Neutral Citation [2014] IEHC 364

THE HIGH COURT

[2008 No. 371 COS]

IN THE MATTER OF SHELLWARE LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

DECLAN TAITE

(OFFICIAL LIQUIDATOR OF SHELLWARE LIMITED)

APPLICANT

AND

EOGHAN BRESLIN

RESPONDENT

JUDGMENT of Mr. Justice Barrett delivered on the 23rd day of July, 2014.

1. This is an application for costs brought against a liquidator by an individual in circumstances where a failed application for an order under s.150 of the Companies Act 1990 has been made by the liquidator against that individual. The s.150 application to which this costs application refers was the subject of a previous judgment by this Court in *Taite v. Breslin* [2014] IEHC 184 (Unreported, High Court, Barrett J., 1st April, 2014).

Applicable Law

2. *Awarding of costs against liquidator*. The law as regards the awarding of costs against a liquidator following a s.150 application appears well-settled since the judgment of Finlay Geoghegan J. in Re *KranksKorner; McCarthy v. Gibbons* [2008] IEHC 423 (Unreported, High Court, Finlay Geoghegan J., 19th December, 2008). Finlay Geoghegan J.'s remarks in that case might perhaps be summarised as follows:

- first, s.150 itself makes no provision as to costs;

- second, the court in s.150 proceedings enjoys the general discretion as to costs that pertains under o.99 of the Rules of the Superior Courts, 1986, as amended;

- third, it is not the case that when persons against whom a failed s.150 application is brought satisfy the court that they acted honestly and responsibly, that the normal rule is that they be, or that they not be, awarded their costs against the applicant liquidator;

- fourth, there is no normal rule as to costs in such cases; the court must exercise its discretion in each case, having regard to the relevant facts and the statutory scheme;

- fifth, there does not generally appear to be any justification for making an order for costs against a liquidator where the following circumstances pertain: (i) there is no dispute that s.150 applied to the company in liquidation and to the respondents as directors thereof; (ii) the liquidator put all relevant facts to the Director for Corporate Enforcement when making his s.56 report(s); and (iii) the respondent directors had an opportunity either to comment on those facts in advance or to furnish the liquidator with relevant information in response to queries.

3. In the course of her analysis in *KranksKorner*, reference is made by Finlay Geoghegan J. to other leading judgments in this area in arriving at her conclusions, viz. her own judgment in *Murphy v. Murphy* [2003] 4 I.R. 451, and the judgments of the court in *In the matter of USIT Ltd.* [2005] IEHC 481 and *Stafford v. Beggs and Ors*. [2006] IEHC 258. However, as a statement of the applicable law, it does not appear to this Court that it is necessary to step outside the guidance provided in *KranksKorner,* as summarised above, which this Court respectfully accepts as a correct statement of the current law in this regard.

Allegations made

4. Various issues have been raised by the applicant, Mr. Breslin, in the course of this instant application as justifying an award of costs in his favour. These are addressed below.

> (1) *The liquidator was unsuccessful in his application*. This is undoubtedly true but while it may be the starting-point for the instant application, it is not determinative as to where costs should lie. That this is so is clear from the principles propounded in *KranksKorner* and indeed other cases such as the Supreme Court decision in *Duignan v. Carway* [2001] 4 I.R. 550 and the High Court decision in *Stafford v Beggs*.
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> (2) *The liquidator did not seek to be relieved by the Director of Corporate Enforcement from his obligation to initiate s.150 proceedings against Mr. Breslin.* Were it the case that a decision as to an order for costs would be impacted by a liquidator's decision in this regard, every liquidator would presumably make such application as a matter of form so as to protect himself or herself from future exposure in a costs application. Such an absurdity cannot have been what s.56 was intended to bring about. Consequently the court does not consider that the liquidator's actions in this regard, which the

court finds were done in good faith, are a factor to which the court should have especial regard in this application for costs. In any event, it appears to the court what this point ultimately boils down to is that having commenced these proceedings in good faith, and the court finds that these proceedings were so commenced, the liquidator was unsuccessful. As stated above, the fact that the liquidator was unsuccessful in his application is undoubtedly true but, while it may be the starting-point for the instant application, it is not determinative as to where costs should lie.

(3) *Criticisms of certain reports and statements*. Mr. Breslin criticises: (i) the inclusion in the liquidator's report of a criticism as to a particular investment that he made; (ii) the liquidator's bringing to the attention of the Office of the Director of Corporate Enforcement certain cumulative losses without also mentioning that Shellware enjoyed an annual profit in 2006 before those cumulative losses were taken into account; (iii) the liquidator for stating that he found no evidence of an attempt to scale back losses; and (iv) the liquidator for failing adequately to respond to requests regarding the amount owed by Mr. Breslin to Shellware. Most of these criticisms are really issues as to the form of the liquidator's actions/reports; none of the criticisms raise appear to raise any issues of real substance. All they show is that, nsurprisingly, Mr. Breslin's view of matters did not entirely accord with that of the liquidator. Insofar as the liquidator is concerned, the court finds that he fairly and properly complied with his obligations to report to the ODCE. Mr. Breslin may not welcome or agree with the various points made by the liquidator but they were made in good faith and reflected the truth of matters as the liquidator perceived it to be. The court does not consider that the liquidator's actions in this regard have any implications for costs. If they do, they do not dispose the court in favour of exercising its discretion under o.99 of the Rules of the Superior Courts so as to award costs against the liquidator.

(4) *That the liquidator stated that he was not satisfied that Mr. Breslin acted honestly or responsibly*. It is not clear to the court how this is relevant to the issue of costs. In its judgment on the s.150 application, the court indicated, at para. 3 thereof, that honesty did not appear to arise as a concern and that the application was solely concerned with the issue of whether Mr. Breslin acted responsibly. As the issue of honesty appeared not to arise and was not therefore addressed by the court, it is difficult to see how this could be relevant to costs. As to the liquidator stating that Mr. Breslin did not act responsibly, what this point, and the allegation as to Mr. Breslin's honesty, boil down to ultimately is that the liquidator was unsuccessful in these assertions and so failed in his application. As stated above, the fact that the liquidator was unsuccessful in his application is undoubtedly true but while it may be the starting-point for the instant application, it is not determinative as to where costs should lie.

(5) *That the liquidator made an untrue personal criticism of Mr. Breslin, that he did not meet with Mr. Breslin, that he denied meeting with Mr. Breslin*. Mr. Breslin complains that the liquidator said he did not cooperate with him. The court has found, at para. 13 of its judgment *"that Mr. Breslin did substantively cooperate with the liquidator"*. However, the court accepts that when it comes to such a matter 'one man's meat is another man's poison': Mr. Breslin may have considered that he was the very epitome of cooperativeness whereas the liquidator may in good faith have formed, and was entitled to form, and advance, the entirely opposite view. The court eventually held against the liquidator in this regard but again this is the starting-point for the present application; it is not determinative as to where costs should lie. Mr. Breslin further complains that the liquidator mistakenly said that he did not meet with Mr. Breslin prior to the liquidator's appointment. The court considers this so trivial a matter as not to be wholly or partly determinative of the issue of costs.

(6) *That the liquidator stated that Mr. Breslin did not keep proper books and records.* The court, found at para. 6 of its judgment in the s.150 application that Shellware maintained comprehensive accounts over the entirety of its existence, albeit that it omitted to have the accounts audited in 2007, in which last regard the court concluded that *"while Mr. Breslin's actions in this regard may be open to criticism, the court does not consider that they are sufficient to be categorised as irresponsible."* Again what this point appears to boil down to is that the liquidator was unsuccessful in his application; however, this is the starting-point for the instant application, it is not determinative as to where costs should lie.

(7) *That there was significant delay*. It is not clear in the circumstances of this case how the issue of delay is relevant to the issue of costs, not least as it was helpfully and properly conceded at the hearing of the present application that Mr. Breslin's exceptional recollection of the events in issue in the s.150 application was such that it was more the case that the delay arising in those proceedings could have put him to difficulty but in point of fact did not. To the extent that there was a concern arising as to delay it was open to Mr. Breslin to bring an application to have the principal proceedings in this matter struck out on the basis of delay. However, this he did not do. The liquidator was required at the proceedings, pursuant to s.56(2) of the Company Law Enforcement Act 2001, to seek an extension of time within which to bring the proceedings; this was granted, and it is of course important for liquidators that they observe the time constraints established by s.56, but this is a separate matter. As was made clear by Finlay Geoghegan J. in *Coyle v. Hughes* [2003] 2 I.R. 627 at p.632 *et seq.*, the fact of such delay, unless objectionable by reference to such principles as are referred to by Fennelly J. in *Duignan v. Carway* [2001] 4 I.R. 550, and there is no suggestion that the delay in this case transgresses such principles, does not impact on the validity of related s.150 proceedings. To the extent, if at all, that any delay on the part of the liquidator was occasioned by delay on the part of the ODCE in its dealings with him, it appears to the court that it would be wholly inappropriate to make a costs order against the liquidator in this regard.

5. The court finds that in this case: (i) there is no dispute that s.150 applied to the company in liquidation and to Mr. Breslin as a director of same; (ii) the liquidator put all relevant facts to the ODCE when making his s.56 reports; and (iii) Mr. Breslin had an opportunity either to comment on those facts in advance or to furnish the liquidator with relevant information in response to queries made. As Finlay Geoghegan J. noted in *KranksKorner*, there would not generally appear to be any justification for making an order for costs against a liquidator in a case where the foregoing circumstances pertain. Having considered each of the various points made by Mr. Breslin in the present application, the court finds that there is no such justification arising on the facts of this case. The court consequently declines to make the order as to costs sought by Mr. Breslin in this application.