THE HIGH COURT

[2002 No. 438 COS]

IN THE MATTER OF
MITEK HOLDINGS LIMITED
(FORMERLY KNOWN AS ANTIGEN HOLDINGS LIMITED)
MITEK PHARMACEUTICALS LIMITED
(FORMERLY KNOWN AS ANTIGEN PHARMACEUTICALS LIMITED)
CASTLEHOLDING INVESTMENT COMPANY LIMITED
MITEK LIMITED (FORMERLY KNOWN AS ANTIGEN LIMITED)
(ALL IN LIQUIDATION)
AND IN THE MATTER OF
MIZA IRELAND LIMITED (IN LIQUIDATION), A RELATED COMPANY
AND IN THE MATTER OF
THE COMPANIES ACTS, 1963 – 2001,
AND IN THE MATTER OF
SECTION 150 OF THE COMPANIES ACT, 1990, AND
SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001,

BETWEEN

TOM GRACE, LIQUIDATOR

APPLICANT

AND

JACK KACHKAR AND ROBERT McCLELLAN CARRIGAN

RESPONDENTS

JUDGMENT RE COSTS OF INVESTIGATIONS

Judgment of Ms. Finlay Geoghegan delivered on the 5th day of May, 2005.

1. On the 21st February, 2005, the court decided to make declarations of restriction of the respondents, Mr. Kachkar and Mr. Carrigan pursuant to s.150 of the Companies Act, 1990 for reasons set out in a written judgment delivered on that date.

2. The applicant then applied for orders for costs pursuant to s.150 (4B) of the Act of 1990. This subsection provides:-

> "The court, in hearing an application for a declaration under subsection (1) from the Director, a liquidator or a receiver, may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter".

3. In the course of application for costs an issue arose as to the proper construction of s.150 (4B) of the Act of 1990. Counsel for the parties argued the issue before me and I reserved my decision.

4. The issue is whether the phrase "any costs incurred by the applicant in investigating the matter" in s.150 (4B) of the Act of 1990 includes remuneration due to the liquidator for time spent by him and his colleagues in investigating the matters involved in the s.150 application and reporting thereon to the Director of Corporate Enforcement ("the Director") pursuant to section 56 of the Company Law Enforcement Act, 2001.

5. The application for costs was grounded upon an affidavit sworn on behalf of the applicant by Bobby Waters a senior manager in the firm of PriceWaterhouseCoopers, Chartered Accountants. The applicant liquidator, Mr.Tom Grace is a member of that firm. Mr. Waters deposes to the fact that he is the person with day-to-day responsibility for the liquidations. Mr. Waters in his affidavit describes the nature of the matters investigated by the applicant in connection with the s.150 applications and then sets out the time costs of the applicant, Mr. Waters and a senior associate and an associate of the firm of PriceWaterhouseCoopers. This is prepared in the normal format in which an official liquidator seeks to have the court determine his remuneration in a winding up by the court. It sets out the numbers of hours worked by each person and the rate charged by PriceWaterhouseCoopers for such work. The total claimed in this application is €21,372.00 plus the VAT at 21%.

6. Whilst counsel for the applicant averted to the fact that the sums sought related partly to the time spent by the official liquidator personally and in part to time spent by three of his colleagues, he did not pursue a submission based on any distinction between the two. No such distinction appears justified. It has long been the practice in windings up by the court to determine the remuneration of an official liquidator, such as the applicant herein, who is a member of a firm as including remuneration due for work done by him personally and work carried out on the liquidation by colleagues within the firm. Such treatment is envisaged by O. 74, r. 46 of the Rules of the Superior Courts 1986. Whilst an individual is appointed official liquidator, in practice the liquidation is normally conducted by a team of persons employed by the firm to which the official liquidator belongs. The team is of course lead by the official liquidator who takes ultimate responsibility for the decisions taken and work done.

7. I am satisfied therefore the single issue is whether the phrase "any costs incurred by the applicant" includes the remuneration of or due to the liquidator.

8. Neither "costs" nor "costs incurred by the applicant" is defined in the Act of 1990 and therefore must be interpreted in accordance with the ordinary rules for the construction of a statute. In *Rahill v. Brady* [1971] I.R. 69 Budd J. stated of those ordinary rules at p. 86:-

> ". . . In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has *prima facie* preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature."

9. I was referred to two further relevant rules of construction from Maxwell on the Interpretation of Statutes (12th ed.). Firstly the well settled rule that statutes which impose pecuniary burdens are subject to the rule of strict construction. The charges must be imposed by clear and unambiguous language (see Maxwell *op cit* p. 256).

10. The second is a presumption that the same word will have the same meaning in different parts of a statute. Whilst there is authority for construing the same words as having different meanings in different parts of a statute, and indeed even within the same section (see Maxwell *op cit* p. 279), the presumption was relied upon in relation to the use of the word "costs" within the same subsection.

11. I am satisfied that each of the above principles apply to the construction of s.150 (4B) of the Act of 1990. Construing the section in accordance with these principles I have concluded that the phrase "and any costs incurred by the applicant in investigating the matter" cannot be construed so as to include the amount charged in the winding up for the remuneration of the official liquidator and his colleagues in investigating the matters relevant to section 150 of the Act of 1990. My reasons for reaching this conclusion in accordance with the above principles are as follows.

12. The applicant is the official liquidator as expressly provided for in s.150 (4A) of the Act of 1990. At law, he is a separate and distinct person to the company, which is in the course of being wound up. *Prima facie* the words "costs incurred by the applicant" mean sums of money that the applicant liquidator is liable to pay to a third party. Such sums do not include his own remuneration.

13. Such literal construction was not seriously disputed by counsel for the applicant but he urged that the phrase in s.150(4B) must be looked at in its statutory context to see what the objects and intention of the legislature were and submitted that when examined they justified a departure from the ordinary meaning of the phrase.

14. Section 150(4B) was inserted by s.41 of the Company Law Enforcement Act, 2001. Section 56 of the Act of 2001 obliges a liquidator to make a report to the Director in a prescribed form. The prescribed form, as was clearly intended by s.56 requires the liquidator to report upon matters pertaining to a potential application for a declaration of restriction of directors of the company in liquidation under section 150 of the Act of 1990. Section 56(2) of the Act of 2001 obliges a liquidator to bring an application under s.150 unless relieved by the Director. It was submitted on behalf of the liquidator that the purpose of the legislature in inserting s.150 (4B) to the Act of 1990 (by s.41 of the Act of 2001) was to ensure that where a successful application under s.150 was made by a liquidator that the costs incurred in the winding up of investigating the matters should be borne by the directors and not by the creditors of the company. The burden of the submission was that by reason of the overall legislative scheme of the Act of 2001 the phrase "costs incurred by the applicant" should, in relation to an application brought by a liquidator be construed as meaning "costs incurred in the winding up" in investigating the matters relevant to section 150 of the Act of 2001

15. I cannot accept that submission. It does not appear to me that there is anything in the wording of s.150 (4B) of the Act of 1990, which permits the Court to find such a legislative intent. Unless such intent is to be found in the words used by the Oireachtas either in s.150 (4B) or another part of the Companies Acts judicial self restraint precludes the court from so construing the section. If it were to do so the court would be stepping into the area of law making.

16. The constraints on a court seeking to ascertain the intent of the legislature in an Act is well expressed in a passage from Craies on Statute Law (1971) (7th ed.) at p. 65 approved of by Blayney J. in *Howard v. Commissioners Public Works* [1994] 1 I.R. 101 at p. 151:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view.' [*per* Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394]."

17. The words used do not permit of the construction. As already stated, it is not disputed that on a literal construction "costs incurred by the applicant" do not include the applicant's remuneration. There do not appear to be grounds for a special meaning in the Act of 1990 as amended. It is common case between the parties that the earlier phrase "the costs of the application" in s.150(4B) means the normal costs of an application to the court which are recoverable following an order for costs made by the High Court and the taxation process. Where the applicant is a liquidator such costs do not include the remuneration of the liquidator in respect of the time spent working on the application to court.

18. Looking beyond s.150(4B) of the Act of 1990 the phrase "costs, charges and expenses incurred in the winding up" is one used by the Oireachtas in the Companies Acts as for example in s.244 and s.281 of the Act of 1963. In the latter section there is added to that phrase the additional phrase "including the remuneration of the liquidator". None of these phrases previously used, have been used in section 150 (4B).

19. Finally, the effect of the phrase at issue in s.150 (4B) may be to impose a pecuniary burden on persons against whom declarations of restriction are made. As such, the intent of the Oireachtas as to the burden to be imposed must be clear and unequivocal. Having regard to the wording used I cannot find any clear and unequivocal intention to impose a burden which includes the remuneration of the liquidator for the time spent in investigating the matters relevant to s.150 of the Act of 1990. While such remuneration is a cost incurred in the winding up it is not a cost incurred by the liquidator in the normal meaning of that phrase. As already concluded there are no grounds for giving it a special meaning as used in section 150 (4B) of the Act of 1990.

20. Accordingly I will not allow so much of the claim for costs as relates to the remuneration of the applicant and his colleagues.