

THE HIGH COURT

[2012 No. 606 COS]

IN THE MATTER OF THE COMPANIES ACT 1963-2009

AND IN THE MATTER OF TADGH O'CONNAILL HEATING & PLUMBING LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 244(A) OF THE COMPANIES ACT 1963 AS INSERTED BY SECTION 125 OF THE COMPANIES ACT 1990,

AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT 1963

AND IN THE MATTER OF SECTION 282B OF THE COMPANIES ACTS 1963

ANTHONY J. FITZPATRICK AS LIQUIDATOR OF TADGH O'CONNAILL HEATING & PLUMBING LIMITED (IN VOLUNTARY LIQUIDATION)

APPLICANT

AND

BARRY GALVIN PRACTISING IN THE STYLE AND TITLE OF

BARRY GALVIN & COMPANY SOLICITORS

RESPONDENT

JUDGMENT of Mr. Justice Gilligan delivered on the 4th day of December, 2012

Background

1. Mr Anthony J. Fitzpatrick (the applicant) was appointed liquidator of Tadhg O'Connell Heating & Plumbing Limited (the Company) on the 12th July, 2011, by both a Members' Meeting and Creditors' Meeting. Barry C. Galvin & Son Solicitors (the respondent) had been acting for the Company in a number of different court proceedings, largely related to debt collection, which were instituted prior to the commencement of the voluntary liquidation and which were still in being when the Company entered into voluntary liquidation. Mr Galvin, practising under the style and title of Barry C. Galvin & Son Solicitors, avers by affidavit dated the 7th of November, 2012, that fees in the nature of €50,000 were outstanding as of June, 2012 by the company for matters in which the respondent Solicitors had acted on its behalf, including several sets of debt collection proceedings in which the respondent has expended outlay and incurred professional fees.

2. The applicant did attempt to retain the respondent as solicitor to collect the outstanding debts on his behalf as liquidator of the Company, but the respondent declined to accept this proposal due to a perceived conflict of interest. The respondent solicitor was prepared to hand over the files to a newly appointed solicitor on the basis of the usual undertaking as to prior costs but the applicant would not agree to this course of action.

3. By letter dated 12th October, 2012, the applicant requested the return of the files held by the respondent Solicitors in the matters for which the latter had been acting for the Company prior to the commencement of the voluntary liquidation. Invoices for work carried out by the respondent Solicitors were also requested and it was stated that these would be admitted within the liquidation in the normal course, as an unsecured creditor. A further letter dated 31st October, 2012, from the applicant to the respondent Solicitors emphasised the claim for the return of the files in question and noted that legal redress would be sought should that return not be realised by 5pm on that date. This request was not complied with, the respondent raising an issue as to a solicitors lien over the files.

4. By Notice of Motion dated 5th November, 2012, the applicant sought an order pursuant to s. 244A of the Companies Act 1963 as inserted by s. 125 of the Company Law Amendment Act 1990, directing Mr. Barry Galvin, principal of the respondent Solicitors, to deliver the books, accounts, records, ledger cards, invoices and other papers of like nature relating to accounts or trade of the Company to the applicant. The applicant also sought a declaration that neither Mr. Galvin nor the firm under whose style and title he practises are entitled to a Solicitor's lien over any of the documents. Directions were also sought under s. 280 of the Companies Act 1963, as to whether it is appropriate to apply to court for leave to examine Mr. Galvin pursuant to s. 282B of the Companies Act 1963, in relation to any further books and records of the Company which Mr Galvin may have in his possession or power belonging to the Company.

5. The applicant avers that these proceedings were issued in order to ensure that the collection of several outstanding balances owed to the Company is progressed as well as to ensure that a s. 56 Report is submitted when required. The applicant expressed concern that, should this not happen, the debts would become statute barred or the debtors themselves may enter liquidation. The applicant also denied the existence of a Solicitor's lien over the documents, as claimed by the respondent. At the hearing of this issue it became clear that submissions were required on two net issues. Firstly, the existence or not of a Solicitors lien, in favour of the respondent, over the files related to the debt collection proceedings and secondly, the entitlement of the respondent to an undertaking by the applicant as to the reimbursement of its pre-liquidation costs and outlays from any costs recovered in respect of the respondent's costs and outlay from any third party in proceedings in being which were realised through the continuance of the debt collection proceedings by a different solicitor acting on behalf of the Company in liquidation.

Relevant Statutory Provisions

6. Section 244A of the Companies Act 1963, as inserted by s. 125 of the Companies Act 1990 provides as follows:-

"Where the court has appointed a provisional liquidator or a company is being wound up by the court or by means of a creditors' voluntary winding up, no person shall be entitled as against the liquidator or provisional liquidator to withhold possession of any deed, instrument, or other document belonging to the company, or the books of account, receipts, bills, invoices, or other papers of a like nature relating to the accounts or trade, dealings or business of the company, or to claim any lien thereon provided that—

(a) where a mortgage, charge or pledge has been created by the deposit of any such document or paper with a person, the production of the document or paper to the liquidator or provisional liquidator by the person shall be without prejudice to the person's rights under the mortgage, charge or pledge (other than any right to possession of the document or paper),

(b) where by virtue of this section a liquidator or provisional liquidator has possession of any document or papers of a receiver or that a receiver is entitled to examine, the liquidator or provisional liquidator shall, unless the court otherwise orders, make the document or papers available for inspection by the receiver at all reasonable times."

7. Section 281 of the Companies Act 1963 provides as follows:-

"All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims."

8. In submissions the applicant seeks the return of the files and documents set out in the Notice of Motion relating to the debt collection matters which the respondent Solicitors had been dealing with prior to the liquidation of the Company, and the respondent seeks an undertaking from the applicant, in his capacity as liquidator of the Company, that in the event that the liquidator successfully recovers costs and outlays from a third party in any of the proceedings in being in which the respondent was involved prior to liquidation, the respondent would be entitled to have its costs and outlays discharged from such recovered sums, rather than being admitted to the liquidation as an unsecured creditor in the normal course.

9. The applicant submits that in relation to the first issue s. 244A of the Companies Acts 1963 as inserted by s. 125 of the Companies Act 1990, is sufficient authority on which to base his claim for the return of all files and documents relating to the outstanding debt collection proceedings. The applicant also notes that this is so since the saver relating to the intentional creation of a consensual security as set out in sub clauses (a) and (b) of that section does not apply in this instance. At the hearing counsel for the respondent conceded this first issue and the various files have been forwarded to the applicant.

10. The applicant submits in relation to the second issue, that *Re Compustore Ltd (In Voluntary Liquidation)* [2007] 3 I.R. 556, is good authority for the proposition that it is the resolution to wind up a company which is the benchmark for pre and post liquidation expenses and that therefore the respondent is not entitled to any undertaking in relation to work done prior to the date of that resolution but must be, in so far as those pre-liquidation costs and outlays are concerned, admitted to the liquidation as an unsecured creditor in the normal course. In that case the solicitor's fees related to advices given with a view to the commencement of liquidation but they were nonetheless disallowed by the court. The applicant cites Laffoy J. at p. 562 of the aforementioned decision, in this regard, where the learned judge noted that, in relation to the wording of s. 281 of the Companies Act 1963:-

"In my view, those words refer to costs, charges and expenses properly incurred while the winding up is in being, that is to say, after the resolution to wind up the company has been passed...I am satisfied that in enacting s. 281, the legislature intended that there would be a rigid temporal cut off at the time of the passing of the resolution to wind up voluntarily. Accordingly, the fees and expenses due to the applicants for pre-resolution advice and services are not "expenses properly incurred in the winding up of the company" within the meaning of s. 281."

11. The applicant submits that, in these proceedings, all advices and services provided by the respondents must be considered to be pre-resolution expenses and therefore any undertaking to the respondent in respect of the return or transfer of documents relating to the outstanding debt collection matters and other litigation in being from the respondent to the applicant would be, in effect, a lien for pre-liquidation expenses and not recoverable other than as an unsecured creditor.

12. The applicant further submits that prior to the enactment of s. 244A the position in relation to a solicitor's lien was set out in *Re Galden Ltd* [1988] I.R. 213 in which it was stated by McCarthy J. of the Supreme court at p. 217 that:-

"It may seem unjust that the solicitors who, with the knowledge of all concerned carried out extensive professional work, should lose their priority or security and, probably, in the circumstances, remain unpaid; it is not to be overlooked, however, that in a liquidation ...many other creditors who have supplied services or goods to the company in liquidation are in a similar plight."

13. The applicant submits that this indicates a lack of authority in support of the proposition that the respondent solicitors are entitled to an undertaking in relation to the return of their outlays and costs from any sums which are recovered by the Company.

14. The respondent submits that the reliance placed on *Re Galden Properties Limited (in Liquidation)* [1988] I.R. 213 is in fact a misinterpretation of the decision of McCarthy J. and that this case is distinguishable given that the interest held by the solicitor in that case was conditional and was expressly in the form of a trusteeship.

15. Rather the respondent submits that he is entitled to an undertaking on a number of different grounds. Firstly, due to the existence of an equitable right of priority in liquidation which arises in favour of the owner of a lien and secondly, due to the existence of a common law lien which a solicitor will hold over any costs ultimately paid by a third party in respect of the work done on behalf of the Company in liquidation before the commencement of that liquidation.

16. In relation to the first of these propositions, the respondent submits that the decision of Mc Carthy J. in *Re Galden Properties* suggests that a lien, if it exists survives liquidation, relying on the following dictum at pp. 216-217 in support of his point:-

"It is not necessary to express a view on the issue of the retention of some equitable right, including a priority in liquidation, if, through force of circumstance, the owner of a lien has to part with possession of the subject matter, but, at first sight, it would seem entirely equitable that he should not lose whatever priority or other rights he might have from such possession by the mere physical parting..."

17. In support of this proposition the respondent also places significant emphasis on the decision of Hobhouse J.. in *Halvanon Insurance Co. v. Central Reinsurance Corporation* [1988] 3 ALL E.R 857. The respondent relies on the statement of Hobhouse J., at page 862-862, that in the case before him:-

"[The solicitors] assert what is called a solicitor's particular 'lien', but it is not in truth a lien properly so called at all. It is a right to ask the court to interfere equitably to protect the rights of the unpaid solicitor... It does not depend on any proprietary or possessory relationship of the solicitor to the property. It simply requires that the property must have been

in some definable way part of the subject matter of the action (see *Re Wadsworth, Rhodes v. Sugden* (1885) 29 Ch D 517) which can be said to have been recovered or preserved by the work done in the action by the solicitor. Where the solicitor has acted for the plaintiff, the question ultimately arises at the time of the enforcement or satisfaction of any judgment that the plaintiff has obtained, or if the action is settled before judgment at that time."

18. In relation to the second of these propositions the respondent relies on s. 3 of the Legal Practitioners (Ireland) Act 1876, which provides that:-

"In every case in which a solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter or proceeding has been heard or shall be pending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved thorough the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit or matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs charges and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always that no such order shall be made by any such court of judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any Statute of Limitations."

19. The respondent further submits that this provision was relied upon by Barrington J. of the Supreme Court in *Lismore Buildings Limited (In Receivership) v. Bank of Ireland Finance Limited & Others* [2000] 2 IR 316 wherein at p. 319 he stated:-

"There is no doubt that a solicitor, whose fees and outlay have not been paid by his client, will normally have a lien on a property or fund recovered by his efforts to secure professional costs and outlay incurred by him....For the same reason it is proper for a court to protect the solicitor's position by granting him a charge on property or costs recovered or preserved as a result of his efforts. Section 3 of the Act of 1876, also contemplates that the charging order should be made by the court which made the order under which the claim to costs arises... the primary purpose of the lien and the charging order is to protect the solicitor against his client though the existence of the charging order or lien may have adverse consequences for other people."

20. The respondent submits in relation to this issue that *Galden Properties* has made clear that the entitlement of a solicitor to such protection is not changed by the commencement of liquidation. He notes that the effect of the equitable remedy provided in *Halvanon Insurance* was effectively the same as that provided under s. 3 of the 1876 Act in *Lismore Buildings Limited*.

21. The respondent further submits that the solicitor's lien is not affected by s. 244A of the 1963 Act as inserted by s. 125 of the Companies Amendment Act 1990, since that section merely precludes a solicitor from withholding a file from a liquidator or from claiming any lien over the file or any other documents of the company and does not preclude the solicitor from asserting the particular lien over the costs and outlays owed from pre-liquidation work.

22. The applicant, in response to these submissions, submits that *Lismore Buildings*, which is relied upon by the respondent, ought to be distinguished from the case currently at issue given that the former case was a decision made in relation to a company in receivership whereas the instant case deals with a company in voluntary liquidation. These two scenarios are distinguishable as in a receivership the company is still, in effect, "alive" whereas this is not the case in a liquidation. Liquidation performs a statutory function which cannot be ignored and the liquidator owes a responsibility to the creditors of the Company due to this position, according to the applicant.

Conclusion

23. Neither the applicant nor the respondent were in a position to provide the court with defining authority in respect of the situation which has arisen in this case.

24. The facts of *Re Compustore Ltd (In Voluntary Liquidation)* [2007] 3 I.R. 556 initially appear to be sufficiently close to those at issue in these proceedings in order to rely broadly on the general principle set out therein. The reading of s. 281 of the Companies Act 1963, adopted by Laffoy J., in that instance, as creating a "rigid temporal cut off point" at the moment of the passing of the resolution for voluntary liquidation, all expenses prior to which not being capable of coming within the s. 281 definition of "expenses properly incurred in the winding up of the company" is quite clear. The court in that case disallowed the solicitor's fees related to advices given prior to but with a view to the commencement of liquidation.

25. As was noted by McCarthy J. of the Supreme Court in *Re Galden Ltd* [1988] I.R. 213 at p. 217: "many other creditors who have supplied services or goods to the company in liquidation are in a similar plight". However, the position in this case is more nuanced than that arising in *Re Compustore Ltd (In Voluntary Liquidation)* as in that case the advice given related to and was in contemplation of the liquidation whereas in the instant case the services provided by the respondent Solicitors related to the collection of outstanding debts owed to the company and in respect of which proceedings had issued and outlay expended, and it is intended that the proceedings will continue albeit with new solicitors instructed, and are unrelated to the subsequent liquidation of the Company and on that basis *Re Compustore Ltd (In Voluntary Liquidation)* is not an entirely appropriate authority.

26. It is also true that the interests which must be protected and the regime at play respectively in the liquidation and receivership scenarios are clearly distinguishable. Therefore, as the applicant submits, *Lismore Buildings Limited (In Receivership) v. Bank of Ireland Finance Limited & Others* [2000] 2 I.R. 316, which dealt with a company in receivership is entirely distinguishable from the matter at issue before the court which is a creditors' voluntary liquidation. The reliance which the respondent places on the dictum of Barrington J. to the effect that "a solicitor, whose fees and outlay have not been paid by his client, will normally have a lien on a property or fund recovered by his efforts to secure professional costs and outlay incurred by him" is therefore not well grounded given the difference in context therein and the proceedings at issue here.

27. In my view, the solicitor's lien runs with the costs recoverable from a third party for outlays and work as done by the respondent Solicitors up to the date of the presentation of the petition to wind up the company. This is true regardless of whether that lien is of an equitable or a common law nature and therefore there is no need for this Court to distinguish between authorities which point towards the common law source for such a lien such as s. 3 of the Legal Practitioners (Ireland) Act 1876, and those which point towards an equitable source for such a right such as *Re Galden Properties or Halvanon Insurance Co. v. Central Reinsurance Corporation*, both of which were relied upon by Counsel for the respondents in his submissions. Costs not recoverable will be admitted

in the liquidation, in the normal course, as a debt owing to an unsecured creditor.

28. The liquidator, however, is obliged to honour the respondent solicitor's lien since, despite the fact that the respondent is clearly no longer entitled to a lien over the documents in question, he maintains an equitable or Common law lien over any costs which are recovered from a third party in any debt collection proceedings brought on behalf of the Company by the liquidator which relate directly to outlays and costs expended by him and recovered in respect of legal services provided by him and which are directly attributable to his professional work up to the date of the presentation of the petition to wind up the Company.

29. Accordingly, the respondent solicitor's costs and outlays must rank before the secured creditors interests due to the existence of a lien, whether equitable or Common Law in nature, over any outlay and professional fees which the liquidator recovers on behalf of the Company from the debt collection proceedings, in reliance on the expertise and exertions of the respondent, with the balance of the respondent's fees ranking as an unsecured creditor in the liquidation.

30. I do not consider in the circumstances that it is necessary to require the liquidator to give any undertaking as the judgment herein speaks for itself.