial position might improve over time. Sometimes such restraint may be attributable to nothing more than a human empathy with, or sympathy for, the particular predicament in which a customer is placed, or it may be attributable to some other reason altogether. Under the proposed process, notwithstanding such recommendation as may issue from M.D. O'Loughlin & Co., the liquidators will have the final say as to whether debt recovery proceedings are to be commenced against a particular borrower. The court expects and exhorts the liquidators in this respect to have keen regard to the individual circumstances of each defaulting borrower and not just to the issue of whether or not such debt recovery proceedings as might be commenced against such borrower would be likely to succeed. In instances where there exists a right to commence litigation but, for whatever reason, the commencement of that litigation does not make wider sense to the liquidators they are at liberty not to commence such litigation, regardless of any recommendation that might issue from M.D. O'Loughlin & Co., and they remain free at all times to seek the guidance of, and appropriate direction from, the court.

Conclusions as to relevant issues

12. Having regard to all of the foregoing, the court reaches the following conclusions in respect of the relevant issues that it has identified above as pertinent issues to be considered in an application of this nature:

- first, the court considers that the proposed process is permitted under s.231.

- second, given the centrality of court officers (solicitors) to the process, the amenability of same to censure, the establishment of regular reviews, and the right on the part of the liquidators to apply to the court at any time for individual directions, the court considers that the oversight process that s.231 seeks to establish is not in any way compromised.

- third, there is an in-built process of review, both by way of the proposed feedback reports and the continuing right of the liquidators to make application to the court at any time under s.231.

- fourth, insofar as the court can determine, the professional parties who are central to the proposed process in this case are competent to join in same. As regards the liquidators, the process does not involve any significant change in their role. As regards the solicitors who are to be involved, they are individually in possession of practising certificates, and the regulated firm to which they belong is a firm of some renown and possesses what the liquidators perceive to be a niche expertise in the type of work that is to be entrusted to them; to the extent that some of the work done within, by or for M.D. O'Loughlin & Co. will be done by employees or agents who are not solicitors, the court understands that such persons will be employed by or otherwise under the control of solicitors within M.D. O'Loughlin & Co.

- fifth, in the event that either the liquidators or solicitors were to act inappropriately, and there is no suggestion that this will arise, appropriate censure mechanisms are available.

- sixth, having regard to all of the foregoing and to the individual advantages and disadvantages (with mitigating factors) identified above, the court considers that the anticipated advantages of the proposed process outweigh its disadvantages.

The court's order
13. Having regard to the conclusions mentioned above, the court proposes to issue an order that will establish the proposed process identified at para. 7 above, subject to the following conditions:

- first, in the event that M.D. O'Loughlin & Co. issue a report in which they do not recommend that proposed debt recovery proceedings be brought or, alternatively, recommend that such proceedings not be brought, the liquidators may not thereafter commence such proceedings without the specific and express sanction of the court.

- second, the court's approval of the proposed process extends only to actions for recovery of an outstanding loan amount plus interest and costs and to associated proceedings, such as proceedings pursuant to related guarantees or for the enforcement of security. All other actions will need to be approved by the court on the usual 'per case' basis that pertains under s.231.

- third, the court will require that feedback reports of the type referred to above be submitted to it by the liquidators at the end of each quarter.

- fourth, the court expects and exhorts the liquidators to have keen regard to the individual circumstances of each defaulting borrower and not just to the issue of whether or not such debt recovery proceedings as might be commenced against such borrower would be likely to succeed. In instances where there exists a right to commence litigation but, for whatever reason, the commencement of that litigation does not make wider sense to the liquidators they are at liberty not to commence such litigation, regardless of any recommendation that might issue from M.D. O'Loughlin & Co.

- fifth, for the avoidance of doubt the liquidators will and do retain the freedom at all times to make application to the court, under s.231 or otherwise, to seek such guidance or directions from the court as they consider appropriate.

14. The court will consider with counsel the precise form of the order that is to issue. Separate to, or as part of, that order the court is satisfied to grant the approval that the liquidators have separately sought to their instructing M.D. O'Loughlin & Co. on the terms and for the purposes contemplated by the letter which the latter issued to the liquidators on 8th August last.

Other order sought
15. In addition to the foregoing, the liquidators have also made application under s.231 of the Act of 1963 to retain two particular employees of Berehaven Credit Union. Sanction was sought by the liquidators for the retention of these employees for a period of six months in the first instance. However, it became apparent at the hearings that a more efficient order, both in terms of cost and otherwise, would be for the court to sanction the continuing employment of the said individuals for so long as the liquidators in their professional discretion consider that conducive to a more effective implementation of the liquidation process. The court therefore approves the continuing employment of the said individuals on such basis.