THE HIGH COURT

Approved

No Redaction Needed

[2025] IEHC 103

[2011/219MCA]

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

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 280 AND 307 OF THE COMPANIES ACT, 1963 TO 2012

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 631 AND 623 OF THE COMPANIES ACT, 2014 ON THE APPLICATION OF THE OFFICIAL LIQUIDATOR

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 20th day of February, 2025.

1. Custom House Capital Limited ("CHC") was wound up on the 21st October 2011. The applicant, Kieran Wallace, was appointed Official Liquidator of CHC and as Administrator for the purposes of the Investor Compensation Act, 1998. Over the intervening 14 years, there has been a significant amount of activity in what was, almost inevitably, a very difficult liquidation.

2. This is my decision on an application made by the Official Liquidator instituted by notice of motion dated 2nd October, 2024, and heard by me on the 5th of February, 2025.

3. The application arises in the following circumstances. The Official Liquidator has made very considerable progress in the recovery and distribution of monies to clients of CHC. However, he has now reached the stage where it is inevitable that there will be what is described

as a "rump" of Recovered Misappropriated Monies and Pooled Client Assets, which will remain undistributed and undistributable at the conclusion of the liquidation. There are a number of reasons why such monies will be impossible to distribute. For instance, the Official Liquidator has identified the fact that in some cases no contact can be made with clients, and the fact that in other cases clients of CHC have not engaged sufficiently with the Official Liquidator for the purpose of receiving monies due to them.

4. This creates a very real difficulty for the Official Liquidator, who is anxious that the liquidation be concluded as early as can practicably be done. In previous judgments in this liquidation, the court on a number of occasions has emphasised the obligation on the liquidator to distribute funds and assets to the persons entitled to these. To give but one example, in her judgment of the 22nd December, 2014 arising from an application by the Official Liquidator, Finlay Geoghegan J. emphasised (at para. 33) that: -

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

5. In a similar vein, at para. 52 of her judgment Finlay Geoghegan J. commented: -

"The reason for which I consider Mr. Wallace is obliged to carry out the reconciliation work as official liquidator CHC derives from my conclusion that on the particular facts of CHC an orderly winding up of its affairs requires the Liquidator to arrange for the distribution and transfer of client assets in an orderly fashion. It is the Liquidator who must conduct the orderly winding up. He cannot complete this without the distribution or release of client assets which CHC controlled as part of its business."

6. Plainly, the liquidation cannot be completed without proper arrangements being made for the distribution of client assets or funds. However, a logical consequence of this obligation on the part of the liquidator is that the liquidation would have to remain open indefinitely for as long as funds were available to the Official Liquidator even though these funds cannot be distributed. Such a situation would plainly be surreal.

7. In approaching the difficulty created by the existence of the rump monies and assets, the Official Liquidator has identified four possibilities. These are set out at para. 34 of his grounding affidavit, which reads: -

*"(1) **Liquidation**: to keep the liquidation open pending engagement in the distribution process by all clients who have been contacted but have not to date responded or have not provided sufficient information or documentation to facilitate their distributions;*

*(2) **Trust**: to establish a trust to administer any rump of Undistributed Recovered Misappropriated Monies and Undistributed Client Assets and distribute to clients in accordance with the terms of the trust;*

*(3) **Distribution of Rump to Clients**: to distribute any Undistributed Recovered Misappropriated Monies and Undistributed Client Assets at the end of the liquidation amongst all clients and/or, as the case may be, amongst those clients who had a claim on the Pool and engaged with my team and me to facilitate previous distribution. This*

distribution would be made pro-rata to their claim on the Pooled Assets and/or Pool as the case may be.

(4) ***Unclaimed Distributions****: to apply the statutory process for dealing with undistributable balances after the dissolution of a company (or a similar or analogous process) in respect of any undistributed and undistributable Client Assets and Recovered Misappropriated Monies."*

8. With regard to the first of these options, it would clearly be intolerable for the liquidation to be kept open for the sole purpose of distributing the rump funds and assets. Mr. Wallace has exhibited a chart setting out the estimated costs of the continuation of liquidation, which shows a total cost over a ten year period of €825,400. Understandably, the Official Liquidator does not recommend that either for the ten year period for which figures are given or indeed for any period a phantom liquidation remains in place at a very significant cost.

9. With regard to the second option, Mr. Wallace records that his staff have sought proposals from four trust service providers as to how this approach might be adopted in practical terms. A lack of appetite in providing such trust services can be seen from the fact that only one of the four trust providers approached reverted to the Official Liquidator. On the basis of that interaction, Mr. Wallace sets out (at para. 49 of his affidavit): -

"On these figures, if I presume an average of €2 million of client monies is held over a 10-year period, the cost to set up and maintain the trust would amount to €235,000 over the period. The associated redemption and/or distribution costs will be additional to this figure and depend on the number of redemptions or distributions to clients. I say and believe that this significant cost would effectively be borne by the former clients of the Company. The cost to put an alternative structure in place would likely have to be borne from Misappropriated Monies recovered from the funds as these investments do not generate ongoing income or returns. The net impact of this would result in a further

reduction in the amount available for distribution to affected investors. In addition, having regard to the fact that various clients are due amounts below €1,000, a €400 redemption or distribution charge would be entirely disproportionate to the sums to be distributed."

10. On this practical basis alone, I agree with the Official Liquidator that a trust arrangement (even if it were possible on a regulatory or legal basis) is an undesirable option.

11. As for option 3, the Official Liquidator identifies three problems with this proposed course of action. In the first place, of course, it involves a distribution of monies to other investors which might have the effect of defeating any claim on these funds which might be made by the persons actually entitled to them. It involves giving away one investor's money to another investor. It is difficult to see how such a course of action can be justified. Secondly, the Official Liquidator identifies the lack of any legislative basis for such action. In a way, this is the other side of the coin to the first objection. It is unsurprising that there is no legislative basis for the distribution to some investors of monies which other investors are entitled to claim. Thirdly, the Official Liquidator identifies the additional costs which would arise from this approach. He gives evidence (at para. 55 of his affidavit) that :-. *"I say and believe that these costs are likely to be entirely disproportionate to the individual share of the amounts payable to each client. In such circumstances, I say and am advised that this is not an appropriate approach in the circumstances."*

12. To the credit of the Official Liquidator, he does not favour the fourth option simply because the other three options have very significant drawbacks. In his affidavit, Mr. Wallace identifies the fourth option as the preferred one for a number of reasons. In essence, it avoids the level of costs attached to certain of the other options. In addition, it is one which he believes is positively supported by the existing legislation. I will now consider that proposition.

13. Section 623 of the Companies Act, 2014 reads: -

"623. (1) Where a company has been wound up, and is about to be dissolved, the liquidator shall, in such manner as may be prescribed, lodge to such account as is prescribed by the Minister the whole unclaimed dividends admissible to proof and unapplied or undistributable balances.

(2) An application to the court by a person claiming to be entitled to any dividend or payment out of a lodgment made in pursuance of subsection (1), and any payment out of such lodgment in satisfaction of such claim, shall be made in the prescribed manner.

(3) At the expiration of 7 years after the date of any lodgment made in pursuance of subsection (1), the amount of the lodgment remaining unclaimed shall be paid into the Exchequer, but where the court is satisfied that any person claiming is entitled to any dividend or payment out of the moneys paid into the Exchequer, it may order that that dividend or payment be made and the Minister for Finance shall issue such sum as may be necessary to provide for that payment.

(4) Where moneys invested or deposited at interest by a liquidator form part of the amount required to be lodged, pursuant to subsection (1), to the account referred to in that subsection, the liquidator shall realise the investment or withdraw the deposit and shall pay the proceeds into that account."

14. The account described at s. 623(1) of the Act has been designated by the Minister in an Order made on the 29th May, 2015. The question, therefore, is whether or not the rump monies and assets constitute *"unapplied or undistributable balances"* within the meaning of that subsection.

15. The phrase *"balance"* is not defined in the legislation. There is no reason to believe that it has any special meaning, other than its ordinary English meaning. On that basis alone, I believe that the rump monies and assets constitute *"unapplied or undistributable balances"* within the meaning of the section.

16. In his submissions, counsel for the official liquidator goes further, and referred to the passage in the judgment of Murray J. in *Heather Hill Management Company v An Bord Pleanála* [2022] 2 ILRM 313 dealing with the proper construction of statutes. It is clear from that judgment that the words of the statute *"are given primacy…"* in the context of statutory interpretation for the obvious reason that they are *"the best guide to the result the Oireachtas wanted to bring about"*; para. 115 of the judgment. As I have already said, confining myself to the words of the section I would decide in favour of the official liquidator. However, as Murray J. goes on to comment (at para. 116 of the judgment): -

> *"…the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose."*

17. This is particularly true in the context of lengthy and complicated legislation such as the Companies Acts. In the context of that legislation, it is clear to me that the Oireachtas wished to avoid the sort of situation which potentially could arise in the case of this company, namely that a liquidation would persist indefinitely because of the existence of assets which the liquidator simply cannot properly distribute. Not only is the specific wording of s. 623(1) applicable to the current situation, the general sense and purpose of the legislation is also conducive to the interpretation for which the official liquidator contends.

18. Finally, I am asked to have regard to a document falling under the rubric of *"other reports"* as referred to by McKechnie J. in *People (DPP) v Brown* [2019] 2 IR 1, in a passage approved by Murray J. at paragraphs 106 et seq of *Heather Hill.* Such a report can, as part of the legislative history of an Act, provide relevant context to the words used in a statute. The relevant report is that of the Company Law Reform Committee, 1958 (*"the Cox Report"*) which reads (at para. 206) as follows: -

> *"Considerable loss of time and expense in voluntary liquidations is sometimes caused by the difficulty which a liquidator has in tracing persons to whom debts are due or to*

whom money is due in respect of shares in the company. The liquidator cannot complete the winding-up of the company until he has made provision for these. The Irish Courts have found a convenient solution to this difficulty by holding that the liquidator is a trustee and is entitled to pay these monies into Court under the Trustee Act… but this involves delay and unnecessary expense. We recommend that there should be an account at the Head Office of the Bank of Ireland to be called 'The Companies Liquidation Account' and that a liquidator should have power to pay any money representing the amounts due to creditors whom he cannot trace or any monies representing unclaimed or undistributed assets of the company or any other sum due to any person as a member of the company to the credit of this account which should be under the general control of the Minister for Industry and Commerce. Anyone claiming to be entitled to be paid out of this account should be entitled to apply for payment to the Minister for Industry and Commerce with a right of appeal to the High Court. The payment by the liquidator to the credit of this account should be an effectual discharge to him in respect of the monies so paid."

19. The section at the start of this passage sets out, with extraordinary prescience, the very difficulty which faces the Official Liquidator in this case, over 75 years after the date of the Cox Report.

20. Ultimately, the essence of the Cox recommendations (though not all of them) found statutory form in section 307 of the Companies Act, 1963. That section is materially identical to section 623 of the 2014 Act, and likewise refers to the issues created by *"unapplied or undistributable balances."*

21. Given the decision I have made about the meaning of section 623, it has not been strictly necessary for me to have recourse to the Cox Report. It is, however, reassuring that the recommendations of that Committee (and the reasons for those recommendations) align with

my own view as to the mischief which s. 309 of the 1963 Act and s. 623 of the 2014 Act is designed to meet, which in turn supports my view that the current application by the Official Liquidator by reference to the provisions of the 2014 Act is a well-founded one.

22. On an earlier application of the Official Liquidator, I directed that the Central Bank be made a notice party to the hearing which took place earlier this month. At the hearing of the substantive motion, counsel for the Central Bank rested on the position taken in correspondence by the bank's solicitors, which has been not to oppose the making of the order sought by the Official Liquidator. Indeed, the correspondence from Arthur Cox (the solicitors for the Central Bank) concludes: -

> *"Having regard to the above, the Central Bank is of the view that the Application and Orders sought that the official liquidator as set out above are appropriate."*

23. The reference to the earlier part of the letter from Arthur Cox is in respect of assurances as to how client communication is to be handled in respect of the rump monies and assets, and the confirmation provided by the official liquidator that he would take guidance from the bank's *"client asset requirements guidance on material transfers of client assets"* when corresponding with clients in respect of certain matters.

24. I should note that the Official Liquidator has made an alternative argument as to how the rump monies and assets are to be dealt with, but it is not necessary to consider that submission (relating to the provisions of O. 74, r. 78, of the Rules of the Superior Courts) given the view which I have formed on the scope of s. 623 of the 2014 Act.

25. I will therefore make an order that all monies on hand or under the control of the Official Liquidator representing unapplied or undistributable balances of monies beneficially owned by and payable to or for the benefit of former clients of CHC should be lodged in accordance with s. 623 of the Companies Act, 2014 to the account prescribed by s.623(1) of the 2014 Act. I will grant the Official Liquidator and the Central Bank of Ireland liberty to apply in respect of

this order. I will also make an order that the Official Liquidator is entitled to his costs of and incidental to this motion and order as part of the costs in the winding up.