



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 115

Appeal No. 2016 218

2015 443

2015 394

**Finlay Geoghegan J.
Irvine J.
Hogan J.**

**IN THE MATTER OF
BALLYRIDER LIMITED (IN VOLUNTARY LIQUIDATION) AND
IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012**

BETWEEN/

THE REVENUE COMMISSIONERS

APPLICANT/

RESPONDENT

AND

ANTHONY J. FITZPATRICK

RESPONDENT/

APPELLANT

JUDGMENT delivered by Ms. Justice Finlay Geoghegan on the 7th day of April 2017

1. This judgment is supplemental to a judgment delivered by this Court (Irvine J.: Finlay Geoghegan J. and Hogan J. concurring) on 26th July, 2016; [2016] IECA 228. That judgment concerned the substantive issues in dispute in relation to orders made by the High Court on 25th July, 2015 and 30th July, 2015, removing the appellant ("Mr. Fitzpatrick") as liquidator of Ballyrider Limited ("the Company"), appointing Mr. Maloney as liquidator in his place, and directing Mr. Fitzpatrick to hand over to Mr. Maloney books, records, and sums retained in the liquidation, along with other sums in respect of monies already paid out of the liquidation by Mr. Fitzpatrick, or retained on account of his fees.

2. In the first judgment, this Court dismissed the appeal against the removal of Mr. Fitzpatrick as liquidator pursuant to s. 227 of the Companies Act 1963 and the consequential appointment of Mr. Maloney, but allowed the appeal against the consequential orders to pay over monies no longer retained in the liquidation.

3. There were in fact three separate appeals brought by Mr. Fitzpatrick to this Court. This arose by reason of orders made by the High Court on different dates. The costs order of the High Court, for the reasons set out in a judgment delivered by Murphy J. on 27th October, 2015, was not formally made until 29th April, 2016. The appeal on costs was left over until after the delivery of judgment in the two substantive appeals.

4. The parties were permitted to put in further submissions and there was a further short oral hearing on 24th March, 2017 in relation to both the appeal on costs and also the costs of the appeals themselves.

5. The order made in the High Court on costs was:

(i) That neither the costs of the Revenue Commissioners nor Mr. Fitzpatrick are costs properly incurred in the liquidation.

(ii) That Mr. Fitzpatrick personally pay to the Revenue Commissioners the costs of the proceedings when taxed or ascertained.

(iii) A stay on the order for costs pending the outcome of the appeal.

6. The High Court proceedings were commenced by an originating notice of motion dated 19th August, 2014 seeking orders pursuant to s. 280 of the Companies Act 1963 ("the 1963 Act") directing Mr. Fitzpatrick to refrain from bringing certain proceedings in the name and on behalf of the Company, and also declaring that certain costs, charges, and expenses were not properly incurred and could not be paid out of the assets of the Company in priority to other claims. It also sought, in the alternative, an order pursuant to s. 277 of the 1963 Act removing Mr. Fitzpatrick as liquidator of the Company.

7. The Company is in voluntary liquidation. The Revenue Commissioners are a preferential creditor and have a nominee as a member of the Committee of Inspection. The application was brought against Mr. Fitzpatrick in his capacity as liquidator of the Company in voluntary liquidation.

8. The trial judge, in delivering judgment on costs on 27th October 2015, concluded that the Revenue Commissioners had been successful in their application and that in accordance with the general rule under O. 99 of the Rules of the Superior Courts, costs

should follow the event. She further held that the order should be made against Mr. Fitzpatrick personally, and that neither his costs nor those of the Revenue Commissioners were costs properly incurred in the liquidation. Her reason for this conclusion was that in the application Mr. Fitzpatrick was solely protecting his own interests; it was his conduct in the liquidation which was in issue and found to be deficient and in those circumstances he could not be characterised as acting as agent of the Company such as would render the Company liable to defray his costs.

9. At the costs appeal hearing, counsel for Mr. Fitzpatrick clarified that he was not pursuing an appeal against the determination that his costs of resisting the High Court application or any order for costs against him in either court could be treated as costs in the liquidation in respect of which he would be entitled to an indemnity out of the assets of the Company. That was a wise decision on the facts herein and the decision of the High Court.

10. The submissions made by counsel on behalf of Mr. Fitzpatrick may be summarised under three broad headings. First, as a matter of principle, this application is not one in which a court should, pursuant to O. 99, r. 1 make an order against Mr. Fitzpatrick, as a liquidator, personally. If the court did not accede to that submission then there were special circumstances in relation to the assertion and absence of any finding that Mr. Fitzpatrick had acted negligently as liquidator.

11. Second, he submitted that the trial judge had failed to take account in her costs determination of what she had stated at para. 85 of her substantive judgment. There she stated:—

“Finally, the Court observes that had the applicant exercised its rights as a member of the Committee of Inspection more vigorously from the outset some if not all of the difficulties encountered in this liquidation might have been avoided.”

12. Third, in part as an alternative submission, even on the determinations of the High Court it was submitted that the primary reliefs sought were directions pursuant to s. 280 of the 1963 Act which were founded on a claim of negligence, and there was no determination that Mr. Fitzpatrick had been negligent. In those circumstances he submitted that the trial judge ought to have determined, in accordance with the principles set out in *Veolia Water (UK) & Ors. v. Fingal Co. Co. (No.2)* [2007] 2 I.R. 81 (and any subsequent judgments), that each party had been successful on certain issues and therefore that there ought to have been a reduction or total set off of the costs. In addition, he submitted that following the first judgment of this Court, it was now the position that Mr. Fitzpatrick had succeeded in resisting the consequential orders in dispute and that in accordance with the *Veolia* principles there should now be no order as between the parties in respect of the High Court costs.

13. On the costs of the appeal, his submission was that there should be no order as to costs as whilst the Revenue Commissioners had succeeded on the appeal in relation to the removal of Mr. Fitzpatrick as liquidator, the latter had succeeded on the appeal against the consequential orders.

14. Counsel for the Revenue Commissioners, in summary, submitted that the trial judge correctly determined that this was an application to which the normal rule that costs follow the event should apply, the comment at para. 85 of her judgment did not warrant any diminution, and that following the decision of this Court there should only be a very small deduction from the overall costs. Similarly, in relation to the appeal, it was submitted that the principal issue was the removal of Mr. Fitzpatrick, and that there should be separate orders on the different appeals or only a small deduction from a full order for costs in favour of the Revenue Commissioners.

Discussion and decision

15. The application brought by the Revenue Commissioners on an originating notice of motion is a “proceeding in the Superior Courts” such that in accordance with O. 99, r. 1, the costs of the application is within the discretion of the Court. Neither party submitted that O. 99, r. 1(4) did not apply as such. This sub-rule provides that, subject to sub-rule (4A) (interlocutory applications);

“The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.”

The motion grounded on affidavit by the Revenue Commissioners is the claim for the purposes of this rule.

16. I cannot accept the submission made by counsel on behalf of Mr. Fitzpatrick that as a matter of principle, in a successful application to remove a liquidator pursuant to s. 277, the starting point for a consideration of the exercise by the Court of its discretion is other than that costs follow the event, i.e., that the applicant is entitled to an order against the liquidator personally. Mr. Hayden S.C. submitted that if this was the approach taken by the Court, then a liquidator faced with such an application is confronted with an impossible or unfair choice, namely, does he immediately accede to the application (or possibly resign) even though in his view the application is unwarranted, or does he decide to resist the application, and risk an order for costs being made against him. I recognise that that is a decision which a liquidator faced with such an application must take. Nevertheless, it is a decision which many defendants or respondents to applications before our courts must also take. It follows from the general approach to costs in our court system. It does not appear to me that there is any basis for exempting a liquidator faced with such an application from having to take the appropriate decision. A liquidator who accepts an appointment in a voluntary liquidation does so subject to the relevant legislation in force which at the time included s.277 of the 1963 Act.

17. On the facts of this application, the trial judge was entitled to determine that the liquidator in resisting the application was acting in his own interest. It was perhaps understandable given the basis upon which the application was brought that Mr. Fitzpatrick should seek to justify what he had done and resist the application that he be removed. He clearly wished to defend his professional reputation as a liquidator. Nevertheless, he was unsuccessful in resisting the application for his removal both in the High Court and again on appeal.

18. Neither do I consider that the fact that there was no finding of negligence, misconduct, personal unfitness or lack of integrity on the part of the liquidator means that costs should not follow the event. For the reasons set out by the trial judge, and upheld in the first judgment of this Court, a conclusion that the liquidator had not conducted the liquidation in an efficient and cost effective manner provides good grounds for removal pursuant to s. 277 of the 1963 Act. That was the primary basis upon which the order was made by the High Court and upheld by this Court.

19. The submissions on behalf of Mr. Fitzpatrick sought to rely by analogy upon the approach to the orders for costs in proceedings brought against a liquidator when he is acting as agent for the company and seeking to defend the assets of the company. The Court was referred to the discussion by Oliver J. in *Re Wilson Lovatt & Sons Limited* [1977] 1 All E.R. 274. The Court was also referred to a judgment given by me in the High Court in *Re Visual Impact and Displays Limited (in liquidation) Murphy v. Murphy* [2003] 4 I.R. 451. As identified at p. 457 in that judgment, the general rule in such litigation is that the costs of a successful plaintiff or applicant are

paid out of the assets of the company, although "under exceptional circumstances an order may be made going beyond that and giving them the right to be paid by the liquidator personally".

20. However, that line of authority does not appear to me apposite to an application such as the present where a creditor seeks to remove a liquidator pursuant to s. 277 of the 1963 Act. As was the position in *Murphy v. Murphy* (which related to an application under s. 150 of the Companies Act 1990), it is the liquidator personally, as distinct from the company in liquidation being sued through the agency of the liquidator, who is the party to this application. The issue here was whether or not the liquidator should remain in office. The application did not concern any dispute between the Revenue Commissioners and the company in liquidation.

21. The fact that the starting point is that costs should follow the event does not, of course, preclude the Court from considering all the relevant circumstances of the application, including the basis of the application as made and upon which it succeeded. The Court must also consider whether there were other issues raised in the application upon which the Revenue Commissioners were not successful.

22. The remaining question is whether Mr. Fitzpatrick, as the appellant, has established a basis upon which this Court should interfere with the order for costs made in the High Court. In a judgment delivered by me (with which my colleagues concurred) on 25th March, 2017 in *Sony Music Entertainment (Ireland) Limited v. UPC Communications Ireland Limited* [2017] IECA 96 I considered the appellate jurisdiction in an appeal against a discretionary order for costs pursuant to O. 99 of the Rules of the Superior Courts in the context of the earlier judgment of Irvine J. in this Court in *Collins v. Minister for Justice Equality & Law Reform* [2015] IECA 27, and that of McMenamin J. in *Lismore Builders (in receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6. At para. 9, I concluded:

"Whilst there is for the reasons stated more fully in *Collins* no a priori requirement that an appellant establish an error in principle for this Court to interfere, I nevertheless consider we should, in relation to costs orders, be very slow to interfere unless there are errors detectable in the approach of the High Court or, even without such errors, an appellant satisfies this Court in the particular circumstances of the case that the interests of justice require that it should interfere in the High Court order for costs."

23. It is not clear to me whether in the High Court any reliance was placed on behalf of Mr. Fitzpatrick on the views expressed by the trial judge at para. 85 of the judgment delivered on 21st July, 2015 to the effect that had the Revenue Commissioners exercised their rights as a member of the Committee of Inspection more vigorously from the outset, some if not all of the difficulties encountered in this litigation might have been avoided. The application which ultimately required to be determined by the High Court unfortunately took four days to hear, notwithstanding that it was heard on affidavit. There were a number of affidavits and experts retained by both sides. There was, however, no cross examination. In circumstances where the trial judge determined that she should remove the liquidator based on evidence that the liquidation had not been carried out in a cost effective and efficient manner, but nonetheless determined that had the Revenue Commissioners exercised their rights more vigorously certain of the difficulties could have been avoided, it appears to me that such conclusion was an appropriate matter to take into account in the exercise of the court's discretion when determining the order for costs which should be made. This arises particularly where the order was one being made against a person in his capacity as liquidator where creditors who exercise their rights to nominate a person to a Committee of Inspection also have a potential role to play in ensuring an orderly winding up.

24. By reason of the first judgment of this Court there is, of course, one further matter which should, in my view, now be taken into account. It is the fact that Mr. Fitzpatrick succeeded in the appeal against the consequential orders. The primary basis of his success was the fact that the trial judge did not have jurisdiction to make such orders pursuant to s. 638(2) of the Companies Act, 2014 where she had not removed Mr. Fitzpatrick under s. 638(1) of the 2014 Act. At the date of the hearing before the trial judge (in May, 2015) the 2014 Act had not yet been commenced. It was commenced by Ministerial Order on 1st June, 2015.

25. However the consequential orders made by the High Court included the payment to the new liquidator of €51,000 which had been paid to a former solicitor, and also a sum of €50,000 which had been retained by Mr. Fitzpatrick on account of his fees. In respect of the former amount, the judgment of Irvine J. concluded that even if the trial judge had jurisdiction pursuant to s. 638(2) of the 2014 Act this Court would have allowed the appeal against the consequential order requiring him to hand over the sum of €51, 000 paid or retained by the solicitor on account of his fees.

Conclusions

26. Accordingly, this Court must review the trial judge's decision on costs in a context where Mr. Fitzpatrick must be considered to have succeeded on an important issue in the High Court. The consequential orders made required him, in addition to the monies still standing to the credit of the liquidation, to pay over to the new liquidator a sum in excess of €100,000, of which €51,000 had already been paid to a third party, the solicitor. The entire issue of the solicitor's fees was a significant one before the High Court and one to which expert evidence was adduced. It also appears to me that a proper exercise of the discretion necessitates some reflection of the view expressed by the trial judge in relation to the potential outcome if the Revenue Commissioners had exercised their position as a member of the Committee of Inspection more vigorously. Taking into account both these matters and the successful application under s.277 of the 1963 Act, I have concluded that the appropriate exercise of the discretion of the Court to do justice between the parties is to make an award in favour of the Revenue Commissioners against Mr. Fitzpatrick personally for 50% of the costs of the High Court application.

27. In relation to the costs of the three appeals, the first two of which were effectively treated as one appeal at the first substantive hearing, with additional short submissions and hearing on the costs appeal, I have concluded that each of the parties have had some success. The Revenue Commissioners succeeded on the removal issue (which was the primary issue) and Mr Fitzpatrick on the consequential orders issues and each party was partially successful on the costs appeal. I have concluded that in exercise of the Court's discretion in accordance with O.99 the appropriate and just order between the parties is to make an order in favour of the Revenue Commissioners for 50% of the costs of the first two appeals up to the date of the first judgment (26th July 2016) with a direction that they are to be treated as one appeal and to make no order on the costs appeal or any additional matter on the other appeals after the date of the first judgment.