

**THE HIGH COURT  
IN THE MATTER OF MOYPOOL LIMITED  
(IN VOLUNTARY LIQUIDATION)  
AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2003  
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990  
AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001**

2005 NO. 121 COS

**BETWEEN****JOSEPH T. GANNON****APPLICANT****AND****ANTHONY O'HORA SENIOR (OTHERWISE TONY O'HORA) AND ANGELA O'HORA****RESPONDENTS****Judgment re costs of investigation****Judgment of Ms. Justice Finlay Geoghegan delivered the 15th day of May, 2006.**

1. On 8th December, 2005, this Court made declarations of restriction pursuant to s. 150(1) of the Companies Act, 1990 in respect of the respondents and ordered that the liquidator recover against the first named respondent his costs when taxed and ascertained. The liquidator's application pursuant to s. 150(4B) for an order that the first named respondent bear the costs incurred by the liquidator in investigating the matter was adjourned to permit the liquidator to furnish his estimate of such costs and to allow the issue be argued before me.

2. The liquidator seeks as costs incurred by him in investigating the application under s. 150, certain fees payable to his solicitors in respect of work done by them at his request in connection with the investigation of the s. 150 application. The estimate of the fees due and the basis of same is set out in a letter dated 24th January, 2006, from Ms. Marshall of McCann Fitzgerald to the liquidator. The costs relate to work done by the solicitor for the liquidator at his request in reviewing the conveyancing files of the former solicitors to the company in connection with matters being investigated by the liquidator in connection with the potential application against the respondents under s. 150.

3. Counsel for the first named respondent submitted that the fees sought by the solicitors from the liquidator do not come within the costs which may be ordered by the Court under s. 150(4B) of the Act of 1990. It was submitted that the phrase "any costs incurred by the applicant in investigating the matter" in s. 150(4B) was confined to legal costs incurred in connection with litigation. It was submitted that the costs now being sought are properly expenses of the liquidator and, as such, do not come within the phrase. Counsel for the first named respondent relied upon the distinction made in s. 281 of the Companies Act, 1963 between costs, charges and expenses.

4. This submission does not appear to me to be correct. Section 150(4B) as amended by section 41 of the Company Law Enforcement Act, 2001 provides insofar as relevant:

"(4B) The court, in hearing an application for a declaration under subsection (1) from ... a liquidator ... 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."

5. The application under s.150 is the litigation between the parties. The explicit wording of the sub-section makes clear that the costs incurred in investigating the matter may be ones separate to the costs of the application i.e. the present litigation between the parties. Hence if the submission was correct, the Oireachtas must have intended that cost of investigation be confined to costs of litigation other than the application under section 150.

6. I previously considered the proper construction of s. 150(4B) in a judgment given on 5th May, 2005 *In the Matter of Mitek Holdings Limited* (Unreported, High Court, Finlay Geoghegan J., 5th May, 2005). At issue in that judgment was whether the liquidator's own remuneration in respect of time spent in investigating the matter was included within the relevant phrase in s. 150(4B). I decided for the reasons set out in that judgment that it was not so included. In that judgment I stated, *inter alia*:

"*Prima facie* the words 'costs incurred by the applicant' means sums of money that the applicant liquidator is liable to pay to a third party. Such sums do not include his own remuneration."

7. I drew attention in the judgment to the wording of s. 281 of the Act of 1963 and the use of the phrase "costs, charges and expenses incurred in the winding up, including the remuneration of the liquidator" and the absence of any similar inclusion of the remuneration in s. 150(4B). However the wording of s. 281 of the Act of 1963 does not appear to me to be a basis upon which the Court should properly construe s. 150(4B) as being confined to costs incurred in litigation as contended for by counsel for the first named respondent. The intention of the Oireachtas as indicated by the words used in the sub-section appears to be that the Court has jurisdiction to make an order that a director against whom a declaration has been made, pay to an applicant liquidator not only the costs of the application but also costs incurred by the liquidator in investigating those matters which were the subject matter of the s. 150 application. There is no warrant in the words used in s.150(4B) for confining such costs of investigation to costs incurred in litigation.

8. The further and alternative submission made related to the scope of the order it made. It was submitted that insofar as the Court made an order for the costs of investigating the matter under s. 150(4B) that the liquidator would have to demonstrate that such costs were costs necessary for the investigation of the matters relevant to the s. 150 application and costs which would not otherwise be incurred in the liquidation. Counsel for the liquidator accepted, correctly in my view, that the sub-section has to be given a narrow interpretation as it imposes a financial obligation on the respondent director.

9. The wording of s. 150(4B) suggest a similar approach to the determination of "costs of the application" and costs of "investigating the matter". Unless otherwise ordered the order for the costs of the application would be taxed on a party and party basis. In accordance with O. 99, r. 10(2) of the Rules of the Superior Courts, 1986 such costs would include "all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed". By analogy it appears to me that the intention of the Oireachtas must be construed as being that where the Court makes an order for the costs of investigating the matter there be allowable "all such costs as were necessary or proper for the investigation of the application

under s. 150". *Prima facie* fees charged by the solicitor for the liquidator for work done at his request in relation to the matters being investigated for the purposes of the s.150 application come within this concept. In so holding, I am not determining that all the work done as summarised by Ms Marshall in her letter was necessary or proper for the investigation. If disputed, that would have to be resolved on taxation.

10. The final submission made on behalf of the first named respondent was that the making of such an order was discretionary and that on the substantive application there had been no finding of dishonesty in respect of the first named respondent and the primary cause of this liquidation was a radical change in the relevant tax regime for projects of this nature.

11. Whilst I accept that there was no finding of dishonesty against the first named respondent it does not appear to me that the Court should now exercise this discretion so as not to make any order in favour of the applicant liquidator as sought. Insofar as the solicitors for the liquidator carried out work which may be considered (upon taxation if necessary) to have been necessary or proper for the investigation of the subject matter of the application under s. 150 of the Act of 1990, then it appears to me on the facts herein such costs should be borne by the first named respondent and not by either the liquidator personally or, if there are funds in the liquidation, the creditors of the liquidation.

12. Accordingly, there will be an order under s. 150(4B) that the liquidator do recover against the first named respondent his costs of investigating the application under s. 150, such costs, in default of agreement, to be taxed and ascertained.