Neutral Citation: [2015] IEHC 113

HIGH COURT

[2010 No. 550 COS]

IN THE MATTER OF PIERSE CONTRACTING (No. 2) (IN LIQUIDATION AND IN RECEIVERSHIP) + AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

SIMON COYLE

APPLICANT

AND

FEARGHAL O'NOLAN, CHARLES NORBERT O'REILLY, GERARD THOMAS PIERSE, KIERAN DUGGAN, MARTIN MURPHY, MICHAEL MCNAMARA, MICHAEL O'REILLY, MATHEW DUGGAN AND BRENDAN CAHALIN

RESPONDENTS

JUDGMENT of Mr. Justice CREGAN delivered the 12 day of February, 2015

Introduction

1. In an earlier judgment in these proceedings delivered on 30th January, 2015, I held that the liquidator's application for an order under s.150 of the Companies Act 1990 against a number of the respondents should be dismissed. Following my judgment in that case, the successful respondents have applied for their costs against the liquidator.

Applicable law

2. The appropriate legal principles in this matter appear to have been set out by Finlay- Geoghegan J. in *Re: Kranks Korner; McCarthy v. Gibbons* [2008] IEHC 423 and summarised by Barrett J. in *Shellware Ltd (in liquidation); Taite v. Breslin* as follows:

> *"The law as regards the awarding of costs against a liquidator following a s.150 application appears well settled since the judgment of Finlay Geoghegan J. in Re.Kranks Korner; McCarthy v. Gibbons [2008] IEHC 423. Finlay Geoghegan J.'s remarks in that case might perhaps be summarised as follows:*
>
> > *(1) First, s.150 itself makes no provision as to costs.*
> >
> > *(2) Second, the Court in s.150 proceedings enjoys the general discretion as to costs that pertains under O.99 of the Rules of the Superior Courts 1986 as amended.*
> >
> > *(3) Third, it is not the case that when persons against whom a failed s.150 application is brought satisfy the court that they acted honestly and responsibly, that the normal rule is that they be, or that they not be, awarded their costs against the applicant liquidator;*
> >
> > *(4) Fourth, there is no normal rule as to costs in such cases; the court must exercise its discretion in each case having regard to the relevant facts and the statutory scheme*
> >
> > *(5) Fifth, there does not generally appear to be any justification for making an order for costs against a liquidator where the following circumstances pertain*
> >
> > > *(1) There is no dispute that s.150 applied to the company in liquidation and to the respondents as directors thereof;*
> > >
> > > *(2) The liquidator put all relevant facts to the Director for Corporate Enforcement when making his s.56 report and*
> > >
> > > *(3) The respondent directors had an opportunity either to comment on those facts in advance or to furnish the liquidator with relevant information in response to queries."*

3. This is an accurate and succinct statement of the principles which are applicable in these cases. The normal rule under O.99 r.1 (4) (that the costs follow the event) does not apply in relation to s.150 applications because, as stated by O'Leary J. in *Stafford v. Beggs* [2006] IEHC 258 *"a liquidator is merely the presenter of the application not a claimant or party with an interest in the outcome either for himself or on behalf of the creditors"*.

4. Likewise as Finlay Geoghegan J. stated in Re Kranks Korner *"The statutory scheme in such circumstances now requires persons who are, or were, within twelve months of the commencement of the winding up, directors of an insolvent company, to then satisfy the High Court that they acted honestly and responsibly if they are to avoid a declaration of restriction. If they succeed in so persuading the court, it appears to me that it is an inevitable consequence of the statutory scheme put in place by the Oireachtas that they may have to bear their own legal costs of defending the application which the liquidator has been required to bring. There does not, in those circumstances, appear any justification for making an order for costs against a liquidator which would have to be borne by him, either personally, or if he was entitled to an indemnity out of the assets of the liquidation (and there were funds in the liquidation) effectively by the creditors of the insolvent company"*.

5. Therefore in this case, I must exercise my discretion having regard to (i) the facts and (ii) the statutory scheme.

6. In exercising that discretion, I am of the view that I should have regard to the following matters in relation to the statutory scheme:

(1) The purpose of the jurisdiction to make restriction orders is to protect the public. In *Re Colm O'Neill Engineering Services Ltd* [2004] IEHC 83 Finlay Geoghegan J. stated that, *"it is well established that the purpose of the section is to protect the public against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others. It was also established that it is not the purpose of the section to punish the individuals concerned"*.

(2) There is a real public interest to be served by a liquidator bringing such applications where he has formed a view that it is appropriate to do so.

(3) It is also in the public interest that there is an inquiry, by virtue of a s.150 application, whether the directors have acted honestly and responsibly.

(4) Under the statutory scheme there is an obligation on a liquidator to bring such an application.

(5) Any costs orders which might be awarded against liquidators would have a chilling effect on such future applications.

The arguments of the respondents

7. The factors which the respondents say the court should take into account in awarding them their costs were as follows:

(1) The fact that the respondents won the case, allied to the fact that the court did not state that it had any reservations about the behaviour of the directors. However, in my view, that is not a persuasive argument on the facts of this case. There were five issues which, the liquidator submitted to the court, justified the restriction order. I held on behalf of the respondents on each of those five issues. They were therefore successful in resisting the application. That however, on its own, is not sufficient to justify me making an order for costs in their favour.

(2) That some of the directors had invested considerable sums of their own money into the company. This was a major factor in the case and it was a major factor in my assessment of whether the directors had acted responsibly. I concluded that the fact that the directors had invested sums of their own money meant that they acted responsibly. However I do not believe that it is a factor necessarily which should be weighed "on the double" when considering a costs application.

(3) That the respondents had furnished an expert accountant report and the liquidator had filed no replying affidavit exhibiting his own expert account accounting report. Whilst that submission is correct (and whilst the liquidator's main concerns related to the accounting treatment of certain issues) I believe that that is a factor which was relevant to my consideration of the substantive issue of whether a restriction order should be made. I gave it due weight at that point in time and I do not believe it should be weighed "on the double" for the question of assessing costs.

(4) The respondents complain that they hadn't seen the s.56 report. However it appears that none of the directors actually requested the s.56 report and if they had done so it would have been provided to them (subject to the usual redacting of certain portions) and that, on its own is not, in my view, a reason for awarding costs against the liquidator.

(5) The respondents submitted that the liquidator had all the information in his possession before embarking on these proceedings, that he embarked on the proceedings nevertheless and yet he lost. Again however that is merely to restate that the liquidator was unsuccessful in this application and is not a ground per se to justify making an award of costs against the liquidator.

(6) Counsel for Mr. Duggan was more critical of the liquidator's behaviour. He stated that Mr. Duggan had not been given a copy of the s.56 report despite a request for the report and despite, as he says, the liquidator's agreement to give him that report. He also submitted that it was not clear that the liquidator had ever made the case to ODCE that Mr. Duggan should be treated differently as a non executive director. Moreover he submitted that the liquidator had not put all relevant facts to the Director of Corporate Enforcement. However, on the facts of this case- and having considered the extensive correspondence between the liquidator and Mr Duggan I am not convinced by this submission.

Submissions by the Liquidator

8. Counsel for the liquidator made the following submissions;

(i) In relying on the principles set out by Finlay Geoghegan J. in *Kranks Korner* and by Barrett J. *Re Shellware Ltd*, he said that the liquidator came within the three limbs of the test set out by Barrett J. in the fifth part of his judgment; thus the liquidator contended (i) that there was no dispute that s.150 applied to the company and to the respondents as directors thereof; (ii) that the liquidator had indeed put all relevant facts to the Director for Corporate Enforcement when making his s.56 report and (iii) that the respondent directors had an opportunity either to comment on those facts in advance or to furnish the liquidator with relevant information in response to queries. In this regard the liquidator pointed to a very significant degree of interaction in particular between Mr. Duggan the Liquidator and the ODCE. The liquidator also submitted that he had engaged in extensive correspondence with Mr. Duggan but that there would simply be an impossible burden placed on liquidators if they had to litigate the entire matter in correspondence - particularly given the strict time limits within which such applications have to be brought.

(ii) The liquidator also submitted that if an award of costs were to be made against the liquidator in cases such as these, it would have a "chilling effect" on s.150 applications into the future. In my view this is a submission to which I attach considerable weight. The court should give full weight to the statutory scheme and to the public policy and public interest objectives behind the statutory scheme. Under this scheme, there is an obligation on liquidators to bring such applications for restriction orders. The respondents then have a full opportunity to put their case on affidavit and to make legal submissions. It is ultimately a matter for the court to decide whether the directors have acted honestly and responsibly and whether a restriction order should be made. That process however fulfils an important public interest function in permitting an adjudication on whether directors of an insolvent company have acted honestly and/or responsibly. The court should be very careful about making awards of costs against liquidators where that might lead to a chilling effect on such applications.

(iii) The liquidator also submitted that the application was brought in good faith, that the liquidators report to the ODCE was made in good faith that there was no evidence that the liquidator failed to put all the relevant facts or documents before the ODCE and that in those circumstances costs should not be awarded against the liquidator. I have no doubt that this application was brought in good faith and there were reasoned grounds upon which the application was based (albeit that the court ultimately found for the respondents).

(iv) The liquidator also submitted that Pierse Construction was one of the largest companies to go into liquidation in recent times; that it had very extensive losses; that there were fifteen subsidiaries and nineteen joint ventures; that there were no assets in the liquidation; that this application had been funded by the liquidator from his own resources and that any costs order, if it were to be made, would be made against the liquidator personally. These are submissions to which I have also attached some weight. However they are not decisive.

Assessment

9. The issue the court has to decide is how it should exercise its discretion in the awarding of costs of a case where a liquidator is obliged to bring an application pursuant to a statutory scheme and where the respondent directors have succeeded in defeating such an application. The court must then balance any unjust burden which might be placed on the respondent directors for having to defend their names and reputations in such a case, against the unjust burden which might be placed on a liquidator in having to bear a costs order where he has been unsuccessful. In my view the justice of this situation cannot simply be balanced by considering the interests of the parties before the court in the present case before it. The Court must also have regard to the objectives of the statutory scheme as set out above.

10. On balance I am of the view that it would be unfair to award the respondents their costs against the liquidator for the reasons set out above and also because:

(1) The liquidator is bound under the statutory scheme to bring such an application

(2) The liquidator brought this application in a fair and reasonable manner. He fairly accepted at the outset that there were no allegations that the respondents had acted dishonestly and that there were no issues in relation to the manner in which the respondents had dealt with the books and records of the company. The liquidator therefore did what was required to narrow the issues to be considered by the respondents and the court. The net issue therefore was whether the respondents had acted responsibly. In my view the liquidator brought this application in good faith and based on what appeared to him to be reasonable grounds. The fact that he subsequently lost in the application is not the determinative factor.

11. Essentially the respondents complained that the liquidator when he had seen all the affidavits and legal submissions in respect of this matter should not have brought the application. However in my view that would be to impose an unfair burden on the liquidator. The liquidator can of course change his mind once he has received all the replying affidavits and legal submissions if he chooses to do so. However the liquidator must also be free to bring the application before the court where he forms the view that, despite the replying affidavits and legal submissions, the application should still be brought. It is ultimately a matter for the courts to consider whether the directors had acted honestly and responsibly. Indeed in the present case the solicitors for one of the respondents wrote a letter headed "without prejudice save as to costs" requesting the liquidator not to bring such an application and stating that if the application was brought that the respondent would rely on the letter to seek to fix the liquidator with all of the costs of the hearing. The liquidator replied saying that he had no intention of withdrawing proceedings even though he acknowledged the threat with respect to costs. In many ways this exchange of correspondence highlights the difficulty for a liquidator. It is clear that if the courts got into a general practice of awarding costs against liquidators that such a practice would indeed have a chilling effect on liquidators and on s.150 applications generally. That could in effect frustrate the entire legislative scheme and would also act against the public interest.

Conclusion

12. On balance therefore I am of the view that considering the statutory scheme and the facts of this case, the application by the respondents for their costs against the liquidator should be refused.