THE HIGH COURT

[2011 No. 219 MCA]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007 AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of October 2012

1. This judgment is given in an application brought by Kieran Wallace, official liquidator of Custom House Capital Limited (In Liquidation) (the "Liquidator" and "CHC" respectively) seeking certain directions and the determination of issues relating to the quantum and discharge of his remuneration, fees, costs and legal expenses associated with the administration and reconciliation of certain client accounts comprising equities and/or segregated cash accounts.

2. The application of the Liquidator raises difficult and unusual issues in this complex liquidation. The issues, as originally presented, have been refined in the course of the application. The issues which require determination can only be understood in the context of the business of CHC, the facts giving rise to the winding up order and the work done by the Liquidator relevant to this application.

Business of CHC

3. CHC was incorporated as a private limited company on 28th July, 1997, and commenced trading in the same year. Its principal activity was in the provision of financial services including investment fund management, setting up and managing approved retirement funds, pension funds and personal savings accounts. It

established investment vehicles for collective investment by clients, including exempt unit trusts, qualifying investor funds established under the laws of Ireland and the purchase of property through special purpose vehicles ("SPVs") established under the laws of various European countries, a Mezzanine Bond Fund and personal retirement savings account ("PRSA") products.

4. In March 2011, CHC had assets in excess of €1.1 billion under management on behalf of its clients and €24m in cash held in designated client accounts. It had approximately 1,500 clients, the majority of whom reside in Ireland.

5. Since 2007, it had been authorised under Regulation 11 of the European Communities (Markets in Financial Instruments) Regulations 2007 (the "MiFID Regulations"). It was also an approved Qualifying Fund Manager in relation to the provision of Approved Retirement Funds ("ARFs") and Approved Minimum Retirement Funds ("AMRFs"). CHC was also a PRSA provider for the purposes of the Pensions Act 1990, as amended. It had three PRSA products approved by the Pensions Board and the Revenue Commissioners.

Facts Leading to the Winding Up

6. In summary, the facts leading to the winding up as disclosed by the Liquidator's and inspectors' reports to the Court are as follows.

7. The Central Bank had been engaged with CHC since 2009. During 2009 and 2010, concerns were raised that some clients' monies were being invested without their knowledge or consent in the Mezzanine Bond Fund. Authorised officers were appointed to investigate a sample of property transactions which included the mezzanine financing. Following this investigation, directions were issued by the Central Bank under the MiFID Regulations which included a requirement for CHC to

clarify the financial position of each syndicated SPV. Directions were given between April 2010 and July 2011, which remained in force at the date of commencement of the winding up. The Liquidator, at s. 3 of his first report to the Court, states that such directions required CHC, *inter alia*, to:

> "• Suspend the making of payments of any sums to any client of the Firm;
>
> • Suspend the making of payments to any person where the payment includes sums received from clients or other customers of the Firm;
>
> • Suspend the making of any transfer or disposal of assets to any person where the transfer or disposal includes assets of or held on behalf of a client of the Firm;
>
> • Suspend transactions on any account held (a) by the Firm or (b) by any other person on behalf of the Firm or (c) by any other person under the direction or control of the Firm where such account contains assets or money of or held on behalf of a client of the Firm.
>
> • Refrain from granting to any person control or security or a power of attorney over any client assets or client money.
>
> • Suspend the issuing of any statements to any client describing clients' investments or holdings; and
>
> • Take all steps necessary to secure and preserve the records of the Firm."

8. In July 2011, the Central Bank applied to the High Court pursuant to Regulation 166 of the MiFID Regulations arising out of serious concerns it had about the affairs of CHC. The Court, by order of 15th July, 2011, made orders pursuant to Regulation 166 authorising an investigation into the affairs of CHC and appointing inspectors.

9. The inspectors presented their final report to the High Court on 19th October, 2011. The version of the report authorised for publication was before the Court on this application.

10. The inspectors, in their final report, found "that there was a practice of CHC effecting transactions on behalf of clients in a manner which could not have been envisaged by those clients and for which no mandate or authorisation had been given by such clients to CHC. In many cases, these transactions were not only authorised but also improper" (para. 1.9). They further stated, at para. 23 by way of general conclusion:

> "In the introduction to the Report, the scale of the misconduct of CHC was summarised, with the body of the Report providing more detail on specific issues. The exact sums of money taken directly and indirectly from clients by CHC and placed into property investments and/or used to meet other cash needs cannot be precisely stated without a detailed reconciliation of clients' holdings. However, it is clear that this amounted to in excess of €56 million. This does not include the funds owed to Mezzanine Bond holders, which amount to an additional €10.4 million (exclusive of interest). There was a systematic and deliberate misuse of assets and cash belonging directly or indirectly to clients of CHC. This misuse was deliberately disguised by CHC through the use of false accounting entries and the issue of false and misleading statements to clients."

11. In the meantime, in early 2011, CHC had sought help from Horwath Bastow Charleton ("HBC") to assist with the day-to-day running of CHC and also in ascertaining the scale of the misallocation of funds, reviewing the affairs of CHC, reconciling its books and records and endeavouring to regularise the affairs of the

SPVs and other companies connected to CHC. The Liquidator reports that the relationship between HBC and CHC was formalised with a signed letter of engagement for the provision of services on 28th July, 2011. Further, the Liquidator, in his first report, records that it was later proposed by CHC that Horwath Bastow Charleton Wealth Management ("HBCWM") would manage the assets and business of CHC and a sub-management agreement was entered into between HBCWM and CHC on 13th October, 2011.

12. On 21st October, 2011, the High Court (Hogan J.) made an order pursuant to Regulation 172(1)(a) of the MiFID Regulations and the provisions of the Companies Acts 1963 to 2009, that CHC be wound up by the Court and appointed Kieran Wallace as official liquidator of CHC. Mr. Wallace was also appointed administrator of CHC for the purposes of s. 33A of the Investor Compensation Act 1998, as amended.

13. The winding up is a winding up by the Court pursuant to the provisions of the Companies Acts 1963 to 2009. Whilst Regulation 172 of the MiFID Regulations authorised the Court of its own motion to make an order for the winding up following the presentation of an inspector's report, it does not appear that any different winding up regime is to apply once the order for winding up has been made, save in one potential respect. As appears below, the MiFID Regulations contain certain specific provisions in relation to a liquidator's remuneration which may apply to this application. That apart, it does not make any specific provisions in relation to windings up.

Post-Winding Up

14. The initial reports of the Liquidator and his first two affidavits to the Court all made or sworn prior to the commencement of this application disclose that the Liquidator was faced with a highly unusual situation in this winding up.

15. The assets of CHC were, in relative terms, small. A draft estimated balance sheet at the date of commencement of the liquidation was prepared. The Liquidator understandably raises concerns about its accuracy. It discloses a cash balance of approximately €400,000 at the bank and estimated trade debtors of €5.6 million. A statement of affairs sworn by directors of the company estimates trade debtors at just in excess of €3 million. The Liquidator, in his affidavit of 8th May, 2012, states that realisations to that date total €413,635.97. This appears to be principally the bank balance and interest earned thereon.

16. However, as already referred to, CHC, at the commencement of the winding up, had under its management or under its control client funds with an estimated nominal value of €1.1 billion.

17. The client funds, in broad terms, were divided into three types of investments, namely: equities, property investments and cash funds. Included amongst the equity and cash funds were what have been referred to as segregated client asset accounts. Within such segregated client asset accounts, in addition to privately held funds, there were funds held in ARFs, AMRFs and PRSA products. Such investments have transfer restrictions explained below.

18. The Liquidator, having taken advice, determined that he should, as liquidator, assist in the transfer of segregated client funds to those entitled or, where required, to another qualified person or product. Further, he determined that it was necessary for

him to be satisfied in relation to the segregated client funds that the relevant client was beneficially entitled to the funds before he could make a distribution either to the client or transfer the ARF, AMRF or PRSA to an appropriate person or product. The Liquidator, therefore, carried out a reconciliation process for the purpose, primarily, of ascertaining that the relevant client was the person beneficially entitled to the monies or equities stated to be in his account.

19. The necessity for the Liquidator to carry out a reconciliation process is disputed by certain of those who appeared on the application and I will return to this.

20. The Liquidator ascertained, initially, that there were 678 clients who held investments with CHC in equities and/or segregated cash accounts and the reconciliation process was carried out in relation to each of those clients. Having obtained a consent of the Central Bank to a variation in directions, he then communicated with each of the holders of those client accounts.

21. Following the completion of the reconciliation of the 678 client accounts, the Liquidator states that it was discovered that 233 of those clients either held accounts, which although they still appeared on the CHC system, were now closed or in relation to which funds were moved prior to his appointment.

22. The Liquidator formulated his claim for remuneration, costs and legal expenses the subject of this application as follows. He estimated that the costs incurred by him and his team in carrying out the reconciliation prior to 30th March, 2012, was €235,022.95 (excluding VAT) applying the appropriate charge-out rates for the individuals in KPMG. However, he indicated that he only proposed charging a fee of €115,000 (excluding VAT) to the individual clients for the work done (a discount of 51%). In addition, his solicitors provided a binding estimate of their costs for advice given and work done in connection with the work carried out in relation to

the equities and segregated cash accounts in the sum of €68,000 (excluding VAT). This was supported by a letter from a cost accountant. The Liquidator consequently proposed charging a total fee for his own remuneration and legal costs inclusive of VAT of €225,000. He states that having regard to his estimate of the then value of the equities and segregated cash assets as at 20th January, 2012, he proposed charging to each client a fee of 0.5% of the total value of that client's equity and segregated cash assets. There is undoubted confusion in the affidavits of the Liquidator as to the basis upon which he decided to seek 0.5% of the value of the client's account and as to whether or not that was intended to be inclusive or exclusive of VAT. It is not necessary to resolve this at present.

23. The Liquidator identified 78 clients in respect of whom a fee of 0.5% of their equities and cash assets as at 20th January, 2012, would result in a fee of less than €10 and did not seek payment from those clients.

24. The number of clients from whom the Liquidator sought payment of fees for the work done in reconciling their client account was 350. The Liquidator wrote to all 350. By May 2012, he states that he received responses from 172 clients making payments to him totalling €185,176.89. The Liquidator, having obtained appropriate directions from the Central Bank, transferred the cash and investments beneficially held by those paying clients as required. Those clients are not the subject of this application.

25. 149 clients did not respond to the correspondence from the Liquidator or advertisements and the Liquidator has not sought any further relief in this application in respect of such clients who were in the papers referred to as "non-dissenting clients".

26. In the period leading to the hearing of the application, nine clients were identified as "dissenting clients" *i.e.* persons who had not agreed to pay the requested fees. I wish to make clear that this term was used as a matter of convenience and is not intended in any way to be critical of those persons who decided not to agree to the request of the Liquidator. As they were entitled to do so, they sought to have the Liquidator's entitlement to seek a payment from them or to deduct an amount of 0.5% from the value of their equities or cash determined by the Court. Two further dissenting clients were added in the course of the application.

27. I am conscious, in setting out the above numbers that they do not appropriately add up. They have been taken from the Liquidator's affidavits and nothing turns on the detail.

Procedure

28. In accordance with directions given by the Court on 30th March, 2012, all nine dissenting clients were served with all the relevant papers grounding the Liquidator's application. In addition, papers were served on the Pensions Board and the Investor Compensation Fund. Affidavits and submissions were filed by those who wished.

29. At the hearings, Mr. Conway, Mr. Shannon, Mr. O'Meara, Mr. Ticher, Mr. Day and Mr. Nugent, being six of the dissenters, all appeared and made submissions to the Court. In addition, Ms. Delaney, solicitor to the Pensions Board, made submissions and Mr. Cahir of Messrs. A&L Goodbody, solicitors to the Investor Compensation Fund, made brief submissions.

30. It became necessary to adjourn the hearings from time to time and there were additional affidavits filed in the course of the adjournments. Further information in

relation to the attitude of the Revenue to the taxation of any distribution from a PRSA for the purpose of discharging the Liquidator's fees was provided to the Court.

31. The dissenting clients may be divided into three classes:

(a) Two dissenting clients held what the Liquidator has termed "private accounts" with CHC. They were accounts in the name of the client, managed by CHC. In respect of each, a mixed portfolio of stock and shares was transferred to Merrion Stockbrokers by CHC. CHC, pursuant to a management agreement, managed the assets and could direct transactions on behalf of the clients. One such client, Mr. Ticher, who appeared before the Court, informed the Court that he gave instructions directly to Merrion Stockbrokers and had direct contact with Merrion Stockbrokers.

(b) Four dissenting clients held PRSA products of CHC. They held two types of non-standard PRSA products. Each client entered into a PRSA agreement and an investment management agreement with CHC. The client is the beneficial owner of the assets in the PRSA but there is a restriction on transfer out of a PRSA product. It may only be to another PRSA product or to an approved occupational pension scheme or statutory scheme of which the client is a member or to a pension arrangement outside the State.

(c) There were three dissenting clients who held ARFs, one of whom also held an AMRF. In respect of each client, there are applications and declarations in respect of an ARF or AMRF, as appropriate, and also an investment management agreement with CHC. Similarly, the beneficial ownership of the assets is with the holder of the ARF or AMRF. However,

the ARF or the AMRF was held with CHC as a Qualifying Fund Manager for the purposes of s. 784 of the Taxes Consolidation Act 1997, and, if the assets are to remain within the ARF or AMRF, they may only be transferred to another Qualifying Fund Manager. Any distribution out of the ARF or AMRF to the client has significant tax consequences.

32. Two additional dissenting clients were identified in the course of the hearings; their facts did not raise any additional issues and they did not make separate submissions.

33. The Liquidator prepared for the Court by way of separate exhibit the contractual documentation relating to each of the nine dissenting clients. That was provided to the Court and to each of the relevant dissenting clients. It discloses the personal amounts and arrangements in respects of each client and it is not proposed to refer to these, save insofar as might become necessary. The above general facts are taken from that documentation.

34. On the facts, it was commoncase by the end of the hearing that in respect of each of the dissenting clients, when the accounts were set up, regardless of their nature, the funds advanced by the client for investment were initially paid to CHC. Further, it was not disputed that those funds were, when received by CHC, paid into a pooled client account and CHC then, as appropriate, transferred the monies either to the relevant stockbroker to purchase the equities or stock or to another financial institution.

35. Certain of the dissenting clients, subsequent to the initial hearing, have reached further agreements with the Liquidator. This does not affect the issues of principle which require to be determined.

36. Counsel for the Liquidator made clear in the course of submissions that whilst this application ultimately related only to a relatively small amount of fees sought from a limited number of persons or their assets that it raised important questions of principle which were relevant to the ongoing work in the liquidation.

Issues

37. The issues to be decided may be summarised as follows:

(i) Whether the reconciliation and administration of the segregated client funds *i.e.* equities and/or segregated cash accounts belonging to the clients of CHC is properly a task for the Liquidator.

(ii) If the answer to the first issue is in the affirmative, whether the Liquidator's remuneration and the fees, costs and expenses, including legal expenses associated with such reconciliation and administration of the segregated client accounts may properly be charged to or deducted from the funds held in those accounts.

(iii) If the answer to each of the above is in the affirmative, whether the Court has jurisdiction to or should make an order that each of the dissenting clients pay or their funds be charged with 0.5% plus VAT of the value of their accounts on 20th January, 2012, in respect of their share of the payment for remuneration, costs, fees and expenses to which the Liquidator is entitled. This third issue includes a number of sub-issues, both in relation to the quantum of the fees sought and the manner of apportionment between clients.

38. I propose addressing each of the above issues, insofar as necessary, in the order set out above.

Official Liquidator's Role in the Winding Up of CHC

39. An order has been made for the winding up of CHC. As has been observed by Laffoy J. in *Re Greendale Developments Limited (No. 1)* [1997] 3 I.R. 540 at 547, "once a winding up order is made, a company is doomed to extinction". The role and duty of an official liquidator is, as is commonly stated, to conduct "a proper and orderly winding up of the affairs of the company". The general obligation on an official liquidator to wind up "the affairs of the company" appears confirmed by the terms of s. 249 of the Companies Act 1963. This provides:

> "249(1) When the affairs of a company have been completely wound up, the Court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly."

In a winding up by the Court, the application for what is normally termed "final orders", which includes the order pursuant to s. 249, is the completion of the proceeding. As appears an order for dissolution may only be sought when "the affairs of a company" have been completely wound up.

40. It is true that many descriptions of the duties of a liquidator refer to the administration of the assets of the company, in particular, their realisation and distribution of the proceeds to those entitled, normally creditors in accordance with the relevant priorities. A liquidator has, in addition, currently a number of statutory duties which go beyond the core function of realisation and distribution.

41. However, it appears to me that what is required of a liquidator to wind up the affairs of a particular company will always depend upon the nature of the business or other activity conducted by the company prior to the making of the winding up order.

Having regard to the business of CHC, the obligation to wind up the affairs of CHC requires the Liquidator to engage in an orderly termination of the involvement of CHC in the investment and management of the client funds formerly under its control. A general description of such a task involves the return to the clients or transfer at their direction of the investments or cash to which they have a beneficial entitlement. The precise work done will depend, firstly, upon the nature of the investments and the contractual arrangements between CHC and the clients (which may have been terminated by the winding up order) and third parties. Secondly, it will depend upon what is required to be done to identify the investments or cash to which each client is beneficially entitled.

42. On the facts herein, this task is complicated by two factors. First, the findings of the inspectors and the abuses disclosed in the final report to the Court, including the unauthorised removal of an estimated €56m of client funds and its unauthorised use in connection with property investments. Secondly, the fact that certain of the investments managed or held by CHC either as a Qualifying Fund Manager (in relation to ARFs and AMRFs) or in an approved PRSA product which may not, by their terms, be transferred to the client beneficially entitled or, if they were to be so distributed, would result in significant adverse tax consequences for the client in question. The orderly transfer of such investments from CHC to another appropriate authorised person or product required the involvement of the Liquidator.

43. Accordingly, I am satisfied that the Liquidator is correct in the decision he made that as part of the winding up of CHC, he is obliged to arrange for the orderly distribution of client funds held in investment vehicles provided by or under the control of CHC, either to those beneficially entitled or, where appropriate, to a qualified person or product at their direction.

44. The dissenting clients, in submission, contended that even if that general proposition was correct, on the facts herein, it was unnecessary for the Liquidator to carry out the reconciliation of the equities or segregated cash accounts to which they were beneficially entitled. The dissenting clients submitted that the letters written by the Liquidator to them following the process of reconciliation did not tell them anything new. They submitted that, all along, they had been receiving from the relevant stockbrokers a statement of the equities and cash held by the stockbroker and that the Liquidator simply confirmed what they already knew.

45. The Liquidator, in his affidavits, and counsel on his behalf, submitted that having regard to the findings in the inspectors' final report to the Court, including in relation to the segregated client asset accounts, that the Liquidator could not make transfers of segregated client asset accounts without being satisfied that the client in question was beneficially entitled the equities and cash in those accounts. In particular, reliance was placed upon the fact that when a client made his initial investment, the monies were paid to CHC; placed by CHC in a pooled client account and then transferred out to the relevant stockbroker for purchase of equities or to be placed other financial institution if being placed on deposit.

46. The inspectors, in their report to the Court in the section dealing with segregated client asset accounts, state in their conclusions at para. 5.4:

> "In the view of the Inspectors, cash held by CHC on behalf of clients was invested in various CHC property funds without their knowledge or consent and contrary to mandates given by clients. There was a systemic and widespread practice within CHC of concealing this in the valuation statements issued to relevant clients. Valuation statements issued to relevant clients showed the full amount of cash that was supposed to be

held for clients in the segregated client asset accounts in line with the clients' expectations and instructions.

This practice was facilitated by the backing out of real transactions (transferring cash to property funds) that had taken place and fictitious cash holdings being substituted in their place. This appears to have occurred regularly on clients' cash accounts. In some instances where valuation statements were issued to clients and the backing out of transactions did not take place the clients raised queries with CHC. This led to further instances of backing out real transactions and replacing them with fictitious cash transactions to show a misleading cash position on client statements.

Within CHC this practice was managed and facilitated by the use of a flag system on CHC's internal systems whereby client accounts where such unauthorised transactions took place were flagged as 'Please contact Harry or Paul before running this valuation'. Further details are set out in Part B12.

It is also clear that a practice existed whereby money being held by CHC on behalf of specific clients was taken and used to fund shortfalls arising on CHC property funds. In circumstances where a request for cash from a client was received and that money had already been placed in a CHC property fund without his or her knowledge, the request to repay the cash was facilitated by taking money from other client cash accounts."

47. The Liquidator, in his affidavit, also refers to the apparent unreliability of the internal accounting systems and records of CHC as disclosed by the inspectors' reports.

48. Whilst I can understand that the dissenting clients who held equities and segregated cash accounts with stockbrokers may consider that this work was unnecessary as it did not tell them anything new, nevertheless, in my judgment, having regard to the facts referred to in the inspectors' reports and the practice within CHC of receiving initial investments into pooled client accounts and then paying the money out to a stockbroker or financial institution, the reconciliation process undertaken by the Liquidator was a reasonable and appropriate step for him to have taken prior to distributing or transferring equities and segregated cash accounts. His obligation, as part of the winding up of the affairs of CHC, is to facilitate or effect the transfer of investments or cash to or at their direction of those beneficially entitled. He had to be satisfied that it was he relevant client's money and not another client's money which had been transferred to the stockbroker or other financial institution from the pooled client account.

49. The other aspect of the work undertaken related to the identification of the different nature of the investments and certain valuations and the clarification of tax positions arising from the nature of ARF, AMRF and PRSA products. This work also appears to be necessary for the orderly and appropriate transfer of such products.

Payment of Liquidator's Fee

50. In this section, I am dealing with the fees sought by the Liquidator in respect of the reconciliation and administrative work done in connection with the equities and segregated cash accounts. As already determined, this work, in my judgment, was done by the Liquidator as part of the work required of him to conduct the orderly winding up of the affairs of CHC. It is also work, the primary beneficiaries of which are the holders of the relevant client accounts. The carrying out of this work at an

early stage in the liquidation has enabled such clients to have their funds either distributed to them or transferred at their direction. The prioritisation of this work has been for their benefit.

51. In a winding up by the Court, the primary jurisdiction of the Court is that conferred by the provisions of the Companies Acts 1963 to 2009, and in its detailed implementation, the Rules of the Superior Courts. Section 228(d) of the Companies Act 1963, provides that a person appointed liquidator shall receive such salary or remuneration "as the court may direct". It does not address the assets or fund out of which such remuneration may be payable.

52. Section 244 of the 1963 Act, is the only section addressing that issue. It provides:

> "The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just."

53. The "assets" referred to in s. 244 are the assets of the company. Correctly, no submission was made that it could include client assets. Whilst s. 244 expressly addresses a situation where the assets are insufficient to meet all liabilities, it is implicit that costs charges and expenses incurred in the winding up (including a liquidator's remuneration) are to be paid out of the assets of the company. The Companies Acts, accordingly, only give the Court a jurisdiction to make orders for the payments in respect of costs, charges and expenses (including a liquidator's remuneration) out of the assets of the company.

54. Counsel for the Liquidator accepted that the general position is as stated by McPherson's *Law of Company Liquidation* (Keay, Andrew R. (Ed). 2009, Sweet & Maxwell, London), para. 8.034:

> ". . . the remuneration of a liquidator cannot be paid out of non-company assets that come into the possession and control of a liquidator."

55. Counsel for the Liquidator primarily contends that this Court has a jurisdiction to make an order that the Liquidator's fees be discharged out of the client assets in reliance upon its equitable jurisdiction and the approach taken by the High Court in England in *Re Berkeley Applegate (Investment Consultants) Limited* [1998] 3 ALL E.R. 71, and in a number of decisions which followed that case. In that case, the company in liquidation carried on the business of receiving money from investors and then investing those monies in mortgages in the name of the company. At the commencement of the voluntary winding up, the company held a number of mortgages and sums of money. The Liquidator initially brought an application for directions as to whether the mortgages and certain sums of monies were held on trust. It was determined that the mortgages and certain sums of monies were held on trust for the investors. The Liquidator had done substantial work in relation to the mortgages and trust monies which was to the benefit of the investors. The assets of the company were considered insufficient to meet his remuneration and expenses and it was found that he was entitled to be paid out of the trust monies. Mr. Edward Nugee Q.C. (sitting as a deputy judge of the High Court) stated at p. 83:

> "The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill

> and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *Re Marine Mansions Co* (1867) LR 4 Eq 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v Nesbitt* (1808) 14 Ves 438, [1803–13] All ER Rep 216), and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46)."

56. As appears from p. 84 of the judgment, the declaration made by the trial judge was that "the liquidator is entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company are insufficient". He also made clear that he was not, in that decision, deciding how the expenses and remuneration should be borne as between the company's assets and the trust assets.

57. There was a subsequent application on that latter issue in which a judgment was given by Peter Gibson J., namely, *Re Berkeley Applegate (Investment Consultants) Ltd. (No. 3)* [1989] 5 BCC 803. In that judgment, he rejected the contention that any part of the expenses and remuneration which the liquidator was awarded by the Court in respect of work done in administering the trust property which the company held as trustee could be payable out of the company's assets pursuant to s. 115 of the Insolvency Act 1986. This provides:

"All expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims."

Peter Gibson J., at p. 805, stated:

"The point, to my mind is a short one, and largely one of first impression. Looking at sec. 115, for my part I have no doubt that the remuneration of the liquidator for administering trust assets which are not the assets of the company and the costs and expenses incurred by the liquidator, again not in getting in or paying out or distributing the assets of the company, but in administering trust assets, are outside the wording of the section. To my mind, it is clear that the section is simply dealing with the winding up of the company, involving as it does the getting in of the assets of the company, ascertaining its creditors, paying its liabilities in accordance with the statutory provisions and distributing any surplus. I do not think that on an ordinary reading 'expenses properly incurred in the winding up, including the remuneration of the liquidator' would include expenses and remuneration which the liquidator has incurred and has been awarded by the court in respect of the work he has done administering the trust property held by the company as trustee, and in my judgment the section must be construed as limited to the liquidator's expenses in, and remuneration for, dealing with assets of the company. Take the reference to the remuneration of the liquidator. There is no doubt to my mind that that does not include what the court in its inherent jurisdiction has awarded to the liquidator in respect of the work he has been doing not as liquidator but as trustee in administering the trust assets. Similarly the other

expenses that are referred to as being incurred in the winding up cannot be expenses in relation to what are not the assets of the company."

58. I accept that whilst the wording of s. 115 of the Insolvency Act 1986, is in different terms to that in sections 228(d) and 244 of the Act of 1963, in substance, they are similar. In this jurisdiction, the Court has jurisdiction pursuant to those sections to make orders that all expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in such priority as it directs.

59. As appears fundamental to the reasoning of Peter Gibson J. is that the work done by the liquidator in that case in administering the trust property was not work done as liquidator in the winding up of the company, and accordingly, could not be the subject of an order under s. 115 of the Insolvency Act 1986. Insofar as Peter Gibson J. expressed the view that a winding up only involves the getting in of the assets of the company, ascertaining its creditors, paying its liabilities and distributing a surplus, I respectfully disagree for the reasons already set out.

60. The broader view of a liquidator's tasks which I have taken is similar to that taken by McLelland J. in the Supreme Court of New South Wales in *Re G.B. Nathan & Co. Pty Limited (In Liquidation)* [1991] 24 NSWLR 674. In that application, the liquidator sought directions pursuant to s. 479(3) of the relevant corporation law as to whether he was entitled or bound to deal with certain monies and securities held on trust by the company for certain of its clients and as to whether the liquidator was entitled to deduct therefrom the costs, charges and expenses of the winding up.

61. On the latter issue, the judge considered the two English High Court judgments in *Re Berkeley Applegate (Investment Consultants) Limited,* and having

referred to the extract from the judgment of Peter Gibson J. referred to above, stated at p. 688:

> "I do not consider that the distinction between work done and expenses incurred by the liquidator in the winding up, on the one hand, and work done and expenses incurred in administering property held by the company as trustee, on the other hand, can be drawn as easily as this passage may suggest. In the first place, it is clearly the duty of a liquidator for the purposes of the winding up to identify the assets of the company, and in particular to ascertain whether particular assets under the control of the company are beneficially owned by the company or by others. Secondly, in fulfilling his function to 'do all such . . . . things as are necessary for winding up the affairs of the company . . .' (see s. 477(2)(m) of the *Corporations Law* and cf s 479(4)), the liquidator cannot disregard the fact that the company holds property in trust for others."

62. The above view is closer to the view which I have formed on the facts of this application in relation to what a liquidator must do to wind up the affairs of a company than that formed by the English judges in *Re Berkeley Applegate (Investment Consultants) Limited.*

63. McLelland J. further concluded at p. 689:

> "Where work done by a liquidator in relation to trust assets may properly be considered as having been done for the purpose of 'winding up the affairs of the company', it is I think consistent with general principle that any remuneration and expenses attributable to that work be paid out of the (non-trust) property of the company in accordance with s. 556 of the *Corporations Law*, to the extent that there is such property available. To

> the extent that there is not sufficient available property, bearing in mind that generally speaking 'a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property' (s. 545), it would normally be appropriate to apply the principle referred to by Deputy Judge Nugee QC in the passage quoted earlier from *Re Berkeley Applegate (Investment Consultants) Ltd (In Liq)* and make an allowance to the liquidator out of trust assets. In the present case, there is nothing to suggest that there is any relevant insufficiency of available property of the company to meet the liquidator's remuneration and expenses. The evidence suggests that there are realisable assets available to the liquidator of the order of $100,000. Accordingly there is no occasion for any allowance for the liquidator's remuneration and expenses to be made from the trust assets."

64. As appears, he held that the liquidator's remuneration and expenses for work in relation to the trust assets were first to be paid out of the company assets and it was only if they were insufficient that he would apply the principle referred to by Deputy Judge Nugee Q.C. Further, his willingness to apply the equitable principle is on the basis of an Australian statutory provision that "a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property". There is, of course, no similar statutory provision in our Companies Acts.

65. As was pointed out in submission by the dissenting clients and accepted on behalf of the Liquidator, CHC did not hold any of the relevant segregated equities or cash funds on trust for any of the dissenting clients. On the contrary, the relevant contractual documents expressly provide that CHC is not acting as trustee. Counsel for the Liquidator sought to rely upon the above principles by analogy and what he

contended was the necessity of those dissenting clients, in particular, those with ARF, AMRF and PRSA investments, to have the assistance of the Liquidator in effecting the transfer of their investments either to Qualifying Fund Managers or into another PRSA product.

66. Whilst I have decided this is work which the Liquidator is required to do as part of the orderly winding up of the affairs of CHC and on the facts pertaining to CHC, the reconciliation work was necessary before he could properly organise the transfer of the relevant investments, I also recognise that this is work which has been done for the benefit of those clients holding the equities and segregated client funds and not for the general creditors of the company. Counsel for the Liquidator sought to rely upon equitable principles analogous to those relied upon in *Re Berkeley Applegate (Investment Consultants) Ltd.* to contend that the relevant clients or their funds should bear the cost of doing the work which was for their exclusive benefit. The dissenting clients, *inter alia*, pointed to the losses suffered by the alleged wrongdoing of CHC and the winding up and submitted they should not have to bear this additional deduction. Both submissions have merit. However, I do not have to address them, as on the facts of this application, I have concluded that the Court has no jurisdiction to make the order sought. There are two principal reasons for my conclusion.

67. First, the relationship between CHC and the dissenting clients is not one of trustee and beneficiary as was the position in *Re Berkeley Applegate*. The contractual documents expressly so provide. The relationship was a purely contractual one according to which CHC had a right and obligation to control and manage certain investments and funds. It follows from this that the dissenting clients are not either expressly or implicitly asking this Court to exercise an equitable jurisdiction for their

benefit. The Court is not exercising an equitable jurisdiction; it is exercising its supervisory jurisdiction in a winding up by the Court.

68. Secondly, and perhaps more importantly, the Oireachtas in the Investment Intermediaries Act 1995 (as amended), and the Minister in making the MiFID Regulations, has expressly addressed a liquidator's right to recourse to client assets, including where a liquidator of an investment firm may be involved in the distribution of client monies and client investments. In that situation, the Court is given a statutory jurisdiction to make orders in certain circumstances that a liquidator have recourse to client funds or investments for the purpose of discharging reasonable expenses. Having regard to that statutory jurisdiction potentially applicable in this winding up, the Court is not faced with the *lacuna* presented to the English courts in *Re Berkeley Applegate* where a liquidator administered trust assets. This Court is constrained to exercise the relevant statutory jurisdiction given it.

69. In the course of the hearing, my attention was drawn to s. 52(7) of the Investment Intermediaries Act 1995 (as amended) as inserted by s. 64 of the Investor Compensation Act 1998, as the applicable section. This provides:

> "(7)(a) No liquidator, receiver, administrator, examiner, official assignee or creditor of an investment business firm shall have or obtain any recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm, until all proper claims of clients or of their heirs, successors or assigns against client money and client investment instruments or documents of title relating to such investment instruments have been satisfied in full.

(b) Notwithstanding *paragraph (a)* of this subsection, a liquidator, receiver, administrator, examiner or official assignee may have recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm in respect of such reasonable expenses as are incurred in the carrying out of their functions under this Act or under the *Investor Compensation Act, 1998*, or incurred in the distribution of client money and investment instruments to clients of the investment business firm where the assets of the investment business firm have been exhausted.

(c) A liquidator, receiver, administrator, examiner or official assignee shall apply to the Court before seeking recourse or right against client money or client investment instruments or documents of title relating to such investment instruments received, held, controlled or paid on behalf of a client by an investment business firm under paragraph *(b)* of his subsection and the Court shall determine the matter and make such order as it sees fit."

70. If this is the applicable section, then, in my judgment, pursuant to s. 52(7)(b), the Liquidator may, subject to making an application to the Court pursuant to subsection (c), be entitled to have recourse against the equities or segregated client assets in respect of the reasonable expenses incurred by him in the distribution of such equities and client assets, but only where the assets of CHC have been exhausted. Mr. Nugent submitted that the prohibition in s. 52(7)(a) precludes this. In my judgment, it does not do so. Section 52(7)(b) is an exception to the general prohibition in s. 52(7)(a). This follows from the express wording of s. 52(7)(b). Subsection 52(7)(c)

gives to the Court jurisdiction to make an order to that effect upon an application by a liquidator where it considers it appropriate on the facts. Leaving aside any objection by reason of the fact that the Liquidator in this application did not make an application pursuant to s. 52(7)(c) of the Investment Intermediaries Act 1995 (or Regulation 158 of the MiFID Regulations if applicable for the reasons set out below), the Court could not be satisfied on the evidence now before it that the assets of CHC have been exhausted as required by s. 52(7)(b).

71. The Liquidator, at para. 33 of his third affidavit sworn on 8th May, 2012, states:

> "Excluding fees paid by clients in respect of reconciliation work carried out, realisations in the liquidation total €413,635.97. Future realisations are uncertain and as matters stand, I say and believe that there are unlikely to be sufficient monies in the liquidation to meet the fees, costs and expenses incurred in connection with the administration and reconciliation of client accounts."

72. In my judgment, the onus of proof is on the Liquidator if he wishes to rely upon the provisions of s. 52(7) of the Act of 1995, and of Regulation 158 of the MiFID Regulations to establish that the assets of CHC have been exhausted before the Court has jurisdiction to make an order in his favour that he may have recourse to client funds. On the evidence before the Court at present, it could not so hold.

73. In reaching this view, I recognise the difficult temporal issue and potential difference of treatment of client funds raised by s. 52(7) of the Act of 1995. The Liquidator is correctly now proposing to effect the relevant transfers of the equities and segregated cash assets. The Liquidator has made clear that he is continuing to carry out work in connection with the pooled client assets and funds which may give

rise to a future application under s. 52(7)(c) of the Act of 1995, or Regulation 158 of the MiFID Regulations, if applicable. Notwithstanding this potential difference in treatment between clients of CHC, it does not appear to me, having regard to the express wording of the statutory provisions and the evidence now before the Court, that the Court has any discretion to make an order at present.

74. It is necessary to add that whilst I have formed the above view on the basis of s. 52(7) of the Act of 1995 (as amended) which was drawn to my attention in the course of the hearing, it appears to me that it may no longer apply to the winding up of CHC, and rather, that an analogous provision in Regulations 157 and 158 of the MiFID Regulations applies. My reason for this potential view is as follows. CHC is stated in the inspectors' reports to be the holder of an authorisation under Regulation 11 of the MiFID Regulations. It is therefore, presumably, an investment firm as defined in Regulation 3 of the MiFID Regulations. Regulation 6(1) of the MiFID Regulations (as amended by Regulation 6(a) of the European Communities (Market in Financial Instruments) (Amendment) Regulations 2007 (S.I. 663 of 2007) provides that:

> "Effective on 1 November 2007, the Investment Intermediaries Act, 1995 does not apply to an investment firm or tied agent."

It would appear to follow that s. 52(7) of the Investment Intermediaries Act 1995, to which I have referred above, may not now apply to CHC. However, Regulation 157 of the MiFID Regulations is, insofar as this judgment is concerned, to similar effect as s. 52(7)(a) and (b). It provides that:

> "(1) No liquidator, receiver, administrator, examiner, official assignee or creditor of an investment firm shall have or obtain any recourse or right against client money or client financial instruments or documents of title

relating to such financial instruments received held or paid on behalf of a client by an investment firm, until all proper claims of clients or of their heirs, successors or assigns against client money and client financial instruments or documents of title relating to such financial instruments have been satisfied in full.

(2) Notwithstanding paragraph (1), a liquidator, receiver, administrator, examiner or official assignee may have recourse or right against client money or client financial instruments or documents of title relating to such financial instruments received, held or paid on behalf of a client by an investment firm in respect of such reasonable expenses as are incurred –

(a) in the carrying out of their functions under these Regulations or under the Investor Compensation Act 1998, or

(b) in the distribution of client money and financial instruments to clients of the investment firm where the assets of the investment firm have been exhausted."

75. Regulation 158 of the MiFID Regulations provides for an application to be made by a liquidator to the Court where he seeks recourse against client money or client financial instruments and give to the Court a jurisdiction to make such order as it sees fit. It contains certain further provisions in relation to when an investment firm is deemed to hold client money or client financial instruments.

76. I have not considered it necessary to reassemble the parties seek submissions as to whether s. 52(7) of the 1995 Act, or Regulations 157 and 158 of the MiFID Regulations apply, as even if the latter do apply, Regulation 157(2) contains the same stipulation in relation to the assets of the investment firm having been exhausted. Accordingly, regardless of which statutory provision now applies, in my judgment,

for the reasons set out, the Court does not, on the present facts pertaining to the winding up of CHC, have jurisdiction to make any order in favour of the Liquidator giving him recourse to the equities or segregated cash funds of the dissenting clients.

Further Submissions

77. Having regard to the conclusion which I have reached above, it is unnecessary for me to address additional submissions made, in particular, by Ms. Delaney on behalf of the Pension Board and the dissenting clients, Mr. Nugent and Mr. Shannon, *inter alia*, on the quantum of the fees in the present application.

Conclusions

78. For the reasons set out in this judgment, my conclusions on the issues identified at para. 38 of the judgment:

(i) In this winding up, the reconciliation and administration of the segregated client *i.e.* equities and/or segregated cash accounts belonging to clients of CHC is properly a task for the Liquidator;

(ii) the Liquidator may have recourse to client funds for the discharge of reasonable expenses incurred in the distribution of client money and investment instruments pursuant to s. 52(7) of the Investment Intermediaries Act 1995 (as amended) or Regulations 157 and 158 of the MiFID Regulations;

(iii) the Court, on the evidence on this application, has no jurisdiction to make an order that the Liquidator's remuneration and the fees, costs and expenses, including legal expenses associated with such reconciliation and administration of the segregated client accounts may

properly be charged to or deducted from the funds or investments held in the accounts of the dissenting clients.

Relief

79. It follows from the conclusions on the above issues that the Court refuses the orders sought permitting the Liquidator to deduct any sum from the funds of the dissenting clients in respect of his remuneration and fees, costs and expenses for the work carried out in relation to the segregated client assets. I will hear counsel and any other relevant party in respect of any of the other reliefs sought in the notice of motion, having regard to the terms of this judgment.

Final Observations

80. The Court is constrained by either s. 52(7) of the 1995 Act, or Regulation 157(2) of the MiFID Regulations from making any order in the present application. These provisions do not expressly provide for the situation which has arisen here, namely, that a liquidator will do work in relation to certain client assets for the benefit of the holders of those assets at an early stage in a liquidation to enable their early distribution and it is envisaged that the total costs of the liquidation (including work done as part of the winding up in relation to the distribution of these and other client assets) may exceed the assets of the company in liquidation. This is a problem of timing. This application was not brought pursuant to the statutory provisions. If an application is brought pursuant to the statutory provisions, then careful consideration will have to be given at that time as to how the Court is to approach the question of proof of exhaustion of assets in a liquidation which may be long running and where client assets fall to be distributed at an early stage in the liquidation.

81. This judgment does not address what constitutes "reasonable expenses . . . in the distribution of client money and investment instruments to clients" for the purposes of s. 52(7)(b) of the Act of 1995, or Regulation 157(2)(b) of the MiFID Regulations and whether the expenses sought by the Liquidator come within such definition. That will be for any future application.