THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 123

Record No. 2018/237

High Court Record No. 2015/219 COS

Donnelly J.
Faherty J.
Haughton J.

IN THE MATTER OF THE COMPANIES ACTS 1963-2009 AND IN THE MATTER OF CHERRYFOX LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT, 1963

ON THE APPLICATION OF:

ANTHONY J. FITZPATRICK

APPLICANT/APPELLANT

-AND-

THE REVENUE COMMISSIONERS

RESPONDENT/ RESPONDENT

Ruling of Mr. Justice Robert Haughton delivered electronically this 30th day of April 2020

1. This court in an *ex tempore* decision delivered by me following the hearing on 11 March 2020 has already dismissed the appellant's appeal from the judgment of High Court (Gilligan J) of 9 May 2018, and his subsequent order on 11 May 2018, on an application made by the respondent (the Revenue Commissioners as preferential creditors) pursuant to s.280 of the Companies Act 1963 in relation to the fixing the fees and remuneration of the appellant as liquidator of Cherryfox Limited. This ruling relates only to the costs of the appeal.

2. In bringing the application in the High Court, the Revenue Commissioners challenged the fees and remuneration of €65,981.55 including VAT sought by the appellant as being unwarranted/excessive. In that court the trial judge fixed the fees/remuneration at €37,500 plus VAT making in total €43,125 plus €10,157.69 for outlay. The trial judged then made a consequential order on the basis that the appellant had recovered total funds of €95,444 in the liquidation. He directed that as the fees/remuneration plus outlay just mentioned totalled €53,282.69, the balance held in the liquidation fund in the sum of €42,161.31 be paid to the Revenue Commissioners as sole preferential creditor. He declined to make a costs order against the appellant and made no order as to costs.

3. The appellant appealed this order, and the Revenue Commissioners cross-appealed the costs order. Following dismissal of the appeal this court heard argument on the costs, and (1) declined to make any variation of the High Court order on costs, and (2) ordered

the appellant to pay the costs of the appeal personally. In making the costs order in respect of the appeal, the court accepted a submission on behalf of the Revenue Commissioners that costs should follow the event, and that the court should not depart from the normal rule because the appeal had been brought in the appellant's own interest, not in the interest of company creditors, and that to allow the appellant to have recourse to the liquidation fund would negate the reasons given in the High Court and affirmed in this court for directing payment out of a specific sum to the Revenue Commissioners. As this meant that the court would be ordering that the appellant would be personally liable for the costs of the appeal, at his counsel's request a further opportunity was granted to make further written submissions on the appeal costs prior to perfection of the order, and on the basis that these would be considered without a further oral hearing.

4. This court has now received and considered the appellant's further Submission, and the reply Submission of the Revenue Commissioners of 6 April 2020.

5. The additional matter to which the appellant refers in support of his claim for an indemnity in respect of the costs of the appeal from the assets of the company is the unapproved decision of the Supreme Court in *Re Ballyrider* (Record S: AP:IE: 000082), and in support of his submission he further relies on section 281 of the Companies Acts 1963 and O74 r 128 of the RSC.

In Re *Ballyrider*

6. The appellant relies on this decision for the proposition that a liquidator is ordinarily entitled to an indemnity in respect of his costs, and that the costs of the application to fix the fees of the appellant were cost "properly incurred" within the meaning of s.281 of the Companies Act 1963 which provides:

> "All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

7. There are some notable comparisons between *Ballyrider* and the present case, but also some differences which I will highlight later. The appellant happened to be the liquidator involved in that liquidation. The Revenue Commissioners were the preferential creditor and became involved due to dissatisfaction with the manner in which the liquidation was being conducted, and the fees/costs being incurred/charged. It is helpful to give some summary of the various judgments in the case before considering the relevant part of the judgment of McKechnie J. in the Supreme Court:

   (1) In the High Court [2015] IEHC 477, the Revenue Commissioners applied for and obtained an order from Murphy J. removing Mr. Fitzpatrick as a liquidator, primarily because he pursued asset recovery proceedings that the Revenue Commissioners did not want him to pursue, but also because of dissatisfaction with regard to his fees/remuneration, failing to stick to an agreed fee, charging for work actually done by Revenue itself, not producing an itemised account in 4 1/2 years, and concern

about the amount he appeared to have paid himself. Murphy J gave consequential directions pertaining to the liquidation; she awarded costs against the liquidator personally on the basis that he was acting solely in his own interest and his conduct in the liquidation was in issue and found to be deficient, and the costs were not "properly incurred" under s.281.

(2) Mr. Fitzpatrick appealed, and in its substantive decision on the removal of Mr. Fitzpatrick as liquidator the Court of Appeal [2016] IECA 228 (Finlay Geoghegan J., who gave the judgment, and Irvine and Hogan JJ.) upheld Murphy J but allowed the appeal on certain consequential orders relating to payment over of monies by Mr. Fitzpatrick to the replacement liquidator.

(3) There was a separate appeal from the High Court order in respect of the "personal" costs order against the liquidator, and this together with the costs of the substantive appeal were dealt with in a supplemental decision reported at [2017] IECA 115. At hearing Mr. Fitzpatrick "wisely" (per Finlay Geoghegan J.) did not seek to be indemnified out of the company assets in respect of the costs of either court, and instead sought 'no order' as to his costs and the Revenue's costs in both courts. Finlay Geoghegan J. gave the judgement of the court and (i) altered the High Court order by granting Revenue only 50% of the costs below, because the trial judge felt that if the Revenue had acted more vigorously on the Committee of Inspection certain problems that arose in the liquidation might have been avoided or the 4 day hearing in the High Court reduced in length; and because Mr. Fitzpatrick succeeded in part on "an important issue" in respect of the consequential payment orders; and (ii) in the exercise of the court's discretion, awarded only 50% of the costs of the appeal to Revenue against Mr. Fitzpatrick personally again on the basis that he succeeded in part on the appeal.

Mr. Fitzpatrick had argued for 'no order' by analogy with the position where a liquidator acting as agent for the company seeks to defend assets of the company. His counsel relied on the authority of *Re Wilson Lovatt & Sons Ltd* [1977] 1 All E.R. 274, and the decision of Finlay Geoghegan J in *Re Visual Impact and Displays Limited (in liquidation) Murphy v. Murphy* [2003] 4 I.R 45, to support the right of a liquidator in such circumstances to have costs paid out of the assets of the company. The court did not consider the analogy apposite, concluding that in opposing the request that he resign, and opposing the application to remove him, the trial judge was entitled to find that liquidator was acting in his own interest and therefore the starting point was that costs should follow the event. The Court of Appeal held that the fact that there was no finding of negligence/misconduct/personal unfitness or lack of integrity did not alter this. However, in the exercise of its discretion it would only order payment of 50% of the costs.

8. Mr. Fitzpatrick was permitted to appeal to the Supreme Court. Central to the appeal was that the liquidator had taken proceedings (and incurred costs) on behalf of the company for the purpose of recovering assets, and the judgment of the court and the principles enunciated need to be read in that context. It is important to note that Supreme Court

(McKechnie J, with whom O'Donnell, MacMenamin, Dunne and O'Malley JJ. agreed) upheld the decision of the Court of Appeal, and the exercise of discretion by that court in respect of the costs.

McKechnie J. analysed the caselaw considered by the Court of Appeal, and at paragraph 88 sets out various principles:

> "Summary of overall position
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> 88. (1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.
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> (2) Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules, *vis-à-vis* an adverse litigant will apply. If a cost order is made the liquidator incurs a personal liability in respect of same: as such the sufficiency or insufficiency of the company's assets is irrelevant.
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> (3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.
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> (4) In the proceedings first mentioned as the liquidator incurs no personal liability the question of seeking to have recourse over to the company's assets does not arise.
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> (5) In the proceedings second mentioned, the position will be as follows:
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> (i) Where acting for and on behalf of the company, the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.
> (ii) Even when acting if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described, include this misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.
> (iii) On the other hand where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.
> (iv) Just as there will be cases which are clear-cut on the one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the court will have regard to section 281 of the 1963 Act and the relevant case law above mentioned. In so doing the Court will consider the

representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine whether there are sufficient grounds of the balance of probability to deny him such a recourse.

These statements are of a generalised nature and may have to yield to individual but rather specialised circumstances where required."

9. The appellant submits that if the court were to proceed to the kind of analysis contemplated in paragraph 88(5)(iv) the costs of the application to fix the fees are "properly incurred" in the winding up within the meaning of s.281 and are therefore payable out of the assets of the company. The Submission also notes that in compulsory liquidations O74 r.128 of the RSC distinguishes between costs associated with the collection and realisation of the assets and the other costs of the liquidation, but no such distinction is made in s.281 in voluntary liquidations which simply provides that "all costs, charges and expenses properly incurred" are to be paid out of the assets of the company in priority to all other claims. It is submitted that "it cannot be said that the application to fix the remuneration of the appellant voluntary liquidator was improperly or wrongly brought. It was brought because the Revenue would not agree the liquidator's fees for the reasons given on affidavit."

10. The facts in *Ballyrider* were materially different to the present case in two respects: firstly the application to the High Court, which was successful and was upheld, was to remove the liquidator. Secondly the fees and remuneration in respect of which the liquidator sought indemnity included the costs of the underlying asset recovery proceedings initiated by him, on the basis that in bringing those proceedings he was acting *on behalf* of the company. As the appellant did not bring or defend the present application or appeal in a representative capacity; the extent to which the principles set out by McKechnie J apply is questionable.

11. What is common to the facts in *Ballyrider* and the instant case is that in both cases the trial judge and the Court of Appeal considered that the liquidator, in opposing the application, and in appealing to this court, was acting in self-interest. That is certainly true in the instant case where the reality is that the appellant's refusal – later found to be unreasonable - to agree to a level of fees and remuneration proposed by the Revenue Commissioners prompted them to apply to court under s.280. It was personal interest, not the interest of the company or its creditors, that motivated the appellant to oppose the application and to bring and prosecute an appeal. It is for this reason doubtful that the principle at paragraph 88(3) applies, because it can hardly be said that these proceedings were 'forced upon' the appellant; it was the appellant's excessive claims which prompted the application and he chose to defend his actions and to appeal an adverse result.

12. The misconduct principle enunciated at paragraph (5)(ii) applies where the liquidator is acting on behalf of the company, and *a fortiori* must also apply when the liquidator is acting on his own behalf, and to this extent the principles give useful guidance.

13. I regret to have say that if the misconduct principle applies I am of the view, on the balance of probability, that there is evidence of misconduct in failing to comply with the direction of the High Court to pay out €42,161.31 to the Revenue Commissioners, despite the refusal of a stay on the order in the High Court. This has been exacerbated by the failure to give any proper explanation for failing to comply with that order, or to explain why there is now only about €22,000 in the liquidation account.

14. Furthermore, I consider that payments out of the liquidator's account that reduced it below €42,161.31 to only €22,000 go beyond mere negligence and amount to bad faith for the following reasons.

15. If any of these payments were made *before* the High Court order was made then that court and the respondents should have been informed, and on appeal this court (and the respondents) should have been informed. This was highly material information, yet the appellant proceeded, or intended to proceed, before both courts without informing either of them that instead of there being €95,444 (which the appellant's affidavit evidence established had been recovered by him in the liquidation) was in the liquidation account, there was only €22,000. This was a singular lack of candour. It is also worth noting that even though counsel were pressed for information by this court we have never been informed when these payments were made and to whom, or for what purpose.

16. If any of the payments were made *after* the High Court order then they were made despite Gilligan J's direction and are evidence of misconduct because they must have been made in the knowledge that such payments breached a court ordered obligation by reducing the account below the sum required to be paid to the Revenue Commissioners.

17. In either situation there is evidence of acts or omissions amounting to bad faith, if not misconduct. Nor can it be said that the present case is 'borderline'. That being so there is no occasion for this court to engage in the analysis suggested in paragraph 88(5)(iv), as to whether the costs were 'properly incurred in the winding up' for the purposes of s.281. If it were necessary to so do, and at the risk of repetition, I would simply re-iterate what was said by the trial judge in his judgment to demonstrate that the appellant's opposition to the respondent's application and his appeal were unwarranted: he disallowed certain items and reduced others in fixing the fees and remuneration below the level of what the respondent had offered to the appellant - a judgment which this court affirmed when upholding the trial judge's power, and exercise of that power, to direct payment to the respondent. It was this that led to both parties incurring additional appeal costs that cannot be said to have been 'properly incurred' in the winding up.

18. Nor do I believe that the appellant can draw any comfort from the fact that pre-2014 compulsory liquidations are dealt with in a different way in O. 74, r.128 of the RSC 1986, which draws a distinction between collection/realisation costs and other costs, whereas s.281 draws no such distinction in a voluntary winding up. O.74, r.128(1) provides –

> "(1) The assets of a company in a winding up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the

> assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs and expenses as the Court may allow to a liquidator appointed in such voluntary winding up, shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority, namely:
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> ..."

This may be explained by the different nature of compulsory liquidations. Generally (although not invariably) the company is insolvent so that creditors will be competing for a dividend (which must be court approved); alternatively the liquidation if sought on the 'just and equitable' ground, is likely to be contentious; in either case it is important that there be court supervision of the liquidator's fees and remuneration. Also there are more extensive statutory provisions and Rules applicable to such liquidations. For instance the official liquidator is appointed by and reports to the court, and (before the coming into operation of the 2014 Act) was obliged to account before the Examiner and ultimately on further consideration to the court, whose approval was required for the discharge of costs and remuneration. By comparison the company going into voluntary liquidation may be solvent (although it may also arise where the company liabilities are such that it cannot continue in business) and the same level of scrutiny by the court is not routinely required.

19. Whatever the reason may be for the differing provisions (which I note are not carried into the new Rules promulgated under the 2014 Act), the effect of the appellant's submission, if it is correct, would be that the voluntary liquidator would be in a position to decide with impunity what constituted 'properly incurred' costs, charges and expenses. The absence of a similar rule relating to voluntary liquidations cannot mean that the liquidator is left at large to charge unreasonable costs, or incur court costs related to an application defended personally and for his own material benefit, and then indemnify himself out of company assets. If the submission was correct it would negate the powers of the court on determining a question raised on an application under s.280. Subsection (2) provides –

> "The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just."

This clearly affords the court wide powers to make orders dealing with any question that may arise, including claims that the fees or remuneration that a liquidator is claiming are excessive. It would be absurd to suggest that the court cannot interfere where it considers that charges or expenses were not 'properly incurred' or were excessive, or to suggest that the court is obliged to allow the appellant to have recourse to the company assets by reason of s.281 and thereby negate the effect of the High Court order and its affirmation by this court.

20. I am not persuaded by any of the appellant's submissions and see no reason to alter the decision previously made that costs should follow the event. I would confirm the award

to the respondent of the costs of the appeal and for the avoidance of doubt the order should note that they are awarded personally against the appellant.

As this ruling is to be delivered electronically, Donnelly and Faherty JJ. have indicated their agreement with it.