Neutral Citation Number: [2006] IEHC 52

**THE HIGH COURT**

**2005 No. 327 COS**

**IN THE MATTER OF COMPUSTORE LIMITED**
**(IN VOLUNTARY LIQUIDATION)**
**AND IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2003**
**AND IN THE MATTER OF S. 280 OF THE COMPANIES ACT, 1963**

**Judgment of Miss Justice Laffoy delivered on 22nd February, 2006.**

1. The applicants, the members of the firm of Eugene F. Collins, Solicitors, bring this application as creditors of Compustore Limited (the Company) under s. 280 of the Companies Act, 1963 (the Act of 1963), asking the court to determine the question whether fees and expenses due to the applicants in respect of advices given in relation to the procedures to be followed to place the Company into creditors' voluntary liquidation are "expenses properly incurred in the winding up of the company" within the meaning of s. 281 of the Act of 1963. Section 281 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."

2. The resolution to wind up the Company was passed by its members on 9th November, 2004. By virtue of s. 254 of the Act of 1963 the winding up was deemed to have commenced on that day. The liquidator of the Company, David Hughes, on behalf of the Company contends that the fees and expenses in issue are not expenses properly incurred in the winding up within the meaning of s. 281.

3. The factual background is that the applicants were first consulted by the Company on 18th October, 2004 for the sole purpose of advising it on the procedures to be followed in initiating a creditors' voluntary liquidation. On being engaged, the applicants sought a payment on account for services to be rendered. The directors of the Company confirmed that they had sufficient cash at the bank to make such a payment and that remained the position up to the commencement of the winding up. However, the Company's bankers refused to allow a withdrawal of any funds. In outlining the services rendered by the applicants to the Company in the grounding affidavit, which is not controverted, Barry O'Neill, a partner in the applicants' firm, stressed the scale and notoriety of the Company, a household name for the sale of computers with outlets in numerous locations throughout Ireland. Mr. O'Neill averred that the Company's financial collapse was very sudden and necessitated numerous meetings with the directors to ensure the Company complied with the procedures leading up to the liquidation. The Company had over 200 creditors and some of the trade creditors were owed significant amounts. The applicants advised on the imminent liquidation and on issues involving internal Company matters, and prepared all documents relating to the creditors' meeting. They also made preparations with the Burlington Hotel for the creditors' meeting itself. The scale of the Company and the speed with which events unfolded resulted in a period of intense legal advice.

4. The applicants have indicated that they are willing to have the quantum of the costs and expenses claimed determined by taxation. Accordingly, the court is concerned with the issue of principle, not the quantum of the bill presented.

5. It is convenient before considering the arguments advanced on behalf of the applicants to refer to the position in a winding up by the court. Rule 128 of Order 74 of the Rules of the Superior Courts, 1986, insofar as it is relevant for present purposes, provides as follows:

> "The assets of a company in a winding up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs and expenses as the Court may allow to a Liquidator appointed in such a voluntary winding up, 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:
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> > First: The costs of the petition, including the costs of any person appearing on the petition whose costs are allowed by the Court. …"

6. As there is no authority directly in point in this jurisdiction on the question raised on this application, counsel for the applicants urged that the court should adopt the approach adopted by the English High Court (Hoffman J.) in dealing with what was suggested were somewhat similar circumstances in *Re A.V. Sorge & Company Limited* [1986] BCLC 490. The facts in that case were that, on 10th November, 1982 a creditor had presented a petition to wind up the company. Before the petition came to hearing, on 8th December, 1982, it was resolved that the company be wound up as a creditors' voluntary winding up and A was appointed liquidator. On 17th January, 1983 an order for the compulsory winding up of the company was made by the High Court. Subsequently, B was appointed liquidator for the purposes of the compulsory winding up. The issue before Hoffman J. was whether A was entitled to remuneration, including disbursements, for acting as liquidator. B contended that he was not.

7. The issue fell to be determined by the application of a rule of court in identical terms to rule 128 of Order 74. In applying the rule, Hoffman J. rejected an argument made on behalf of B that the company had not "previously commenced to be wound up voluntarily" because the compulsory winding up was deemed to commence on the date of the presentation of the petition, which predated the commencement of the voluntary winding up. Hoffman J. held that "previously" in the rule meant before the making of the compulsory order.

8. Hoffman J. also rejected a challenge on behalf of B to the expenses incurred before the resolution for voluntary winding up was passed, which included the cost of sending out notices of the meeting to creditors, advertising the meeting, preparing the statement of affairs for presentation at the meeting, and hiring the room for the meeting to take place. Hoffman J. commented that those expenses were expenses which had to be incurred to comply with the requirements of s. 293 of the Companies Act, 1948, a provision with which s. 266 of the Act of 1963 corresponds. The approach of Hoffman J. to this challenge is pertinent on this application because the basis of B's challenge was that the court should not under the rule allow priority to expenses which would not have been entitled to priority if the voluntary winding up had proceeded under a provision in identical terms to s. 281. Therefore, Hoffman J. had to consider whether B's contention that those expenses were not "incurred in the winding up" because they were incurred before the commencement of the winding up was correct.

9. In addressing the proper construction of the analogue of s. 281, Hoffman J. referred to a reported County Court decision, which was fifty years old, *Re Waterloo Manufacturing Company (Burnley) Limited* [1936] 3 CCR 281, in which the County Court judge had held that pre-resolution expenses might be "costs of the winding up" or "incidental to the winding up" but could not be costs "in the winding up". He also referred to a guidance note issued by the Insolvency Practitioners' Association in 1982, which advised that all pre-resolution expenses would rank only as unsecured claims in the liquidation and recommended that all such expenses be paid for in advance. Alternatively, if no funds were available, it was suggested that cheques from debtors might be endorsed over to meet bills.

Having commented that, if the Company was wholly illiquid, it seemed that it would have to languish in limbo, unable either to trade or to be wound up, until a creditor could be persuaded to put it out of its misery by presenting a petition for the compulsory order, Hoffman J. continued (at p. 494):

> "If this is the law, its effect is to create a trap for the unwary (in penalising anyone who incurs s. 293 expenses without taking the precaution of asking for cash in advance) and to prohibit steps being taking to wind up insolvent companies. I do not believe that the legislature intended such an odd result. In my judgment no distinction was intended between the words 'costs in the winding up' and phrases like, 'costs of and incidental to the winding up'."

10. After commenting that a rigid temporal cut-off was altogether too mechanistic, Hoffman J. noted that in *Re William Adler & Company Limited* [1935] Ch. 134 at 141-142, Eve J. had distinguished between a solicitor's entitlement to costs which the company had incurred before the winding up resolution and after it and had stated that, in relation to the former category, the solicitor was in the same position as any other creditor of the company. Hoffman J. commented that there was nothing in that case to suggest that the advice for which the solicitor was charging was specifically for the purpose of enabling the company to pass the winding up resolution and to take the other steps required by s. 293. He continued (at p. 495):

> "In some case it may not be easy to distinguish between general advice (e.g. on the options open to the company, one of which may be winding up) and advice which is truly 'incidental to the winding up'. But this is a familiar problem to taxing masters and should not affect the general principle."

11. Although, as counsel for the liquidator pointed out, Hoffman J. was applying the corresponding rule to rule 128, not the statutory provision, and he was concerned with the remuneration of a liquidator rather than the costs of obtaining legal advice, in my view, it is to be deduced from his judgment that the general principle to which he referred was that pre-resolution costs incurred, whether through a solicitor or otherwise, so as to enable the company to pass the winding up resolution and take other statutorily required steps are costs "incurred in the winding up".

12. In a subsequent decision of the English High Court (*Re Sandwell Copiers Limited* [1988] BCLC 209) Mervyn Davies J. referred to the judgment of Hoffman J. in the *Sorge* case, but distinguished it on the facts. In the case before him the pre-liquidation expenses were not incurred "specifically for the purpose of enabling the company to pass the winding up resolution and take the other steps required by section 293"; rather they were expenses incurred by the person who became the voluntary liquidator in collecting the company's debts. Accordingly, it was held that the liquidator was not entitled to be remunerated for those services.

13. It was submitted on behalf of the applicants that sound policy considerations underlie the approach adopted by Hoffman J. in the *Sorge* case and that significant practical benefits ensue from adopting such approach. If no priority were to attach to the costs and expenses of obtaining legal advice prior to the passing of a resolution to wind up a company, companies in financial difficulties could find it difficult to obtain appropriate advice. Given the priority afforded to a petitioner's costs in rule 128 of Order 74, the directors of a company might opt for compulsory liquidation in a situation in which a voluntary liquidation might be more beneficial. Alternatively, a more serious consequence might be that the directors would not initiate winding up proceedings at all.

14. The position advanced by the liquidator on behalf of the Company was that the words of s. 281 are clear and unambiguous. The reference in s. 281 to costs "incurred in the winding up" presupposes that the winding up was in being when the costs were incurred. In this case, the costs and expenses at issue were not incurred in the winding up; they were incurred prior to the winding up. While counsel for the liquidator acknowledged that it is permissible for the court to depart from a literal construction of a statute and adopt in its place a teleological or purposive approach that would ascertain the true legislative intention from the Act as a whole, it is not necessary to do so in this case. The interpretation contended for by the liquidator does not in any way undermine the legislative intent of the Act as a whole; on the contrary it advances the legislative intent of protecting the totality of creditors. Without prejudice to his contention that there is no basis for adopting other than a literal construction of s. 281, it was submitted on behalf of the liquidator that the policy considerations or practical benefits advanced by the applicants are not compelling. It was suggested that of all possible creditors, lawyers are best equipped to secure their own position. It was also suggested that a situation in which a company is not in a position to pay for legal advice prior to the winding up resolution but is in a position to pay for it after liquidation in priority to other creditors is a rare occurrence.

15. The determination of the question raised on this application turns on the proper construction of the words "costs, charges and expenses properly incurred in the winding up" in s. 281. Rule 128 of Order 74 has no application in a voluntary winding up (In *Re A. Noyek & Sons Limited* [1986] I.R. 183). 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. The words in the section are clear and unambiguous and the intention of the legislature is plain. I do not find the reasoning on which Hoffman J. arrived at a different conclusion in the *Sorge* case as persuasive. 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.

16. Finally, I think it appropriate to record that the application was heard before the coming into operation of the Interpretation Act, 2005 (the Act of 2005) on 1st January, 2006 and it has been decided on the basis of the submissions made on behalf of the parties. The decision would be no different if the case had been argued after s. 5 of the Act of 2005 came into operation because, in my view, s. 281 is neither obscure nor ambiguous nor does a literal interpretation produce an absurd result or fail to reflect the plain intention of the Oireachtas.

17. The application is dismissed.