THE HIGH COURT

[2011 No. 219 MCA]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO REGULATION 166 OF THE EUROPEAN COMMUNITIES (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007 ON THE APPLICATION OF THE CENTRAL BANK OF IRELAND

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012
AND THE MATTER OF SECTIONS 150 AND 160(2) OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

KIERAN WALLACE
(OFFICIAL LIQUIDATOR OF CUSTOM HOUSE CAPITAL LIMITED)

APPLICANT

AND

HARRY CASSIDY, JOHN WHYTE and JOHN MULHOLLAND

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 29th June 2017

Introduction

1. The applicant is the official liquidator of Custom House Capital Limited. Each of the respondents was a director of that company. By Order made on 2 December 2016, pursuant to the terms of s. 842 of the Companies Act 2014 ('the 2014 Act'), each of the respondents was disqualified from, amongst other things, being appointed or acting as a director, or being involved, directly or indirectly, in the promotion, formation or management of any company. The disqualification periods imposed were 14 years, 10 years and 12 years, respectively. The judgment underpinning that Order, delivered on the same date, can be found under the neutral citation [2016] IEHC 689.
2. The applicant now moves, pursuant to s. 160(9B) of the Companies Act 1990, as inserted by s. 42(f) of the Company Law Enforcement Act 2001 and substituted by s. 11(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2006 or, in the alternative, pursuant to s. 846 of the 2014 Act, for his costs of that application, and for the whole of his costs and expenses incurred: (i) in investigating the matters that were the subject of the application; and (ii) in collecting evidence in respect of those matters. Those costs are sought against the respondents on a joint and several basis.

The law

3. Section 160(9B) provides, in material part:

> 'The court, on the hearing of an application for a disqualification order under subsection (2), may order that the persons disqualified … shall bear-
> (a) the costs of the application, and
> (b) in the case of an application by…a liquidator…(in this paragraph referred to as the 'applicant'), in addition to the costs referred to in *paragraph (a)*, the whole (or such portion of them as the court specifies) of the costs and expenses incurred by the applicant-
> (i) in investigating the matters the subject of the application, and
> (ii) in so far as they do not fall within *paragraph (a)*, in collecting evidence in respect of those matters,
> including so much of the remuneration and expenses of the applicant as are attributable to such investigation and collection.'

4. That provision has now been repealed and replaced by s. 846 of the 2014 Act, which is cast in substantially identical terms.

The application

5. The application is grounded on an affidavit of the applicant, sworn on 15 March 2017. That affidavit exhibits a fee report, dated 14 March 2017, in which the applicant sets out a summary and outline of the fees due to him for the work that he and his staff carried out in connection with: (i) the investigation of the matters that were the subject of the application; and (ii) the collection of evidence for the purposes of the application. The affidavit also exhibits a detailed bill of costs in respect of the legal fees incurred in the preparation and prosecution of the disqualification application, together with the opinion of a firm of legal costs accountants concerning that portion of the solicitor's professional fee and of Counsel's fees, submitted on a solicitor and own client basis, as would likely tax on a party and party basis.

i. *the investigation*

6. The applicant avers to the large volume of work that he and his staff carried out in investigating the conduct of the respondents as directors of the company. He avers also to having calculated the fees charged for that work in accordance with the reduced rates approved by this Court in *Re Missford Ltd t/a Residence Members Club* [2010] 3 IR 759 (at 767) and *Re ESG Reinsurance Ireland Ltd (in administration)* [2011] 1 ILRM 197 (at 204). The applicant further avers that, to the best of his ability, he delegated the work involved wherever possible to other members of his staff with the appropriate skills to deal with it. That was done in order to ensure that the necessary work was carried out in a cost efficient manner.
7. The fees for that work come to €86,075.50, plus VAT of €19,797.37, amounting to €105,872.87 in total.
8. Having considered the evidence before me, I am satisfied that the said fees are reasonable, not only by reference to the hours worked at the rates claimed, but also by reference to the nature and complexity of the work carried out and its value to the company in liquidation.

ii. *the collection of evidence*

9. The applicant avers that he and his staff also carried out significant additional work in collecting evidence. Once again, he avers that the work was delegated in the interests of cost efficiency wherever possible and the associated fees have been calculated on the basis of rates approved in earlier decisions of this Court.
10. The fees for that work are €57,386, plus VAT of €13,198.78, totalling €70,584.78. Having considered the evidence, I am satisfied by reference to the same criteria that those fees also are reasonable.

iii. *legal costs*

11. In the draft bill of costs exhibited to the grounding affidavit of the applicant, his solicitors have marked a professional fee of €42,750. They have received fee notes from Counsel amounting to €20,650. Both sums are exclusive of VAT. There has been outlay on postage of an additional €750. Hence, the applicant seeks an order for his legal costs on a solicitor and client basis in the sum of €64,150.
12. The opinion expressed on behalf of the firm of legal costs accountants retained by the applicant is that the solicitors' professional fee would tax on a party and party basis at between €20,000 and €25,000, plus VAT and that Counsel's fees would tax on the same basis at €11,500. Thus, the applicant acknowledges that the legal costs he might expect to be awarded on a party and party basis (including outlay) amount to €37,250.

The arguments

13. The applicant's submission starts from the proposition that he is entitled to an order for his legal costs of the disqualification application against each of the respondents jointly and severally on the basis of the usual rule, under O. 99, r. 1 of the Rules of the Superior Courts ('RSC'), that those costs should follow the event.
14. The applicant next submits that, in the particular circumstances of this case, the Court should also make an order, pursuant to s. 160(9B) of the 1990 Act, as amended, or, in the alternative, s. 846 of the 2014 Act, against each of the respondents jointly and severally, for the whole of the costs and expenses that he has incurred in investigating the matters the subject of the application, and in collecting evidence in respect of those matters.
15. The applicant seeks an order determining and measuring the costs described in the two preceding paragraphs (collectively, 'the costs') in accordance with the evidence.
16. In his grounding affidavit, the applicant acknowledges, as an experienced insolvency practitioner, that it is not usual to seek an order for the costs of the investigation and collection of evidence that precede a restriction or disqualification application, in addition to the legal costs of that application. He then avers:

> 'I have arrived at the view that it is appropriate to request this Honourable Court to make such an Order in this instance, however, having regard to the scale of the dishonesty in which the [r]espondents were engaged and the particular consequences of that dishonesty for the unfortunate clients of the [c]ompany….The consequences of that gross dishonesty are that clients of the [c]ompany have suffered significant losses of their investments to the extent that they are faced with the prospect, subject to the Court, of having to meet elements of the costs of the liquidation from their own funds. It would in my view be inappropriate to reduce the dividend payable to the clients of the [c]ompany – or even worse to require them to discharge from their own funds – by reference to the costs of investigating the conduct of the [r]espondents giving rise to that loss and collecting the necessary evidence for the recent application, without first looking to the [r]espondents to meet that burden.'

17. The first respondent, Mr Cassidy, failed to appear in response to the present application for costs against him, just as he had failed to appear in response to the disqualification application. Áine Murphy, a solicitor in the firm that represents the applicant, swore an affidavit on the applicant's behalf on 25 April 2017, to which she has exhibited the more recent correspondence passing between Mr Cassidy and her office. Ms. Murphy also refers to an earlier affidavit that she swore on 9 March 2015 in the context of the disqualification application, to which she had exhibited their earlier correspondence.
18. From that exchange of correspondence it would appear that Mr Cassidy believes that the contents of his e-mails to the applicant's solicitors have not been drawn to the attention of the court. The evidence establishes that in that belief he is mistaken. Insofar as Mr Cassidy understands that his assertions in that correspondence carry some evidential weight, in

circumstances where he has not appeared in answer to the application, much less sought to file any affidavit in opposition to it, he is equally mistaken. Mr Cassidy's correspondence includes repeated assertions that he lacks the funds to retain legal representation. Those assertions have no evidential value. But even if they were correct, there was nothing whatsoever to prevent Mr Cassidy from appearing in person to make his case or defend the application. He did not do so.
19. The solicitors for the second respondent, Mr Whyte, indicated to the court at the commencement of the application for costs that they had no instructions. Neither they nor Mr Whyte played any further role in the application.
20. The third respondent, Mr Mulholland, swore an affidavit on 26 April 2017, in opposition to the liquidator's application for costs against him.
21. In that affidavit, and in the deft submissions made on his behalf at the hearing of the present application by Mr McGillicuddy B.L., Mr Mulholland sets out three matters that, he contends, militate against the order for costs that the liquidator seeks.
22. First, he points to the co-operation that he provided in the course of the investigation and the absence of any suggestion that he obstructed it in any way. Mr Mulholland submits that his conduct thus saved time and costs in the investigation and that this must be relevant to the issue of whether he should be made liable for the costs of the investigation, or at least to the issue of the appropriate extent of his liability for those costs.
23. Second, Mr Mulholland asserts that he did not seek to contest the disqualification application against him on its merits and that the submissions advanced on his behalf were properly focused on matters of mitigation, thus also saving time and cost.
24. Mr McGillicuddy submits that Mr Mulholland's position must be distinguished from Mr Cassidy's in relation to each of these two matters in order to properly incentivise co-operation and compromise on the part of directors of insolvent companies under investigation, and to deter non-cooperation and obstruction.
25. Third, Mr Mulholland submits that it is 'unfair' to fix him with joint and several liability for the relevant costs without assessing the difference between his position and that of the other respondents. In that regard, Mr Mulholland appears to have in mind the difference between his position and that of Mr Cassidy – specifically, in regard to Mr Cassidy's status as the primary actor behind the scheme of fraudulent conduct in which the respondents each became engaged; his failure to co-operate with the applicant in the course of the investigation; and his asserted lack of funds to meet any order for costs that might be made against him.

Analysis

26. There are several reasons why I cannot accept any of the propositions underlying those submissions.
27. The first reason is that they entirely overlook the grave findings of fraud that have been made against Mr Mulholland; see paragraphs 63 to 66 of the judgment. In particular, they fail to address the specific finding (at paragraph 64) that Mr Mulholland personally benefitted from the payment to him of wrongful 'commissions', in most instances directly from client accounts, and the further specific finding (at paragraph 78) that, although Mr Mulholland has expressed embarrassment and distress at the position the company's clients now find themselves in, there is no suggestion that he has made any attempt to address the deficit in client funds. Those findings confirm that the investigation and disqualification application, and all of the reasonable costs thereby incurred, were precipitated by the fraudulent conduct of each of the respondents, including Mr Mulholland.
28. The second reason is that the propositions upon which Mr Mulholland seeks to rely pay no regard to the finding in the final report of the inspectors who investigated the affairs of the company that, as of 19 October 2011, the potential losses to the pension holders and investors who were its clients stood at €66.55 million; see paragraph 14 of the judgment. Thus, as the applicant avers, the practical question at the back of the present application is whether the respondent directors should have joint and several liability for the costs now at issue or whether some conception of fairness requires instead that their liability (or, certainly, that of Mr Mulholland) for those costs should be somehow capped or limited, thereby increasing the risk of injustice and unfairness to the pension holders and investors who were the company's clients. It is barely necessary to ask that question in order to plainly see the answer.
29. In my view, Mr Mulholland's submission that he is entitled to some credit on the issue of costs for his co-operation with the applicant's investigation and for not contesting the merits of the disqualification application against him is entirely misconceived. He has already received the relevant credit, not once but twice over. First, those matters were expressly considered as mitigating factors in relation to the period of disqualification otherwise appropriate to be imposed on him to reflect the gravity of his conduct as a director of the company. Second, he has already had the benefit of his co-operation with the investigation and of his approach to the merits of the disqualification application against him in that he can have no liability for whatever additional costs there might have been had he failed to co-operate with the investigation or elected to contest the disqualification application against him on its merits.
30. I can find no merit in Mr Mulholland's submission that it is 'unfair' to fix him with joint and several liability for the relevant costs without assessing the difference between his position and that of the other respondents. In my view, a strong analogy can be drawn between the position of the respondents in this case, each of whom has been found to have committed a fraud upon the company or its creditors, or both, and that of persons found to be concurrent wrongdoers generally under both the common law and ss. 12 and 14 of the Civil Liability Act 1961. It is right that an injured party or parties should be able to recover the full extent of any loss in so far as may be possible from any of the wrongdoers concerned and it is for any such wrongdoer to pursue the issue of the appropriate apportionment of responsibility for that loss by way of an application for contribution from his fellow wrongdoer(s) thereafter. The striking of the necessary balance in that way is entirely fair and just, and in harmony with the core principles underlying civil liability generally; see *Iarnród*

Éireann v Ireland [1996] 3 IR 321 (at 376-7). The jurisdiction to make concurrent wrongdoers jointly and severally liable in costs is clear; *Gillespie v Fitzpatrick* [1970] 1 IR 102 (at 109).

31. The applicants evidence concerning the costs he has incurred in the investigation of the respondents' conduct, the collection of evidence, and the prosecution of the disqualification application against each of them, though queried in correspondence by Mr Cassidy, stands uncontroverted by any of the respondents.

32. In *Re Moypool Ltd; Gannon v O'Hora & Anor* [2007] 3 IR 563 (at 566), Finlay Geoghegan J pointed out that the wording of s. 150(4B) of the 1990 Act, as amended (a provision materially identical to s. 160(9B) that dealt with restriction, rather than disqualification, applications), 'suggests a similar approach to the determination of "costs of the application" and costs of "investigating the matter"'. Finlay Geoghegan J went on to observe that '[u]nless otherwise ordered the order for the costs of the application would be taxed on a party and party basis.' It seems to me that, in acknowledging the discretion to order otherwise while acknowledging the usual rule, Finlay Geoghegan J was making clear that, in relation to the costs of an application, the costs of investigating the matters the subject of an application, and the costs of collecting evidence in respect of those matters, the Court has a broad discretion under s. 150(4B) (and, by extension, s. 160(9B)), analogous to that conferred upon it by O. 99, r. 1 of the RSC in respect of proceedings generally.

Conclusion

33. Having carefully considered the submissions of the parties, I propose to direct that a sum in gross be paid in lieu of taxed costs – that is to say, I propose to measure the costs to be paid.

34. I measure those costs on the following basis. First, I must consider the legal costs of the application. While under O. 99, r. 10(3) of the RSC, the Court may, in any case in which it thinks it fit to do so, order or direct that costs shall be taxed on a solicitor and client basis, it seems to me that such orders are very rarely made and then only where there has been some misconduct in the carriage of the proceedings, rather than in the conduct that gave rise to the proceedings. Thus, it seems to me right to measure the applicant's legal costs in the amount likely to tax on a party and party basis. The uncontroverted evidence before the Court is that legal costs that would tax are a professional fee of €25,750 (exclusive of VAT) (taking the higher figure estimated, as I am disposed to do); outlay of €750; and Counsel's fees of €11,500 (exclusive of VAT), giving a total figure of €38,000 for the legal costs of the application.

35. Second, I have already indicated that the fees that the applicant claims for investigating the conduct of the respondents as directors of the company are reasonable, not only by reference to the hours worked at the rates claimed, but also by reference to the nature and complexity of the work carried out and its value to the company in liquidation. Those fees come to €86,075.50, exclusive of VAT.

36. Third, I have already concluded by reference to the same criteria that the applicant's proposed fees for the collection of evidence, being €57,386, exclusive of VAT.

37. Adding the total figure under each of those three heads together, I come to the aggregate amount of €181,461.50. I will order that the respondents are jointly and severally liable to the applicant in that amount and that said costs are to be paid forthwith.