THE HIGH COURT

[2017 No. 36 COS]

IN THE MATTER OF BEAUTY HOLDINGS LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF HAIRSPRAY WHOLESALERS LIMITED

(IN VOLUNATARY LIQUIDATION)

AND IN THE MATTER OF SECTION 261 OF THE COMPANIES ACTS 1963 - 2012

***EX TEMPORE* JUDGMENT of Mr. Justice Tony O'Connor delivered on the 23rd day of May, 2019**

1. These are applications by way of a notice of motion issued in December 2018, on behalf of Mr. Jim Luby, Chartered Accountant. He was appointed on 6th May, 2014, at a meeting of creditors of Beauty Holdings Limited, in voluntary liquidation, ("*Beauty*") and Hairspray Wholesalers Limited, in voluntary liquidation, ("*Hairspray*"), both referred to in this judgment as ("*the companies*").

2. Mr. Luby, in that role, is seeking recovery of fees estimated or calculated to have been overpaid by Mr. Gary Lennon, who describes himself in his three affidavits as an insolvency practitioner or accountant. He was granted leave yesterday to file his last affidavit sworn on 20th May, 2019. He was appointed a liquidator by members of the companies in May 2013, and advised a creditors' meeting on 17th April, 2014, that the companies were insolvent.

3. Background facts can be gleaned from the judgments delivered by Allen J. on 30th April, 2019, in the applications by Mr. Luby to restrict the directors of the companies; *Luby v. Logan* [2019] IEHC 260 and *Luby v. Logan & Mackenzie* [2019] IEHC 261.

4. It is not necessary to summarise those facts for the purpose of determining these applications which were cited to the Court on behalf of Mr. Lennon to indicate the commonly-held view that the records of the companies were, in my words, in "rag order" and that the failure to pay the correct amount of VAT due by the companies *"can be traced directly to the failure to keep records and make tax returns".*

Introduction

5. The verbosity of correspondence and affidavits, which started after an earlier notice of motion dated 1st December, 2017, about the reasonableness of the fees paid by Mr. Lennon to himself and the companies for what he described as agreed rates, tends to indicate a lack of focus. This was ultimately tackled in a positive way by counsel following the direction of this Court yesterday for written outline points to be submitted to the Court by both sides before the hearing resumed at 11am this morning for another two and a half hours of hearing. Mr. Luby is seeking recovery of €122,126 plus VAT and €31,677.42 of, what is described as "overcharged fees" in respect of Beauty and Hairspray respectively.

6. The notice of motion dated 1st February, 2017, with an indexed and paginated lever arch folder with 39 leaves of affidavits, exhibits and legal submissions, ultimately led to an agreement dated 21st December, 2017 "*with a view to resolving the proceedings*" ("*2017 agreement"*). The terms of the 2017 agreement were negotiated and ultimately agreed by the parties, who are professionals in their own right, with the assistance and advice of counsel and solicitors. The following clauses of the 2017 agreement are most relevant to this application:-

"1. Joint appointment of an independent expert

> *The parties agree to jointly appoint Mr. Jim Stafford to act as an independent expert (the "Independent Expert") to determine the following issues:-*
>
> > *(a) A reasonable fee having regard to market hourly rates and the number of hours which would generally be spent by a liquidator carrying out a members' voluntary liquidation of a similar entity up to the date of conversion to a creditors' voluntary liquidation, on the assumption that no VAT recalculation was carried out by the liquidator; and*
> >
> > *(b) whether the Respondent ought to have undertaken the tasks that he did as liquidator prior to the conversion of the liquidation to a creditors' voluntary liquidation; and*
> >
> > *(c) whether the Respondent ought to have undertaken the tasks that he did as liquidator and in particular the recalculation of the VAT liabilities of the Companies without the consent of the directors and/or the creditors of the company; and*
> >
> > *(d) if it was necessary for the Respondent to carry out the VAT recalculation prior to conversion to a creditors' voluntary liquidation, the level of fee that would reasonably be charged by the liquidator having regard to the fact that the companies were likely to be insolvent and transpired to be insolvent (the "Expert Determination").*

2. Access to Documents

> *The parties agree that the Independent Expert shall have access to the documentation listed in the Schedule hereto, comprising the pleadings exchanged in the Proceedings, the books and records of the Companies, timesheets of Mr. Lennon together with and any other documents which the Independent Expert may reasonably request in order to reach a determination. Any additional documentation subsequently provided to the Independent Expert must also be furnished to other party hereto within 7 days thereof.*

3. Affidavit

The Respondent shall, on or before 25 January 2018 prepare and swear an Affidavit in response to the matters raised in the Affidavits sworn by and on behalf of the Applicant in the Proceedings for the purposes of the Expert Determination.

The Respondent reserves his right to swear an additional Affidavit in the Proceedings to respond to any additional matters raised by the Applicant in the Proceedings.

4. Submissions

The Applicant shall furnish brief submissions (no more than 3 pages) to the Independent Expert on or before 1 February 2018. The Respondent shall furnish brief submissions (no more than 3 pages) to the Independent Expert on or before 8 February 2018.

…

6. Adjournment of Court Proceedings

The Parties shall apply to Court to adjourn the Proceedings to be listed for mention on 8 March 2018 or such other date thereafter which the Court considers appropriate.

7. Failure to reach a Determination

If for whatever reason the Independent Expert has not reached an Expert Determination by 30 March 2018 or such other later date as is agreed between the Parties in writing, the Parties reserve their right to mention the Proceedings (on notice to the other party) to the High Court in order to set a new timetable for the exchange of final pleadings and to obtain the earliest available hearing date for the Proceedings. In the event that the Independent Expert is not able to or is unwilling to reach an Expert Determination, the parties agree that at the next available opportunity, the Parties shall apply to the High Court to seek the earliest available hearing date for the Proceedings."

Expert's Determination

7. Mr. Jim Stafford, FCA, was duly appointed to give the expert determination which is dated 13th March, 2018. Mr. Stafford's report addresses the four issues at 1(a) – (d) of the 2017 Agreement, ("*the Stafford report*"). A timetable of key events is set out in appendix 2, p. 18 of the Stafford report which can be attached to this judgment for further factual background since there is no controversy with respect to same.

8. Uncontroversially, he determined the issues at 1(a) – (c) in favour of Mr. Lennon's position.

9. Paragraph 1(d) of the 2017 agreement is addressed at para. 4.4 of the Stafford report. For the sake of convenience and completeness set out below are paras. 4.2 – 4.4 of the report:-

"4.2 A review of the 2009 accounts for Beauty filed at CRO would have raised further alarm bells as the Profit & Loss Account simply did not reconcile with the Balance Sheet.

4.3 Given the advance notice that Mr. Lennon had received about the Companies' failure to maintain proper books and records he should have proceeded with caution. When a liquidator determines that proper books and records have not been maintained, it can be a pointless exercise attempting to reconcile the irreconcilable. My review of Mr. Lennon's time sheets shows that he spent considerable time attempting to reconcile the Companies computerised records with the primary records such as bank statements. Mr. Lennon's time records on Beauty for February and March 2014 show that he spent 156 hours (at a cost of €39,000) on "Detailed examination between Excel bank statements, recalculated VAT returns and Sage accounts. Item by Item review. Amend VAT calc for errors. Producing correct VAT returns per VAT period between 09–13".

4.4 In my view he should have determined after, say, 12 hours of work over the 2 Companies that such a reconciliation was not going to produce reliable accounts and that he should have advised the directors at that stage that it would be necessary to prepare proper accounts from the start of the relevant periods. Preparing accounts from the start of the relevant periods would have involved a team of more junior staff at less cost, and some of the Companies' own staff could have been utilised. In the case of these Companies, Mr. Lennon could have initially prepared accounts on a "Cash Receipts" and "Cash Payments" basis, then made journal adjustments for prepayments and accruals, and then reviewed the accounts to determine if they made commercial sense by using key ratios such as Gross Profit percentages and other information available such as staff rosters, sales per hair stylist, seasonality etc. In cases of "incomplete records", it is permissible for an Insolvency Practitioner to avail of the "Expressions of Doubt" provisions when submitting returns to the Revenue Commissioners."

10. After the payment of Mr. Stafford's fees and the release of his report in April 2018, intricately involved reports of consideration by Mr. Lennon and his solicitors alleged that Mr. Stafford had erred in his consideration particularly of the issue posed at para. 1(d). This resulted in a long series of correspondence and emails starting on 19th April, 2018, and ending as recently as a letter dated 17th May, 2019, from Mr. Lennon to Mr. Stafford personally.

11. Mr. McCarthy, for Mr. Lennon, usefully at para. 28 of his typed speaking note, exchanged and submitted to the Court today, submits:-

"So what do we say is wrong here and why should the court refuse the application?

(a) The expert did not do what he was asked to do;

(b) The expert did not consider the books and records and the affidavit [of Mr. Lennon] that he should have done; and

(c) The report is not concluded as the Expert has made it clear that he needs to consider the matter further (email of 21st March, 2019 [from Mr. Stafford to Mr. Luby which was copied to each of the solicitors involved]).”

The Law on Expert Determination
12. The judgment of Clarke J. (as he then was) in *James O'Mahony & Ors v. Patrick O'Connor Builders (Waterford) Ltd & ors* [2005] 3 I.R. 167; [2005] IEHC 248, (“*O'Mahony*”), at para. 51;10.2, cites *Jones v. Sherwood Computer Services Plc* [1992] 1 W.L.R. 277, and confirms that an expert's report cannot be challenged in the courts.

13. In *O'Mahony*, Clarke J. concluded however that the expert should have notified the parties of “*his intention to make the interim report final in the absence of compliance*”, (para. 60;12.2).

14. This Court agrees that the first step must be to see what the parties have agreed, and then to identify if the expert followed the request for his expert determination.

Approach to Interpretation
15. Clarke C.J. in *Jackie Greene Construction Ltd v. Irish Bank Resolution Corporation (in special liquidation)* [2019] IESC 2 (unreported, Supreme Court, 24th January, 2019), sets out the accepted law which is, at the risk of oversimplification, *“the 'text in context' approach requires the Court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself”* (quoting from his judgment in *Lanigan v. Barry* [2016] 1 I.R. 656; [2016] IESC 46).

Interpreting the 2017 Agreement to Resolve Proceedings
16. Paragraph 1(d), which is the most controversial clause, is clear. The expert, Mr. Stafford, is asked to determine the level of fees that would reasonably be charged by the liquidator having regard to the fact that the companies were likely to be insolvent and transpired to be insolvent.

17. Mr. Stafford succinctly states that “*it can be a pointless exercise attempting to reconcile the irreconcilable”*. However much Mr. Lennon complains in the voluminous letters and affidavits, Mr. Stafford has completed the task and Mr. Lennon, in fairness, readily and rightly acknowledges the integrity of Mr. Stafford.

18. The submission that Mr. Stafford was not furnished with all banker boxes, or with Mr. Lennon's affidavit, fails to acknowledge that the 2017 agreement does not require Mr. Luby or his solicitors to deliver papers generated by Mr. Lennon. The solicitors may have purported to do so but that did not, according to the 2017 agreement, preclude Mr. Lennon from furnishing copies or details of what he thought should be given. Furthermore, Mr. Stafford could have, if he required, requested copies, even though it might be argued that he did not know that they existed. It is clear that Mr. Stafford had knowledge of how the companies worked.

19. Clause 4 refers to the option for parties to furnish brief submissions to the expert, no more than three pages, in February 2018, and that particular clause does indicate a willingness or a wish on the part of the parties to be concise. It is worth noting that Mr. Lennon did not exercise his right to apply to the court under the 2017 agreement, or to challenge Mr. Stafford himself in proceedings.

20. Mr. Luby is entitled, under para. 5 of the 2017 agreement, to oblige Mr. Lennon to consent to judgment in the sums as determined by Mr. Stafford.

21. In determining this issue, I did consider the points raised in relation to the period after the determination.

22. In a five-page tightly-typed letter dated 6th March, 2019, which was two weeks after Mr. Lennon's affidavit about which he makes great play in regard to relevance for Mr. Stafford, Mr. Lennon explained his grievance about the work required due to what I might describe as the “Sage” saga.

23. In an email dated 11th March, 2019, Mr. Stafford informed Mr. Lennon and the relevant solicitor and he states:-

“I have carefully reviewed your letter and it does not contain any new information that would require me to adjust my report. …

In my view you should have determined after, say, 12 hours of work over the 2 Companies that such your reconciliation work was not going to produce reliable accounts and that you should have advised the directors at that stage. …”

24. I have considered Mr. McCarthy's submission that this exhibits the same mistake in regard to issue 1(d). However, for the reasons already outlined, Mr. Lennon's challenge to Mr. Stafford's determination as based on mistake is ill-founded. Mr. Stafford determined the issue at para. 1(d).

Creation of New Request for Mr. Stafford
25. Mr. Lennon, in his affidavit sworn on 29th March, 2019, at para. 8, avers that Mr. Luby must now accept that Mr. Stafford's report was prepared in the absence of documentation that was required and that it cannot be a final determination.

26. Firstly, Mr. Luby does not accept that and Mr. Stafford has not so confirmed. Yes, Mr. Stafford may have offered to look at matters afresh but that requires a new agreement. The email from Mr. Stafford dated 21st March, 2019, politely remarks that “[*e]ach piece of correspondence that I receive potentially contains new information which I have to carefully consider and determine if I need to adjust my original report”.*

27. Reference is made by Mr. Stafford to the extensive correspondence generated since his report and he asks Mr. Luby whether he will pay the invoice for all of this extra work. I accept the submission of Mr. Cunningham, counsel for Mr. Luby, that Mr. Lennon is effectively asking for new instructions for Mr. Luby who is obliged to account and have regard to the creditors of the companies. As much as Mr. Lennon may feel aggrieved at how the 2017 agreement has worked out to resolve his issues, there is a corresponding duty on Mr. Luby to bring matters to a conclusion.

28. Mr. Lennon was advised upon and contributed to the 2017 agreement. He may not like the result but that was a genuine effort to adopt an Alternative Dispute Resolution approach which the Court will not interfere with lightly. Mr. Lennon agreed to that approach. Mr. Stafford's reputation and integrity have not been challenged and for all those reasons, Mr. Luby is entitled to orders which the Court will hear counsel now in order to be as specific as possible.