[2019] IEHC 137

THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 410 C.A.]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

AND IN THE MATTER OF THOMAS FINNEGAN (A DEBTOR)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A OF THE PERSONAL INSOLVENCY ACT 2012 (AS AMENDED)

JUDGMENT of Mr. Justice Denis McDonald delivered on 4 March, 2019

Relevant facts

1. This is an application by the personal insolvency practitioner ("*the practitioner*") for the costs relating to a preliminary issue which arose in these proceedings and which was the subject of a hearing which took place on 21 January, 2019. The issue (which was raised by an objecting creditor, Mars Capital Ireland No. 2 DAC ("*Mars*")) related to whether an application under s. 115A of the Personal Insolvency Act 2012(as amended) could be said to have been "*made*" to the court within the 14 day period prescribed by s. 115A(2) where it had been lodged in the Circuit Court Office within that period but not served on the statutory notice parties until after that period had expired.

2. In the Circuit Court, the learned Circuit Court judge decided the issue in favour of Mars and dismissed the s. 115A application of the practitioner on the grounds that it was out of time. The practitioner then appealed that decision to this court.

3. In the meantime, a significant number of objectors to similar s 115A applications relied on the decision of the learned Circuit Court judge in this case to raise the same s. 115A(2) point and these objections were, in turn, upheld on the basis of that decision. This has resulted in a substantial number of appeals backing up the appeal in this case.

4. On 21 January, 2019 I heard extensive and detailed submissions from senior counsel for both Mars and the practitioner in relation to the s. 115A(2) issue and there were also detailed written submissions provided by the parties.

5. In a judgment delivered on 11 February, 2019 I ruled in favour of the practitioner's arguments and I concluded that the relevant application had been made within the prescribed 14 day period in circumstances where it had been lodged in the Circuit Court office within that period.

The submissions in relation to costs

6. On 25 February, 2019 I heard further submissions from counsel for both parties in relation to costs. Counsel for Mars urged that, in circumstances where the issue raised by Mars affected a large number of other cases, this was, in effect, a test case such that it would be appropriate to make no order as to costs. He also stressed that, in the Circuit Court, Mars had not sought costs notwithstanding that it had been successful on the issue in that court.

7. Counsel for the practitioner complained that the issue raised by Mars was simply yet another "*technical issue*" in a long line of such issues which had been raised by Mars in an attempt to defeat a meritorious case. He also argued, by reference to the decision of Clarke J (as he then was) in *Cork County Council v Shackleton* [2011] 1 IR 443, that, even if it could be said that this was a test case, it was one between private parties such that the ordinary principle that costs follow the event should apply. He relied on the following passage (with emphasis added) from the judgment of Clarke J at p 489:

> *"Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution or statute law … and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable … that one or a small number of cases which happen to be first tried will clarify the legal issues arising. Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case …happens to be a test case".*

8. In response, counsel for Mars sought to rely on a further passage from the same judgment where Clarke J suggested that a different approach might be taken where one of the parties is a public authority which was responsible for the way in which a legislative provision giving rise to the test case was drafted. Clarke J also suggested that a similar approach might be taken where one of the parties was a body which was funded by the public authority concerned. Counsel for Mars suggested that there was an obvious parallel here given that the practitioner's legal costs have been met by the Legal Aid Board which is a body funded by the Minister for Justice who was also the Minister responsible for the enactment of the 2012-2015 Acts.

9. Counsel for the practitioner argued that the reliance by Mars on the analogy of a public authority was misplaced. Counsel submitted that a practitioner was plainly not in the same position as Cork County Council in the *Shackleton* case. He also relied on s. 33(2) of the Civil Legal Aid Act 1995 which provides, in substance, that a court should approach the question of costs in proceedings involving a legally aided party in exactly the same way as it would in a case where all parties had retained lawyers at their own expense.

Preliminary

10. I should make clear at the outset that I do not believe that it is appropriate to characterise, in a somewhat pejorative way, the issue raised by Mars as a mere "*technical*" point. In my view, an objector is fully entitled to raise any issue, whether on the merits or of a legal nature, which may assist in defending its interests.

11. Next, I should make clear that I do not believe that Mars is entitled to any special credit for not seeking costs in the Circuit Court. Given the decision of Baker J in *Niamh Meeley* [2018] IEHC 38, it is difficult to see how a costs application could, plausibly, have been pursued as against the practitioner.

Discussion

12. As Clarke J stressed in *Shackleton*, at p 485, the starting point for the award of costs has to be to identify the winner. The standard approach or default position is that costs follow the event. The winner, ordinarily, is entitled to costs. I fully acknowledge the general applicability of that principle but I believe it must be approached with some caution in the context of proceedings under the 2012-2015 Acts. As the decision in *Niamh Meeley* illustrates, the standard approach does not always apply in connection with personal insolvency proceedings.

13. Equally, it seems to me that it is not always appropriate to apply the standard approach in cases where issues arise on the evidence presented by a practitioner and the court derives assistance from the submissions of an objector in resolving those issues. In such cases, it may be appropriate, depending on the individual circumstances, to make no order as to costs even where the practitioner is, ultimately, successful in the application.

14. However, the present case is not in that category. Here, Mars has mounted a vigorously pursued argument on the law which was designed to deal a knockout blow to the application under s. 115A. Prima facie, it is difficult to distinguish the approach taken by Mars in this case from normal *inter partes* litigation where the standard approach discussed above is almost invariably taken. Mars, nonetheless, argues that, because this was a test case, it would be appropriate that no order as to costs should be made. Mars submits that I should take the same approach as that adopted by Clarke J in *Shackleton*. In that case, Clarke J made no order as to costs against the unsuccessful notice party notwithstanding that Cork County Council succeeded in its application to set aside an award made by the property arbitrator in favour of the notice party.

15. It is important to consider the basis on which Clarke J, in *Shackleton*, came to the view that it would be appropriate not to make any order for costs in favour of the successful party, Cork County Council as against the notice party there.

16. As noted above, his starting point was that costs normally follow the event. He then drew attention to a recognised exception to that principle where proceedings raise public law issues of general importance and are pursued by a party with no personal private interest in the outcome. He stressed that this exception does not apply where a party is pursuing a commercial interest. Thus, the notice party in that case (a property developer seeking to minimise its obligation in respect of social and affordable housing) could not rely on this exception.

17. Clarke J then dealt with the position in test cases but, again, he held that, where such proceedings involve private parties, there was, usually, no basis to depart from the ordinary rule in relation to costs.

18. However, Clarke J expressed the view that a further exception may exist, at least in the context of test cases, where a particular Minister responsible for the introduction of the legislation, the subject of the proceedings, is a necessary party to the proceedings. Clarke J indicated that, in assessing liability for costs in such cases, a court was entitled to weigh in the balance the fact (if it be the fact) that the litigation may have been necessitated by the complexity or difficulty of the legislation.

19. There was no Minister involved directly in the *Shackleton* proceedings. Nonetheless, Clarke J was of opinion that a similar discretionary factor arose in that case where Cork County Council is largely funded by the Department of the Environment and where the Minister for the Environment was responsible for the legislation in issue in that case which Clarke J characterised as "*opaque*" and "*ill worked out*". Clarke J concluded that the litigation was necessitated by the introduction of legislation which was "*extremely difficult of construction*". In those very particular circumstances, Clarke J decided that, in the exercise of his discretion, it was appropriate to make no order as to costs. It was likely that the Minister responsible for the ill thought out legislation would ultimately bear the burden of those costs through his ongoing funding of the Council.

20. With due respect to Mars, I do not believe that there is a parallel between the facts of *Shackleton* and the facts here. In the first place, I do not believe that the provisions of the 2012-2015 Acts can be said to be opaque or ill thought out. While the interpretation of the Acts have occasionally given rise to difficulty and debate, I do not accept that they can properly be characterised in the same way as the provisions of s. 96 of the Planning and Development Act 2000 (as amended) which were so trenchantly criticised by Clarke J in *Shackleton*. On my analysis of the provisions of the Acts as a whole, I was able to conclude that the intention of the legislature was clear. In my judgment of 11 February, 2019 I pointed to the language of s. 140 of the 2012 Act which, in my view, strongly supported the interpretation advocated by the practitioner.

21. Secondly, although it is possible to classify this appeal as a test case, it is somewhat different in character to the type of test case discussed by Clarke J in *Shackleton*. There is nothing to suggest that the issue raised by Mars here in relation to the interpretation of s. 115A(2) had given rise to doubt or concern in a significant number of cases or that it had given rise to debate among practitioners and lawyers. On the contrary, it was canvassed for the first time in argument in the Circuit Court hearing in this case as a consequence of the ingenuity and industry of counsel searching for points that might deal a knockout blow to the s. 115A application. Following the success of the point, it was then taken up by a range of other objectors in other cases. But prior to being raised in that way, there was no suggestion that the operation of s. 115A(2) had been beset by doubt or difficulty. In fact, as noted in my judgment of 11 February, 2019 both the Circuit Court and Superior Courts Rules Committees appear to have operated on the basis of an understanding of the operation of s. 115(2) which was consistent with that taken by the practitioner.

22. Thirdly, I do not believe that the position of the practitioner here can be equated to the position of the Council in *Shackleton*. In that case, the day to day funding of Council was provided by the Minister responsible for the legislation in question. Here, the practitioner is not funded directly by the Minister for Justice. All that has happened is that, under the Abhaile Scheme, certain costs have been made available by the Legal Aid Board. It is true that the Minister for Justice funds the Legal Aid Board but he does so on the basis of the Civil Legal Aid Act 1995 which, in s. 33(2), makes it clear that the court, when dealing with costs, is required to proceed on the basis that all parties have obtained the services of their lawyers at their own expense. Accordingly, I do not believe that I can properly have regard to the fact that the Legal Aid Board is involved in funding the practitioner's costs in any way.

Conclusion

23. I therefore do not believe that the exception identified in *Shackleton* applies here. It follows that the costs fall to be considered by reference to the ordinary principles (albeit subject to the caveat mentioned in paras. 12-13 above). In my view, the manner in which the issue was pursued by Mars here calls for the application of the ordinary rule. The issue was pursued with all the vigour of normal inter partes proceedings such that none of the factors outlined in paras. 12-13 above could be said to apply. It follows that it is appropriate to make an order for costs against Mars and in favour of the practitioner.

24. However, a further issue arises in relation to whether there should be an adjustment made to the normal order for party and party costs to reflect the fact that the submissions on behalf of the practitioner here were delivered just one week before the date of hearing of the appeal. This failure to comply with the timetable set by the court could have put the hearing of the appeal in jeopardy (with very serious ongoing delay for all of the appeals backing up this case) were it not for the very helpful approach taken by junior

and senior counsel for Mars. Rather than seeking an adjournment (to which they would have been entitled), counsel, conscious of the ramifications for the court list, pulled out all the stops and delivered well-reasoned and comprehensive written submissions in time to permit the hearing to proceed. In my view, this is a factor that must be weighed in the balance in considering the appropriate costs order to be made.

25. I have come to the conclusion that, in the circumstances, outlined in para. 24 above, the costs of the written submissions filed on behalf of the practitioner should be disallowed. I have given consideration to whether any other element of the costs should also be disallowed but, with some hesitation, I believe it would be going too far to otherwise interfere in the normal party and party order that would be made. I might have gone further if the appeal had not been able to proceed as a consequence of the late delivery of the submissions. I am very grateful to counsel for Mars that, thanks to their efforts, an adjournment was avoided.

26. Accordingly, I will make an order that Mars should pay to the practitioner, the party and party costs of this appeal in so far as it relates to the s. 115A(2) issue but with no order as to the costs of the written submissions.