Neutral Citation Number: [2006] IEHC 258

THE HIGH COURT

2003 COS 459

IN THE MATTER OF DOHERTY ADVERTISING LIMITED
(IN OFFICIAL LIQUIDATION)
AND IN THE MATTER OF SECTION 150 OF COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANIES LAW ENFORCEMENT ACT, 2001

BETWEEN

JAMES STAFFORD

APPLICANT

AND
MARK BEGGS
ANTONY MARTIN
PASCAL TAGGART
SHAY MORAN
LIAM GASKIN

RESPONDENTS

Judgment of Mr Justice Sean O'Leary delivered on the 14th day of July 2006

1. This is an application for costs by the third and fourth named respondents which arises consequential to a decision of this Court made in respect of an application under s. 150 of the Companies Act, 1990. The substantive application was brought by the applicant, who is the liquidator of Doherty Advertising Limited ("the Company") having been so appointed by order of the High Court of 24th September, 2003. On that application the Court decided that the second to fifth named respondents should not be restricted as the Court was satisfied that they had shown that they had acted responsibly and honestly and that there was no other reason why they should be restricted.

2. In *Visual Impact and Displays Limited (in Liquidation) v Murphy & Others* [2003] 4 I.R. 451 Finlay Geoghegan J. decided that the combined effect of the original provisions of s.150 of the Companies Act, 1990 and the amendment of that Act by the insertion of s.150 (4B) as provided by s. 41 of the Company Law Enforcement Act, 2001, did not remove the court's discretion to award costs in accordance with the normal rule dealing with costs i.e. O. 99, r. 1.

3. This reasoning was followed by Peart J in *In the Matter of USIT Limited and In The Matter of The Companies Acts 1963-2003* [2002 No 25 Cos] and also *In the Matter of USIT World PLC and In The Matter of The Companies Acts 1963-2003* [2002 No 38 Cos] (unreported, High Court, Peart J, 16th November,2005).

4. This Court sees no reason to depart from the aforementioned decisions.

5. Further, the Court rejects any application that the effect of s. 150 (4B) is to limit the discretion of the court in applications falling outside the terms of that section. Specifically the Court rejects any suggestion that it is obliged, by the enactment of s.150 (4B), to award costs to a director who discharges the onus of proof. If such a departure from normal practice was intended the matter would have been addressed at the time s. 150 (4B) was enacted.

6. The Court is satisfied that the law remains that O. 99, r. 1 is the basis on which the courts must exercise their discretion.

7. Order 99, Rule 1 provides as follows:

> *"Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be at the discretion of those Courts respectively.*
>
> *(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.*
>
> *(3) ……*
>
> *(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

8. The Court is satisfied that (save for the exceptional circumstances envisaged by the Order) this is the applicable law in the present circumstances. It falls to the Court to apply that law in the context of a s.150 application.

9. The primary provision of the Order is that costs are at the 'discretion of the court'. The Order further provides that the normal outcome is costs should 'follow the event'.

10. The normal meaning ascribed to the Order is that the 'successful' party is awarded his/her costs against the 'unsuccessful' party. The outcome is described in the rule as the 'event'. In the majority of cases before the court there is a 'losing' and a 'winning' side and the rule is applied in such a way that the unsuccessful party bears the cost of the action. Does this general rule have any application in the present case? It is clear that the directors feel that they have succeeded as they have proved to the satisfaction of the court that they had acted in an honest and responsible fashion. Therefore they submit they are justified in claiming that as they have won (i.e. were successful) they should as a matter of normal practice, get costs. But has anybody 'lost' (i.e. been unsuccessful)? Is there any reason why the applicant cannot also maintain that he was equally successful in the sense that he put before the court an application for the court's determination and the decision of the court (irrespective of the outcome) is the fulfilment by him of his legal duty. When the necessity to make the application, on the instructions of the Director of Corporate Enforcement, is backed by a criminal sanction is the application itself not the 'event' in question rather than the adjudication of the court.

11. This possible interpretation is in the view of the Court supported by (but not dependant on) the description (amounting possibly to a qualification) of the issues falling with the rule within O.99, r.1 (4) as relating to a 'claim or counterclaim'. Can an application

(pursuant to a legal duty) by a liquidator for adjudication by a court on the pre-liquidation (or post liquidation) behaviour of a director be properly called a claim or a counterclaim? The liquidator is merely the presenter of the application not a claimant or party with any interest in the outcome either for himself or on behalf of the creditors.

12. A comparable situation arises in criminal matters. When an accused in a criminal matter is charged with an offence he is under an obligation to use his/her funds to fight the case. In such cases the awarding of costs is very unusual and limited to cases where the prosecution has misbehaved in some way.

13. For all the foregoing reasons the court is of the view that the proper application of O. 99. r. 1. of the Rules of the Superior Courts leads to a conclusion that costs should not be normally awarded to a director who satisfies the court that he/she should not be the subject of a restriction order under s. 150.

14. As is usual in cost matters in exceptional circumstances the normal rule need not be applied.

Is there a reason to depart from the normal rule?
15. In this case the Court was very critical of the inclusion of an allegation concerning the Dublin Daily matter as a complaint against the third named respondent. Further the Court was critical of the liquidator's imprecise formulation of the issues to be met by the directors. On the other hand the absence of cash flow projections from November, 2002 to the middle of 2003 represented a real failure by the directors. Further the absence of formal board meetings was a legitimate issue to be raised at a s.150 hearing.

16. Further, in the view of the Court, in the context of the behaviour of the first and second named respondents (with whom the other directors had the misfortune to share a board room) it was extremely unlikely, even if the liquidator had acted with perfection, that he would have been relieved of his obligation by the Director of Corporate Enforcement to make a s.150 application in respect of each of the directors.

17. In all the above circumstances the Court will make no order as to costs.