[2020] IEHC 348

THE HIGH COURT

[2019/246 COS]

BETWEEN

CRUMB RUBBER IRELAND LIMITED (IN LIQUIDATION)

APPLICANT

AND

THE COMPANIES ACT 2014

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 17th day of July, 2020.

1. The Applicant (Mr. Morgan) seeks an Order pursuant to section 678 of the Companies Act 2014 for leave to issue proceedings against Crumb Rubber Ireland Limited (In Liquidation), which I will refer to as "Crumb".

2. The proceedings to be brought against Crumb are taken under section 57 and/or 58 of the Waste Management Act 1996, as amended. The reliefs sought against Crumb are also sought against others, including former directors of Crumb. The full range of Orders to be sought in the main proceedings read as follows:-

> "1. Orders against the Respondents, or each or either of them, their respective servants or agents, pursuant to sections 57 and/or 58 of the Waste Management Act, 1996 as amended (hereinafter referred to as 'the 1996 Act') to the following effect:
>
> (a) That they forthwith or within such period as may be fixed by this Honourable Court, take and/or pay for any measures (including but not limited to extraction, transport and disposal of any remaining waste) identified by Herr Engineering and Design Limited in its reports dated 14 April 2016 and 20 October 2016, subject to the removal by AES, Bord Na Mona in or around 2018 of 91.66t of tyres, 71.22t of tyres, 141t of 10 – 19mm equifill, 8.2t of carpetfill and fibre and otherwise to mitigate and/or remedy the effects of the deposit of any waste material at lands at Mooretown, Dromiskin, Co. Louth (hereinafter referred to as 'the Site') and to ensure it is left in a condition whereby it is not causing or likely to cause environmental pollution. Such measures to be carried out within such period as specified by Herr Engineering and Design Limited in its remediation proposal or in default of such agreement such period as the court may specify and/or deem appropriate.
>
> (b) That they arrange for the removal of waste held at the Site by authorised waste collection permit holders only and prior to the transfer of the waste to submit to the Applicant the Reference Numbers of the Waste Collections Permits held by all waste collection permit holders involved in the transfer of waste from the Site.
>
> (c) That they submit to the Applicant receipts/disposal certificates in respect of all waste transferred from the said facility within two days of such transfer.

(d) That they discharge all costs incurred by the Applicant associated with the removal and disposal of waste from the Site and to discharge any further costs incurred in the removal and disposal of the aforesaid waste.

(e) That they carry out no further waste activities on the Site and/or at any other unauthorised waste facility in their ownership, occupation and/or control in circumstances where waste is currently being, or has been, held and/or recovered and/or disposed of on the Site in a manner that is causing and/or is likely to cause environmental pollution and/or is in contravention of sections 34(1) and/or 39(1) of the 1996 Act.

(f) That the Respondents cease and/or refrain from holding, recovering, disposing or receiving waste of any kind at any waste facility in their ownership, occupation and/or control, other than in strict compliance with any Waste Collection Permit or Waste Facility Permit validly issued from the relevant Authority.

2. Such interim and/or interlocutory relief as may appear to be just and/or appropriate to this Honourable Court pursuant to sections 57 and 58 of the 1996 Act.

3. Such further or other relief as to this Honourable Court deems meet;

4. Costs of the Proceedings.

5. Liberty to apply."

3. Put in very general terms, the proceedings arise from the leasing of property to Crumb by Mr. Morgan; Crumb went into liquidation in May 2017, and by Deed of Surrender of the 27th of June 2017 the liquidator (Mr. Murray) surrendered the property to Mr. Morgan. However, Mr. Morgan claims that the property was at the time of surrender contaminated and an environmental hazard, and seeks to have that situation put to rights.

4. The parties agreed at the hearing of this motion that the relevant legal principles governing the grant of an Order under section 678 are set out at pages 923 and 924 of The Companies Act 2014 by Conroy (2018 Edition) in these terms:-

> "Criteria to be used in determining whether to grant leave: The court has a broad discretion in relation to an application under this section and is required to do what is right and fair in the circumstances: *Wright-Morris v. IBRC Ltd*. [2014] 3 I.R. 468; *Re Aro Co. Ltd.* [1980] Ch 196. Leave should generally be refused where the issues in the proceedings can be conveniently decided in the winding up (Re Exchange Securities Ltd. [1983] B.C.L.C. 186) or where the proceedings are clearly statute-barred: *Wright-Morris v. IBRC Ltd*. [2014] 3 I.R. 468. It is appropriate to grant leave in respect of civil proceedings even where there are no funds to meet the claim, if there may be an insurer against whom the plaintiff wishes to proceed pursuant to s.62 of the Civil Liability Act 1961 or if there are multiple defendants and the plaintiff wishes to avoid adverse consequences pursuant to s.35(1)(i) of the Civil Liability Act 1961*: Re MJBCH Ltd*. [2013] 1 I.R. 407. In *Re Hibernian*

Therapeutics Global Ltd. [2014] IEHC 141, Finlay Geoghegan J. granted leave to continue a counterclaim against a company on a number of grounds, including: that it involved complex issues which could be conveniently determined in the winding up; that the counterclaim plaintiffs claimed that success in the proceedings would provide a benefit to them in defending separate proceedings in the USA; and that no application had been brought to strike-out the counterclaim."

5. Crumb puts forward three reasons why the Order should not be granted:-

"(a) First, most of the reliefs sought by the Applicant in the substantive proceedings (hereinafter, "the proceedings") are of a mandatory nature which are outside the scope of the liquidator's powers under section 677 of the 2014 Act;

(b) Secondly, insofar as the reliefs sought against the Applicant can be refined solely to monetary reliefs, the Company does not have sufficient assets to meet any part of the Applicants claim; and

(c) Finally, by virtue of the Deed of Surrender made on 27 June 2017, the Applicant has already released the Company from any obligations or liabilities arising from its lease of the Site and, as such, the Proceedings as against the Company are doomed to fail."

6. The first argument is supported by the decision of Baker J. in *Lee Towers Management Company v. Lance Investments Limited (In Liquidation) & Ors.* [2018] IEHC 444. Particular reliance is placed by the Liquidator on the following passages:-

"6. The questions for determination arise out of Circuit Court proceedings authorised by Barrett J. on 17 November 2014 and brought pursuant to, *inter alia*, the provisions of the Multi-Unit Development Act 2011 ('the MUD Act') by Lee Towers Management Company Ltd. ('Lee Towers'), the owners" management company of the relevant parts of the development.

[…]

10. In summary, Judge O'Brien directed the transfer of the common areas and reversions to Lee Towers and made what was described as orders of 'mandamus', but more properly described as mandatory orders, directing that the Companies and IIF would complete the development in accordance with the development agreement of 1 January 2001, and comply with their respective obligations pursuant to the Planning and Development Act 2000, as amended ('the PDA') and/or the Building Control Act 1990, as amended ('the Building Control Act') to the satisfaction of the consulting engineer of the plaintiff. For convenience, I will refer to these orders as 'remedial orders'.

[…]

29. Section 677(1) of the Companies Act provides that from the commencement of a winding-up, the company shall cease to carry on its business 'except so far as may

be required for the beneficial winding up of it'. The principle is well established. Laffoy J., in In *Re Greendale Developments Ltd. (In Liquidation) (No. 1)* [1997] 3 IR 540, expressed the effect as follows:

> 'Once a winding up order is made, the company is doomed to extinction. The winding up process is the process of the administration of the assets of the company: their collection, realisation and distribution in discharge of the liabilities of the company to the creditors and of the entitlement of its contributories in accordance with the scheme of priorities prescribed in the Companies Acts. Insofar as the Companies Acts give an entitlement to a creditor or a contributory to be heard by the court in relation to a matter arising in the winding up, in my view, the court is required to have regard to the sectional interest of that creditor or contributory and, in particular, to the protection of his legal entitlement to a distribution from the assets of the company as defined by the Companies Acts', at p. 547.

30. The duties and powers of a liquidator are limited to the realisation of assets and the distribution to those entitled at law to share in the proceeds pro tanto, per Clarke J. in *Hughes v. Hitachi Koki,* at para. 3.7.

[…]

33. For the purposes of the present argument, this statutory limitation constrains the activity of the liquidator so that, for most purposes, he does not continue the business of the Companies, but more critically, the purpose of the process is to ascertain the assets so that they may be distributed in accordance with law, and the scheme of priorities contained in s. 621 of the Companies Act.

34. In that context, counsel for the Companies argues that the effect of the winding-up is that the Companies may continue their normal activity only in limited circumstances linked to the benefit of the winding-up, and that there is no evidence that the assets of the Companies might be improved in value by the carrying out of works of repair and maintenance of the common areas of the development when these works would benefit Lee Towers only.

35. I consider that proposition to be correct, but not to offer a full answer to the question raised.

[…]

72. The MUD Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building Regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 of the MUD Act has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which

creates a proprietary interest which might give rise to an argument that the remedy lies in rem.

73. Further, even in the case of a claim for specific performance of a contract for the sale of lands, the court may decline to make an order for specific performance on account of the impecuniosity of a purchaser, as is clear from *Aranbel Ltd. v. Darcy* [2010] IEHC 272, [2010] 3 IR 769, or where another impossibility of performance renders the making of such an order inappropriate. The remedy of specific performance may in a suitable case be refused and damages granted *in lieu."*

7. There was no submission on behalf of Mr. Morgan in answer to this argument; that in itself does not mean that the argument is correct. However, having considered the judgment in *Lee Towers*, I have come to the view that it may well be inappropriate to order that Crumb carry out the remedial works which Mr. Morgan seeks to have ordered in the main proceedings. It does not follow that a compensatory award against Crumb will not be made. Indeed, such Orders are already sought in the claim (for example reliefs (a) and (d)). Were I to decide that the claim against Crumb should proceed in respect of these compensatory orders, I would then have to decide whether (at this early juncture) to shut out Mr. Morgan from also prosecuting his claim for mandatory orders; a relevant consideration in that regard is that Crumb have made no submission and lead no evidence to the effect that there would be any extra costs or expense involved in defending the claim for mandatory and compensatory orders, as opposed to defending a claim for compensatory orders alone.

8. The second argument made on behalf of Crumb relates to the absence of assets to meet any award against it, either of damages or costs. The central factual issue here is Crumb's insurance position.

9. In his affidavit resisting the application, Mr. Murray swore that:-

"9. I say and believe that the Company does not have any funds available to spend on the required waste removal and reinstatement works. Since my appointment as liquidator, I have assessed the Company's financial position, as well as the claims of its various creditors, and I have formed the view that there are insufficient funds available for any distribution to be made to the Company's unsecured creditors. In this regard, I beg to refer to a statement of affairs, upon which, marked with the letters and number "TM2", I have signed my name prior to the swearing hereof.

10. In addition, I have reviewed the various insurance policies held by the Company and it does not appear that the Company has any policies in place which could be called upon in respect of the Applicant's claim.

11. As the Company does not have sufficient funds available to take the steps required by the Applicant, the continuation of the proceedings against the Company serves no practical purpose and, for that reason alone, I say and believe that leave should

not be granted to the Applicant to prosecute the proceedings as against the Company."

10. This affidavit was sworn on the 1st of October 2019.

11. In a letter from Crumb's solicitors, dated the 27th of November 2019, sent in response to correspondence from Mr. Morgan's solicitors, further information is provided. In particular, the following is stated:-

> "The averment in paragraph 10 of the affidavit of Tom Murray sworn 1 October 2019 (the "Affidavit") is clear and does not require any further elaboration on the part of our client. Moreover, the insurance policies held by our client for the Company are the property of the Company and there is no legal obligation on our client to provide a copy of the policies to your client.
>
> Without prejudice to the foregoing, our client responds to your request, in the same order, as follows:
>
> 1. Please find enclosed a copy of Combined Liability Insurance (ROI) taken out by the Company with Allied World Assurance Company ("AWAC") with policy number B2000/OMP601616 (the "Insurance Policy").
> 2. The Insurance Policy provides cover for Pollution Liability (section 3) for injury to land and property damage. The Insurance Policy does not indemnify the Company for any liability:
>
> i. property damage where that property has been occupied by the Company; or
> ii. injury to land where that land, or the water beneath that land, is within the boundary of land that has previously been occupied by the Company.
>
> 3. […]
>
> […]
>
> Further, your client executed a deed of surrender dated 27 June 2017 with the Company, as liquidator, in respect of the Property. Your client released our client from all covenants, indemnities, obligations and liabilities arising under or in respect of the lease previously entered by our clients, and the Settlement Agreement, whether past present or future and all actions, proceedings, costs, claims, damages, demands and expenses arising from such covenants, indemnities, obligations and liabilities. In the circumstances, the Proceedings issued by your client are wholly inappropriate."

12. In an affidavit in response to Mr. Murray's evidence, Mr. Regan (the solicitor acting for Mr. Morgan) swore:-

"6. I say that the contention of the liquidator's solicitors that the averment in paragraph 10 of Mr. Murray's affidavit *"is clear and does not require any further elaboration on the part of our client"* is a view not shared by the Applicant and his legal advisors. This issue, it is submitted, will therefore require further consideration in the context of the overall substantive injunctive proceedings. The Applicant is entitled to fully investigate as to whether there is any valid insurer against whom he can proceed.

7. I beg to refer to paragraph 11 of Mr. Murray's affidavit where he maintains that the Company does not have sufficient funds available to take the steps required by the Applicant and that *"the continuation of the proceedings against the Company serves no practical purpose and, for that reason alone, I say and believe that leave should not be granted to the Applicant to prosecute the proceedings as against the Company."* I respectfully wholly disagree with this contention on behalf of the liquidator. The Company's involvement in the history of the waste facility which it operated is fundamental in the context of the substantive injunctive proceedings and it will ultimately come down to legal argument in the context of those proceedings as to what responsibility, if any, the Respondents had for the environmental hazard that now exists on the Applicant's lands and as to how that responsibility is to be apportioned as between the Respondents."

13. When the matter was first before me on the 9th of December 2019, and given the use by the solicitors for Crumb of the plural word "policies" when only one policy of insurance was revealed, I suggested that the liquidator would provide copies of all insurance policies to Mr. Morgan's solicitors before the hearing resumed on the 17th of January. By letter of the 13th of December, Mason Hayes & Curran (for Crumb) set out the company's position in these terms:-

> "We refer to the Proceedings and to your client's application to issue leave against Crumb Rubber Ireland Limited (in Liquidation) (the "Company").
>
> As you know, the Court directed on 9 December last that our client, in his capacity as liquidator of the Company, make full disclosure of any insurance policy, or insurance policies, held by the Company.
>
> Our client has called up the books and records of the Company from off site to review them again in order to assess what, if any, other insurance policy(ies) might have been held by the Company, in addition to the policy already furnished to you.
>
> In this regard, we are instructed that the only insurance policy appearing from the Company's books and records in our client's possession is the policy already furnished to you i.e. the Combined Liability Insurance (ROI) taken out with Allied World Assurance Company ("AWAC") with policy number B2000/OMP601616.
>
> Separately and for the sake of completeness, we enclose a copy of a schedule detailing an insurance policy with policy number B0621P33083417/INS002260 that

our client took out with AWAC, on his appointment as liquidator of the Company on 29 May 2017. The Company vacated the site at Drumiskin, Dundalk, Co. Louth in June 2017, and the insurance policy was cancelled by our client in that same month."

14. While there was no "direction" made by me on the 9th of December, I did indicate very clearly that I wanted the liquidator to provide this information to Mr. Morgan's advisers. This letter explains the earlier reference to "policies" and provides a copy of the other policy considered by Mr. Murray. While objection is taken by Mr. Morgan's side to the reservation in this correspondence to policies "appearing from the books and records in [the liquidator's possession]", it is important that this reservation follows a statement that Mr. Murray "has called up the books and records of the Company from off site to review them again [...]." I therefore conclude that full disclosure of all insurance policies has been made by the liquidator of Crumb to Mr. Morgan; were that not the case, a very serious situation would have arisen. I agree with Counsel for Crumb, in his written submission, that the suggestion on behalf of Mr. Morgan that there is a responsive policy of insurance in this case is essentially conjecture.

15. It follows that, even if Mr. Morgan succeeds in a compensatory claim against Crumb, there is no reality to any such award being satisfied by Crumb (either out of its own assets or by insurers).

16. It also follows that, even if the Court were to make some or all of the mandatory Orders sought in the main proceedings (which I have already determined may well not be appropriate), there are no funds available to Crumb to carry out the works required by such Orders. The Court would be in the position of making Orders which are incapable of compliance; Crumb would be in the position of being subject to Orders imposing requirements which it could not meet.

17. The third argument made on behalf of Crumb relates to the Deed of Surrender. As I have already described, that Deed was entered into in June 2017; at that time, a disclaimer application by the liquidator of Crumb was pending, and (according to Crumb's written submissions) Mr. Morgan was "fully aware of a claim under the Waste Management Acts". The relevant part of the Deed is to this effect:-

    "1. The Tenant as beneficial owner acting by the Liquidator hereby surrenders assigns transfers and yields up unto the Landlord ALL THAT AND THOSE the Demised Premises TO HOLD the same unto the Landlord its successors and assigns for the unexpired residue of the term of years created by the Lease and or the Settlement Agreement TO THE INTENT that all estate, title, interest and rights of the Tenant in the Demised Premises shall merge and be extinguished in the reversion which immediately before the execution of these presents was expectant thereon held by the Landlord.

    2. In consideration of the foregoing surrender the Landlord hereby releases the Tenant from all covenants, indemnities, obligations and liabilities arising under or in

respect of the Lease and Settlement Agreement whether past present or future and all actions, proceedings, costs, claims, damages, demands and expenses arising from such covenants, indemnities, obligations and liabilities.

3. The Liquidator hereby covenants with the Landlord that he has not done or knowingly suffered or been party or privy to any act or thing whereby the Tenant is prevented from surrendering the Demised Premises in the Manner aforesaid.

4. The Landlord hereby expressly acknowledges and agrees that the Liquidator enters into this Deed solely in his capacity as liquidator of the Tenant and not further or otherwise and in particular acknowledges that the Liquidator has no liability however arising affecting the estate, person or property of the Liquidator in connection with the surrender of the Demised Premises in the manner aforesaid."

18. On the basis of these terms, Crumb argues that no claim for breach of the Waste Management Acts can succeed.

19. The response by Mr. Morgan is twofold.

20. Firstly, it is argued that the Deed forgives liability for criminal acts, and may therefore be contrary to public policy. However, no authority to this effect has been put before me, notwithstanding the opportunity to do so presented by the fact that the hearing of the motion resumed on the 17th of January after being heard in substance on the 9th of December. In the written submissions which I directed to be provided over that adjourned period, while this argument is restated no support for it is provided. I agree with Counsel for Crumb that it is unlikely that a private contract is void merely because it purports to settle a civil claim which could include wrongs which also breach the criminal law.

21. Secondly, it is argued that there is a period not caught by the waiver, for this reason:-

"The particular of the deed of surrender which the Company seeks to rely on the states as follows:-

'2. In consideration of the foregoing surrender the landlord hereby releases the Tenant from all covenants, indemnities, obligations and liabilities arising under or in respect of the Lease and Settlement Agreement whether past, present or future and all actions, proceedings, costs, claims, damages, demands and expenses arising from such covenants, indemnities, obligations and liabilities.'

The lease in question is dated 25th November 2003 and was made as between the applicant and respondent herein. The term of the lease was for a term of 10 years and terminated on 1st October 2013.

The parties subsequently entered into a Settlement Agreement dated 12th December 2013 whereby it was agreed that the respondent herein would enter into a new lease for a term of 20 years commencing on 1st January 2014. It is common

case that no such new lease was ever entered into by the parties. Therefore, it is respectfully submitted that the period between October 2013 and May 2017 is not covered by the deed.

Consequently, if the respondent is correct in asserting reliance on the deed of surrender – which the applicant makes no concession in respect of – there is a minimum period of approximately 3 years and 7 months during which time the respondent continued to trade at the applicant's facility and which is not covered by the asserted waiver."

22. The response from Crumb is to the effect that the agreement to enter into a lease with effect from January 2014 created a lease in equity, and that Mr. Morgan is precluded from denying that the Settlement Agreement (which provided for a formal lease) governed Crumb's occupation of the site from January 2014 onwards; this alleged preclusion arises from an affidavit stated to have been sworn by Mr. Morgan in June 2018.

23. I have concluded that the issue of the Deed of Surrender is not a basis on which I can decide to refuse an Order under section 678. While I do not agree with Mr. Morgan's argument that the Deed is void, I do not think that the second argument raised by him is one which can be "clearly" decided against him at this point in time in the context of an application such as this. It therefore follows that the Deed of Surrender cannot provide a complete answer to the application to prosecute this claim against Crumb. Given the potential for a dispute at the hearing of the main proceedings as to the true meaning and effect of the Deed of Surrender, a dispute not really ventilated in the motion before me, if the Deed of Surrender were the only issue it would be preferable that the main proceedings continue against Crumb in respect of the entire period over which that company occupied the site. The alternative is that the claim progress in respect of a truncated period (from January 2014 on) against Crumb but progresses against the other Respondents in respect of the whole period (from 2002 to 2017). That would not be conducive to a streamlined hearing of the main proceedings.

24. There remains a fundamental argument made by Mr. Morgan, which is that he will be prevented from obtaining orders against other respondents in the other proceedings if he cannot proceed against Crumb. It is submitted that the absence of Crumb will impede fall back orders being obtained against the other respondents. Separately, while reliance is placed on s. 62 of the Civil Liability Act 1961 (and I have already dealt with the insurance position) no argument is based on s. 35.

25. Mandatory orders of the sort sought by Mr. Morgan against Crumb are also sought against former directors of that company, as well as against Laois County Council. Such orders can be made against individuals in the event that they are found to bear what Clarke J described as "primary liability" under the 1996 Act; see *John Ronan and Sons v. Clean Build Limited (In Voluntary Liquidation) & Ors*. [2011] IEHC 330 at, *inter alia*, paragraphs 6.8 and 6.9. It is not submitted on behalf of Mr. Morgan that he is in any way impeded in obtaining such orders against the other Respondents in the event leave is not granted to proceed against Crumb. In addition, any documents in Crumb's possession relevant to the

involvement of the other Respondents in the offending acts will be available to Mr. Morgan, albeit by way of non-party discovery.

26. Mandatory orders of the type described in the last paragraph can also be sought as 'fallback' orders; such orders were found to be available to the Court by O'Sullivan J. in *Wicklow County Council v. Fenton (No. 2*) [2002] 4 I.R. 44. At page 68, it was held that:-

> "The domestic law in relation to limited liability of companies would, in my opinion, frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in circumstances where the company in question having first been directed by the Court to comply with such orders was not in a position for financial or other reasons so to do. In my view in order to ensure the full application of the "polluter pays" principle whereby those responsible even indirectly for causing environmental pollution should pay for it rather than leave it to an innocent party or the community to do so, the Court must be in a position to make orders directly against directors in such circumstances, and the domestic company law of limited liability should be suspended and the veil, of incorporation lifted in order to ensure the full application of this principle and other objectives of the European Waste Directives. To hold otherwise would, in my opinion, mean that innocent parties (local authorities or the public) would have to "pay" (if only by accepting pollution of their environment without remedy), whereas those individuals who are at least indirectly responsible for it would be beyond the reach of Irish domestic law. That is not, in my opinion a transposition into the Irish law of the European Directives. Accordingly a "fall-back" order may be made against individual directors and/or shareholders where a company cannot comply with a primary order."

27. Subsequently, Edwards J. in *E.P.A. v. Nephin Trading Ltd*. [2011] 2 I.R. 575 decided that O'Sullivan J. was in error in concluding that "fallback" orders could be made. At paragraph 109 of the judgment, and having referred to the relevant portion of the decision of O'Sullivan J., Edwards J. held:-

> "Where I differ with O'Sullivan J. is in his belief that, in the circumstances, s.57 and s.58 respectively are capable of being construed so as to confer a blanket jurisdiction on the High Court to make "fall-back" orders against individual directors and/or shareholders where a company cannot (as opposed to will not) comply with a primary Order."

28. Edwards J. concluded (at paragraph 116):-

> "It seems to me therefore that the Waste Framework Directive has not been properly or adequately transposed in so far as enforcement is concerned, in so far as the existing enforcement procedures contained in s. 57 of the 1996 Act do not in fact allow for the making of fall back orders against individual shareholders/directors of a corporate entity. In the circumstances I must answer the preliminary question in the negative."

29. This uncertainty in the state of the law does not, in my view, assist the application before me. If Edwards J. is correct, and there is no jurisdiction to make "fallback" orders, then there is no prejudice caused to Mr. Morgan by not allowing him to proceed against Crumb. If O'Sullivan J. is correct, and "fallback" orders can be made by the Court, the relevant proof required by Mr. Morgan is that Crumb, is "not in a position for financial or other reasons [...]" to comply with an order directing it to remediate the property. The uncontradicted evidence before me is that Crumb itself has no assets which would enable it to comply with such an order; in that regard it is notable that the scale of the costs involved in carrying out the remedial work is in the region of €900,000 (according to the letter of claim of the 29th of May 2019 from Mr. Morgan's solicitors). Equally, I have decided on the information and evidence available to me that there is no relevant insurance available to Crumb or its liquidator; on that point, it is notable that as long ago as the 8th of January 2014 Laois County Council was informed by Crumb that it was "not possible" to extend the company's public liability policy to cover "Gradual pollution and clean-up costs" or to put "Environmental Impairment Liability" insurance in place. This evidence, contained in the affidavit of Mark Regan grounding the current application, supports Crumb's position on the absence of responsive insurance.

30. If "fallback" orders can be made by the Court, then the first proof required is already established in this application. I am conscious that my decision on the inability of Crumb to comply with any mandatory order (of the type sought in these proceedings) is not binding on the other Respondents; they were not Notice Parties to the section 678 Motion, and therefore have played no part in it. However, it is not submitted to me that the claim against Crumb should be maintained lest the other Respondents avoid a 'fallback' order by establishing (at the trial of the main proceedings) that Crumb is solvent after all or has the benefit of a responsive policy of insurance; such a submission would fly in the face of the evidence presented by Crumb in this current application, which is uncontradicted inasmuch as the solvency of Crumb is concerned.

Summary.

31. The parties agree that the decision on this Motion involves an exercise of discretion on my part. In doing so, I take into account the following factors:-

    1. The Deed of Surrender. I have decided that this is not a factor which should weigh against granting the order sought.

    2. The effect that funding the defence of the claim would have on the preferential creditors of Crumb. This is certainly a factor which suggests that the order should not be granted, and no submission to the contrary is made.

    3. The inappropriateness of the mandatory orders sought against Crumb in the main proceedings. I agree with the Crumb submission on this point; while not in itself by any means determinative, this consideration also suggests that leave should be refused.

4. The absence of any assets or insurance on the part of Crumb which would allow it to comply with any of the orders sought in the main proceedings, should Mr. Morgan succeed in obtaining such reliefs. This very important factor suggests strongly that there is no useful purpose to be served in allowing the case against Crumb to go forward.

5. The absence of any prejudice to Mr. Morgan (caused by refusing the order) in the case that he makes against the other Respondents in the main action. Were any such prejudice established, I would have allowed Mr. Morgan to proceed against Crumb. However, on considering the arguments made by Mr. Morgan and the response by Crumb, it is clear that no such prejudice arises.

32. I am therefore of the view that the application should be refused applying the principles set out at paragraph four of this ruling. However, there is one outstanding matter to be addressed before any such order is made.

33. It is preferable that Mr. Murray swear an affidavit confirming the contents of his solicitors correspondence upon which I have relied in deciding that no insurance cover exists relevant to the claims made against Crumb in the main proceedings. This affidavit is to be sworn and served within one week of delivery of this judgment. If Mr. Murray is not willing to swear such an affidavit, I will reconsider my view about the application for relief under s. 678.

34. I will put this in for 10 am on the 28th of July 2020 in order to finalise matters.