

THE HIGH COURT

[2009 No. 404 COS]

IN THE MATTER OF HAYDON PRIVATE CLIENTS LIMITED T/A HAYDON INVESTMENTS (IN LIQUIDATION) AND IN THE MATTER OF  
THE COMPANIES ACTS 1963 TO 2009

BETWEEN

David Van Dessel (Official Liquidator)

APPLICANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered the 13th day of January 2015

1. This judgment is given on a discrete point raised by the reliefs sought at paras. 2 and 3 of the motion for final orders. Those reliefs are:

2. An order measuring the costs of the petitioner herein, the Company, in the sum of €29,000 (inclusive of outlay and counsel's fees and applicable VAT) in respect of the costs of the petition herein.

3. An order directing payment out of the assets of the Company directly to Mr. Peter Haydon, the total sum of €29,000, being the costs outlined in para. 2 above.

Facts

2. Mr. Peter Haydon was the managing director and 90% shareholder of Haydon Private Clients Limited ("the Company"). The only other director was his wife who was a non executive director.

3. In 2009, on a date prior to the 20th July, 2009, Mr. Haydon decided, having taken advice that a petition should be presented for the winding up of the Company by the court. He instructed Kirwan, McKeown James Solicitors. The petitioner was the Company. On the 20th July, 2009, the petition was presented and Mr. David Van Deesel was appointed provisional liquidator. On the 23rd October, 2009, an order was made for the winding up of the company and appointing Mr. Van Deesel official liquidator ("the Official Liquidator"). Each of the orders of the 20th July, 2009 and 23rd October, 2009 reserved the petitioner's costs.

4. At the time of the petition there were separate proceedings in being brought by certain investors against both the Company and Mr. Haydon.

5. Subsequent to the making of the winding up order, the proceedings continued on the Examiner's side and no application was pursued by the solicitors acting for the petitioner for an order that the petitioner be entitled to its costs as costs in the winding up or for an order measuring same.

6. The solicitors for the petitioner have not appeared on the Official Liquidator's final application. They are not making any claim for any undischarged costs due to them by the Company as petitioner. They have already been paid a sum of €29,000 by Mr Haydon which he states was an agreed amount. Mr. Haydon at para. 5 of the affidavit sworn by him on the 15th October, 2014, states:-

"In respect of the petitioner's costs, I say that these costs were paid by me personally. I say that I remember in 2009, that Kirwan McKeown James Solicitors, who acted in this matter, were very particular to ensure that the payments were made personally. I also say that at the time Kirwan McKeown James, Solicitors agreed to a fixed price contract and that as money was scarce that I pay them this sum in total by means of a number of separate payments over a period of July to October, 2009."

7. Mr. Haydon in his affidavit has also exhibited extracts from a personal current account (in the name of himself and his wife) which identify the following payments to Kirwan McKeown James:

9 July 2009 €5,000

10 July 2009 €4,500

4 August 2009 €5,000

5 August 2009 €4,500

1 October 2009 €5,000

2 October 2009 €5,000

Total: €29,000

8. Mr. Haydon also exhibited a receipted invoice from Kirwan McKeown James Solicitors addressed to him personally dated the 31st August in an amount €17,973.43 (inclusive of VAT and outlay) acknowledging that it was paid in full and a second invoice again addressed to him personally dated the 29th October 2009 in the sum of €23,112 (inclusive of VAT and outlay) upon which it is noted that €11,026.57 had been paid. Notwithstanding the invoice for the larger amount the Solicitors for the Company have not pursued any claim for unpaid costs of the petition.

9. On the evidence presented by Mr. Haydon I find as fact that when he instructed Kirwan McKeown James Solicitors in June or early July 2009, firstly he instructed that the petition be presented by the Company; second he reached agreement with Kirwan McKeown James that he personally would discharge an agreed sum of €29,000 in respect of the costs including outlay to be incurred by the Solicitors in presenting the Company's petition and pursuing the application for its winding up by the court and third that Mr. Haydon personally discharged the agreed sum on the dates specified above.

### **Application and Objection**

10. On those facts in the final application, the Official Liquidator seeks the orders identified above. In the Official Liquidator's affidavit grounding the final application, he made no specific reference to or explanation of the basis upon which he sought these orders from the court. However, in his final report to the court at para. 3.8 he states the following under a heading of petitioners costs:

"Mr. Peter Haydon has indicated that he discharged the sum of €29,000 to Kirwan McKeown James Solicitors in respect of the costs of petitioning for the winding up of the Company. At a meeting on the 20th December, 2011, held with the High Court Examiner, Mr. John Glennon indicated that it would be incumbent on Mr. Peter Haydon to seek payment of the costs incurred by him in this regard.

I am of the view that it would appropriate for the Honourable Court to adjudicate upon the Petitioner's costs at the final application hearing. A provision of €29,000 in respect of these costs payable to Mr. Peter Haydon has been retained in the Estimated Outcome Statement attached at appendix 2 of this report."

11. The final application was on notice to the Steering Committee appointed by the investors in a property investment promoted by the Company who were represented by solicitors. The investors are the main unsecured creditors of the Company. Ms. Jukka Kovero swore an affidavit on behalf of the Steering Committee setting out a number of objections to the final application of the Official Liquidator. All of those objections other than the petitioner's costs were resolved by agreement with the Official Liquidator prior to the hearing before the Court.

12. The objection made in the affidavit and subsequently pursued by counsel at the hearing on behalf of the Steering Committee to the payment of the sum of €29,000 to Mr. Haydon in respect of the petitioner's costs is twofold. Firstly there is an objection to the amount as not being a reasonable amount for petitioner's costs. Secondly and more importantly there is an objection to any payment in full to Mr. Haydon of such amount as might be allowed for the petitioner's costs by the Court. The primary submission is that insofar as Mr. Haydon may have an entitlement to recover an amount in respect of the €29,000 paid to Kirwan McKeown James Solicitors it could only be as an unsecured creditor of the Company in the winding up.

13. Counsel for the Steering Committee in submission pointed out that the agreement reached with the Solicitors predated the date of commencement of the winding up ie. the 20th July, 2009. She submitted that there was nothing in s. 244 of the Companies Act 1963, nor O. 74, r. 128 which permitted the Court on the facts herein to permit or direct the Official Liquidator to pay the sum of €29,000 (or such other sum as might be measured by the court) to Mr. Haydon in respect of the costs of the petition. She submitted his proper status in relation to any debt due to him by the Company in respect the sums paid in relation to the costs of the petition was as unsecured creditor.

14. Mr Haydon appeared personally and in reliance upon the facts set out in his affidavit submitted that as he had paid the sum of €29,000 in respect of the costs of the petition and that that amount was less than the full amount of the two invoices raised by the solicitors that it would now be just and equitable for the court to direct or permit the payment of the full sum of €29,000 to him. He also sought to rely on other facts which I indicated in the course of the hearing were not relevant to the issue on this application.

15. Counsel for the Official Liquidator explained the basis upon which the Official Liquidator considered it appropriate to make the orders as sought in the notice of motion in reliance on both s.244 of the 1963 Act and O. 74, r. 128(1) and its provision in relation to the priority for the payment of "the costs of the petition" as distinct from "the petitioner's costs" or any similar phrase. He also referred to Mr Haydon's entitlement to be paid by analogy to position where a creditor petitions and pays its solicitors in advance and in reliance on the principle of subrogation.

### **Conclusions**

16. Section 244 of the Companies Act 1963 provides:

"The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just.

17. The winding up proceeding to which s. 244 refers commence with the presentation of a petition by the petitioner. The costs incurred in presenting the petition and making the application for the winding up order are therefore costs incurred in the winding up and included within the matters for which the court is given discretion by section 244 to make orders for payment out of the assets of the company. The discretion given to the court by s.244 is wide and not prescriptive.

18. Order 74, r. 128 of the Rules of the Superior Courts applies in part to the exercise by the court of the wide discretion given by section 244. Insofar as relevant to the issue to which this judgment relates provides:

"128(1) The assets of a company in a winding up by the Court remaining after the payment of the fees as expenses properly incurred . . . shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority, namely:

First - The costs of the petition, including the costs of any person appearing on the petition whose costs are allowed by the Court.

Second - . . .

(2) No payments in respect of bills of costs, charges or expenses of solicitors . . . other than payments for costs, charges or expenses fixed or allowed by the Court shall be allowed out of the assets of the company unless they have been duly fixed and allowed by the Examiner or the Taxing Master as the case may be."

19. Section 244 expressly gives the court authority to make an order as to the payment out of the assets of the company of the costs incurred in the winding up. As previously stated this includes the costs incurred in the presentation and hearing of the petition

commonly and in O.74 r.128 referred to as "costs of the petition". *Prima facie* a petitioner is entitled to an order that its costs are paid out of the assets of the company being wound up with the priority in O.74 r.128. Also in certain circumstances other persons who appear at the hearing of the petition may be allowed their costs.

20. On the facts herein, the Company as petitioner is entitled to an order for its costs as costs in the winding up. There is no evidence of any fact before the Court which would justify the court in departing from the normal order that Company as petitioner be entitled to an order for its costs. The Court will now make such an order.

21. Next in relation to the amount, as appears from O. 74, r. 128(2) where the costs have not been taxed or determined by the Examiner then they must be measured by the court. The court is regularly asked to measure fees of a petitioner to avoid the delay in costs of taxation and has experience of the normal range of such costs. This is often done with the benefit of a letter from a cost accountant and the court does not have such a letter in this instance. It does have copies of the two invoices from Kirwan McKeown James Solicitors addressed to Mr Haydon amounting in aggregate to €41,085 and the description given of the work done. The total amount is well in excess of the normal amounts for which the court is asked to measure fees upon the presentation of a petition. In my experience the normal range of costs (exclusive of VAT) are in the order of €10,000 to €20,000. Where there is an application for the appointment of a provisional liquidator the VAT exclusive amount of such costs tend to be in the region of €15,000 - €20,000. The description is such that it is not clear that all work done would be allowed on taxation.

22. By reason of the background to the presentation of the petition and in particular existence of separate commercial proceedings, and the evidence that VAT was charged I have concluded that the reasonable amount of the petitioner's costs herein (inclusive of outlay and VAT) is the sum of €25,000.

23. The next question therefore is whether Mr Haydon is entitled on the facts herein to be paid the amount of €25,000 allowed by the Court in respect of costs of the petition. The first issue is whether s.244 gives the Court discretion to make such an order and secondly if so whether the Court should exercise the discretion in favour of making such order.

24. My conclusion is that s.244 does grant the Court discretion to make such an order. It permits the court, where there are insufficient assets to "make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks just". The costs in respect of which orders may be made include the costs of the petition for the reasons already set out. Section 244 enables the court to make orders "as to the payment out of the assets of the costs . . ." [emphasis added]. It is not prescriptive as to the persons to whom the court may order such payments out of the assets to be made. It does not require the person to be a creditor of the company being wound up. The discretion relates to costs incurred in the winding up. It appears to me intended to include a discretion to order a payment to any person whom the court considers is entitled to be reimbursed in respect of "costs, charges and expenses incurred in the winding up". The purpose of the section is to enable persons undertake necessary work or incur expenses to enable a winding up by the court be commenced, pursued and completed in reliance upon such costs and expenses incurred or paid being reimbursed with priority out of assets of the company being wound up.

25. In accordance with general construction principles O.74 r.128 cannot assist in the proper construction of s.244. It is simply relevant to note that there is nothing in it inconsistent with the construction I have given to section 244. It is directed to the priority of payments to be made out of the assets as distinct from the persons to whom payments are to be made. First priority (after certain realisation expenses) being given to the "costs of the petition" unless the court makes an order to a contrary effect.

26. I now turn to the exercise of the discretion given the court by s.244 on the facts herein having regard also to O.74 r.128. The proper approach appears to be that where the company being wound up was the petitioner once the Court has made an order that the petitioner is entitled to its costs as costs in the winding up and measured same the Court should ascertain whether the solicitors for the petitioner have or have not been paid the costs of the petition. If they have not then an order for the payment of the measured costs to the solicitors should normally be made. If they have been paid, and some other person claims an entitlement to be reimbursed in respect of the costs of the petition the court must consider whether on the facts the person is so entitled. That will depend upon the circumstances in which the costs of the petition were paid. In my judgment if the court is satisfied that a person has paid a sum equal to or greater than the measured amount of costs in respect of costs of the petition to the solicitors then the court should normally exercise its discretion pursuant to s.244 to make an order for payment of the costs of the petition out of the assets of the company to such person in accordance with the priority given by O.74 r.128.

27. I have carefully considered the submission made by the Steering Committee that Mr Haydon should only be admitted as an unsecured creditor for the €29,000 paid by him in respect of the costs of the petition. Whilst I accept that on the evidence Mr Haydon's entitlement to be reimbursed may be considered as pursuant to an agreement which predates the commencement of the winding up as did part of the payment it does not appear to me that such facts preclude the Court from now making an order for the payment out of the assets of the Company of €25,000 in respect of the costs of the petition to Mr Haydon pursuant to s.244 and in accordance with the normal priority provided for costs of the petition in O.74 r. 128. Mr Haydon is not entitled to such payment as a creditor of the Company but rather as a person who is entitled to be reimbursed for costs incurred in the winding up by reason of his payment to the Solicitors in respect of such costs. This approach is consistent with the intention of s.244 that persons who incur costs in relation to a winding up may be reimbursed with priority out of the assets of the company.

28. There are no facts herein relating to the Company, the presentation of the petition or winding up which would justify the Court making an order to depart from the priority of payments out of the assets of the Company in respect of costs of the petition in O.74 r. 128. If Mr Haydon had not paid the Solicitors for the Company, and the Solicitors pursued a claim to be paid the costs of the petition the Court would now be making an order for the payment by the Official Liquidator of €25,000 in respect of the costs of the petition to the Solicitors. On the facts herein the Court has found that Mr Haydon paid to the Solicitors for the petitioner a sum in excess of €25,000 in respect of the costs of the petition to enable the petition be presented and winding up commenced.

29. Accordingly the Court will make an order pursuant to s.244 that the sum of €25,000 be paid by the Official Liquidator to Mr Haydon out of the assets of the Company in respect the costs of the petition in accordance with the priority in O.74 r.128.

## **Reliefs**

30. In lieu paras. 2 and 3 of the notice of motion, there will be :

A declaration that the Company, as petitioner, is entitled to its costs of the petition as costs in the winding up.

An order measuring the costs of the petition in the sum of €25,000 (inclusive of outlay and counsel's fees and applicable VAT).

An order directing payment of the sum of €25,000 out of the assets of the Company to Mr. Peter Haydon, in respect of the costs of the petition.