

THE HIGH COURT

[Record No. 2015\62 COS]

IN THE MATTER OF

A-WEAR LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF SECTION 316 OF THE COMPANIES ACTS

1963 – 2012

BETWEEN

THE REVENUE COMMISSIONERS

APPLICANTS

AND

DECLAN TAITE

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 9th day of November, 2016

Introduction

1. This further application by the applicants for directions as a creditor of A-Wear Limited ("**the Company**") concerning the allocation of receivership costs under s. 316 of the Companies Act 1963 (as amended by s. 172 of the Companies (Amendment) Act 1990) [the provisions of which were re-enacted by s. 438 of the Companies Act 2014] was heard on 25th October 2016.

2. The Notice of Motion issued on 10th February 2015, giving rise to this judgment, also contained an application for the directions which were declined in the judgment given by this Court on 18th March, 2016 ([2016] IEHC 141). The parties had agreed prior to the hearing of that application to re-categorize Category A described as "Balance at date of appointment €59,381.66" as a floating charge asset and this was mentioned at para. 29 of that judgment.

3. The basis of the current application is that the respondent Receiver and his predecessor applied, according to the applicants, an unfair rule to the apportionment of the costs and outlays (including legal expenses) to those who asserted rights to the floating charged assets and the fixed charged assets. In other words, no account was taken of the small amount of work undertaken to categorise, realise, and distribute the proceeds of the floating assets with which the applicants are now only concerned. It was submitted that the vast majority of the work since the appointment of the respondent's predecessor in 2012 concerned the fixed assets of the Company.

4. The directions now sought and which are the subject of this judgment seek to require the respondent to:-

(iii) "Apportion the remuneration and costs, including the legal costs of the receivership to date, including the work and costs of the first Receiver between fixed and floating charges on the basis of the work actually done in respect of each category of assets"; and

(iv) Prevent the apportionment of any costs incurred by the first Receiver "in respect of the dispute" ... "over the categorisation of costs in the realisation of the fixed charged assets".

5. The draft schedule of realisations and payments emailed by the respondent's solicitors to the applicants on 16th April 2014, ("**the Schedule**") indicated that €250,023.97 was the value of the floating charged assets and €1,302,541.01 was the value of the fixed charged assets. The Schedule further identified that a total of €771,791.01 in costs and expenses would be allocated for deduction from the proceeds of the fixed assets and €121,317.19 would be deducted from the proceeds of the floating assets.

6. It appears to be common case that the Schedule omitted €850,000 which was the sum received from Latzur Limited for business equipment belonging to the Company.

7. Counsel for the respondent maintained that the onus is on the applicants to establish that the applicants are "being unfairly prejudiced by the" preparation and use of the Schedule.

8. Counsel for the applicants at the hearing on 25th October 2016, relied upon and refined his written submissions dated 24th May 2015. It might be said that the earlier judgment in these proceedings delivered on 18th March 2016, simplified the context and detail for consideration now.

9. At its simplest, the floating charged assets arose from the sale of stock belonging to the Company to Latzur Limited for €250,023.97 which occurred as soon as the first Receiver was appointed at 5pm on 16th February 2012. Added to this figure for floating assets is the agreed additional sum of €59,381.66 which was the agreed balance of cash taken over at the date of appointment and which fell within the floating charged assets category.

10. According to the applicants, the costs of the Receiver for categorising and realising these assets cannot be loaded with the costs associated with the classification, maintenance and realisation of the fixed assets of €1,302,541.01 and the said sum of €850,000 (total = €2,152,541.01). Counsel for the applicants invited the Court to conclude that the fees of the first Receiver and of his replacement (the respondent) together with the legal fees and other smaller disbursements incurred during the receivership ended up being 83.9% attributed to the fixed charged assets and 16.1% attributed to the floating charged assets. Those percentages arose from adding the said sum of €1,302,541.01 to the said €250,023.97 and getting a percentage of the total for each of those figures.

11. It was stressed that those percentages also omit the said sum of €850,000 for other fixed assets. It is noted that the agreed additional sum for the said floating charge categorisation of €59,381.66 mentioned in the earlier judgment was also not factored into the equation.

12. A reader of this judgment who has had no part to play with the events giving rise to it, may find difficulty in following these figures. However, the cogent submission made by counsel for the applicants was to the effect that the applicants, having become entitled quickly to the acquired proceeds of the floating charged assets, should not have to pay for the costs of preserving, managing or selling the more complicated type of assets which came to a figure in excess of €2million and which fell within the fixed charged assets category.

13. Counsel for the respondent Receiver stressed that the applicants under s. 316 of the Companies Act 1963 must satisfy the Court that they are being unfairly prejudiced before directions can be given. He pointed to the absence of any evidence, whether by affidavit or otherwise, which supported the facts relied upon for this submission about prejudice arising. Emphasis was put on the uncontradicted averment of the respondent Receiver that he followed normal practice in not allocating his staff's time to each category of charge.

14. There is indeed a necessity for submissions to be based on facts which have been established or can be inferred. In an application like this, the Court has regard to affidavit evidence and the exhibits which record details that are not disputed to any material extent. Having said that, the Court ought not to close out details of an understanding which requires explanation. An incumbent Receiver has the means to assuage concerns where prejudice is alleged or anticipated. In the circumstances outlined above, it is indeed reasonable for the applicants to assert perceived prejudice which should be addressed by the respondent.

15. The Court appreciates the concerns expressed on behalf of the applicants that the cost of work undertaken after the quick sale of the Company's stock by the first Receiver and then the second Receiver in categorising, managing and selling fixed assets should not be attributed to the beneficiaries of the floating charged assets.

16. Despite the most general averment about the respondent's practice, it is the Court's view that the applicants, who are the beneficiaries of the proceeds from the floating assets, should only have to pay for the cost of the stock sale and whatever limited work of the first Receiver was involved in categorising the stock as floating charged assets. Applying what appears to be a 'rough and ready' rule for the allocation of costs based on practice which does not accommodate any degree of assessment for the work involved does indeed prejudice the applicants in this receivership.

17. In the circumstances, the Court proposes to give directions along the lines sought but invites counsel to make any further submissions which they may wish to make concerning paras. (iii) and (iv) of the Notice of Motion.