Neutral Citation Number: [2005] IEHC 481

THE HIGH COURT

Record Number: 2002 No. 25 Cos

IN THE MATTER OF USIT LIMITED AND IN THE MATTER OF THE COMPANIES ACTS 1963-2003;

THE HIGH COURT

Record Number: 2002 No. 38 Cos

IN THE MATTER OF USIT WORLD PLC AND IN THE MATTER OF THE COMPANIES ACTS 1963-2003

Judgment of Mr Justice Michael Peart delivered on the 16th day of November 2005:

1. I refused to make orders herein for the restriction of certain directors of the above companies.

2. The issue now to be decided is what order to make in relation to the costs of the applications. The liquidator seeks to have no order for costs made against him.

3. The directors of USIT World PLc against whom declarations were unsuccessfully sought were Gordon Colleary, Mairin Colleary, Angel Olivares, Gerard Connolly, Lynn Millington-Wallace, Xavier Moreels, as well as what have been referred to as the STA Directors Richard Porter; Mark Adams; Dan McGing:

4. Orders were also sought against Gordon Colleary and Xavier Moreels in their capacity as directors of USIT Limited.

5. Gordon Colleary through his Counsel has informed the Court that even though he was successful in the application brought against him, he does not wish to seek his costs against the liquidator sine he recognises that this will impose yet further loss on the creditors who have already suffered huge losses. He does however support the application by his wife and another director, Gerard Connolly in their applications for costs. He believes that they ought to be awarded their costs.

6. Mairin Colleary, through her Counsel has applied for an order for costs, but, like her husband, being conscious of the impact on creditors, has indicated that she would wish to limit the extent of those costs to a sum of €10,000 plus VAT. Given the fact that this case took, as far as I recall, about four days before the Court and involved the production of several lever arch files of documents and extensive legal submissions, this sum would represent realistically a modest proportion of the overall cost of her legal representation.

7. Gerard Connolly applies for his costs. He was a financial director but only for a period of a few months from January 2001 to July 2001 when he resigned on health grounds. His duties were quite circumscribed when he took that job and were closely linked to the company's plans for expansion and were related to refinancing the borrowings of the company, and finding an investment partner.

8. Angel Olivares filed an affidavit in order to put some matters before the Court to assist in satisfying the Court that he acted honestly and responsibly, but was not legally represented at the hearing of the application. Accordingly there is no application for costs being made on his behalf.

9. Neither Lynn Millington-Wallace nor Xavier Moreels were legally represented and there is therefore no application for costs by them.

10. The STA directors were also successful also in meeting the liquidator's application, and apply for their costs. Their involvement as directors was confined to a period after the company was acquired by STA in the wake of the onset of financial difficulties, and continued for short time until the 15th February 2002 .

11. The creditors may well feel that in some circumstances they should not have be the ones to have to foot the bill for the liquidator's failed application, but that issue would need to be addressed by the legislature. In the present circumstances, the liquidator, being the applicant, is the only person against whom the Court can make an order for costs, and it is inevitable that those costs will become part of the costs of the liquidation and will in the heel of the hunt be borne out of the funds otherwise available for the creditors.

Section 150(4B) of the Companies Act 1990:

> *"(4B) – The Court, in hearing an application for a declaration under section (1) from the Director, a liquidator or a receiver, may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter."(my emphasis)*

12. Order 99, rule 1 of the Rules of the Superior Courts 1986 provides as relevant as follows:

> *"Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the superior courts shall be at the discretion of those courts respectively.*
>
> (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party except under an order or as provided by these Rules.
>
> (3) ……
>
> *(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

13. In *G.M.T. Engineering Ltd (in voluntary liquidation) [2003] 4 I.R. 133*, it appears that the liquidator had applied unsuccessfully for declarations of restriction against certain directors, and yet sought his costs against the directors in order to protect the creditors of the liquidation from having to bear the costs of the proceedings. Those directors sought to argue that s. 150(4B) precluded the Court from making an order against them where the declaration had been refused. She held, inter alia, that the Court was under this section precluded from making any order in respect of the liquidator's costs other than against the persons referred to in the section, namely directors against whom the declaration of restriction is made.

14. She also concluded that the Court's discretion under O. 99, r.1 of the Rules of the Superior Courts in the matter of costs was

limited by the terms of s. 150(4B) so as to exclude the Court from having any discretion to make any order for a liquidator's costs other than against the persons referred to, namely directors against whom the declaration of restriction is made."

15. In *Visual Impact and Displays Limited (in liquidation) [2003] 4 I.R. 451*, Finlay Geoghegan J. decided that the Court's discretion under O.99, r.1 of the Rules of the Superior Courts to deal with the costs of a respondent as opposed to those of the liquidator, was not affected by s. 150(4B) of the 1990 Act. In that case the Court decided that a declaration of restriction should not be made because the applicant liquidator had not discharged the onus of showing as a probability that that the respondent was a director within twelve months of the winding up. He was in other words the successful party. An order for costs was made against the applicant as opposed to against the company since it is the liquidator who is the applicant.

16. I see no reason whatsoever not to follow these decisions with which I respectfully agree.

17. It seems to follow that in spite of the manner in which s. 150(4B) of the 1990 Act is couched, there remains in the Court by virtue of O.99, r.1 Rules of the Superior Courts a discretion in the matter of an application by a successful respondent against whom no declaration of restriction is made following an application by the liquidator. Under that rule costs should follow the event unless the Court otherwise orders. What is completely unspecified of course is in what circumstances the Court should otherwise order in the case of a director who successfully overcomes the hurdle of satisfying the Court that he or she has acted honestly and responsibly in relation to the affairs of the company.

18. Mr Murray on behalf of the liquidator has submitted that cost should not in this case follow the event for a number of reasons:

> 1 Directors know when they take on the duties of being a director that part of that responsibility involves the risk that upon a liquidation they may have to meet an application for restriction, and that this risk has to be seen in the context of the privileges of being able to operate a company under the cloak of limited liability. Accordingly there is no unfairness in a director having to meet his own costs of this application against him even where no declaration order is made. I feel however that if it had been intended that such an onerous burden of costs was in all circumstances to be automatically borne by a director, even one who successfully meets the application, the legislature would need to have said so. Even in the exercise of my discretion under O.99 I would not be of the view that I should be persuaded to exercise it, as suggested, on the basis that it is one of the risks inherent in agreeing to become a director that one would have to bear one's own costs of meeting the application even if successfully met.
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> 2 That the liquidator is required to provide a s. 56 report, and that in this case it was always inconceivable that the Director of Corporate Enforcement would relieve the liquidator from bringing the application in respect of the respondent directors, and that the absence of any reply in respect of question 22(g) of the report form has little relevance, as has the fact that the liquidator indicated in the report that he had not yet formed a view as to whether the directors had acted responsibly.This submission relates to a submission made on behalf of some of the respondents that one reason why the liquidator should be required to pay the costs is that he commenced the applications for declarations in circumstances where he had not yet completed his investigations. In particular, the Court was referred to question 22(g) in the form of Report to be completed by the liquidator. That question asks:
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> *"Has the person demonstrated to you that s/he has acted honestly and responsibly in relation to the conduct of the company's affairs?"*

19. Unlike every other question to be answered in the report, the liquidator has chosen not to answer that question by ticking the box for either "yes" or "no". It is clearly a question which is thought to be important since below it the liquidator is invited to "provide on a separate sheet details of the factors which support this answer." Furthermore, at Q. 31 the liquidator is asked whether he is asking the Director of Corporate Enforcement is being asked at this time to relieve him from the requirement to apply for a restriction order against any of the directors, to which the liquidator has replied "No". It is also the fact that in Q.32 albeit in the context of the possibility that a disqualification order might be applied for under s. 160 of the Act, the liquidator stated that he was going to continue his investigations into the actions of the directors and that he was at that point uncertain whether he would be applying to the High Court pursuant to that section. The date of that report is 29th November 2002, just over six months from the date of the liquidator's appointment. By letter dated 30thApril 2003 the Director of Corporate Enforcement wrote to the liquidator stating that the liquidator was not relieved of his obligation to bring the applications against all the directors. Yet there does not appear to have been any further report prior to April 2003 after any investigations were might have been completed in that regard. This situation relates to each company.

20. It certainly seems to me on the face of the documentation that by writing the letter dated 30th April 2003 as he did the Director had closed his mind to the possibility that by the time the liquidator had completed the investigations which were incomplete at the time of the s. 56 report, that a view may by then have been formed by the liquidator that one or more of the directors had acted honestly and responsibly in relation to the affairs of one of both companies.

21. This could in certain cases have a bearing on the exercise of the Court's discretion. Even without this feature in the present case, I am satisfied in any event that costs should be awarded to the respondents who have sought them. But I feel it is appropriate to draw attention to the matter in this way in case it is of assistance in future cases.

> 3. That section 150(4A) was intended to supplant the provisions of O.99 , r.1 Rules of the Superior Courts, and remove the court's discretion as to costs even in respect of a director who successfully resisted the application, and that accordingly the court has no power to award costs against the liquidator in favour of such a successful director.
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> This submission has already been the subject of a judgment of Ms. Justice Finlay Geoghegan to which I have referred and there is no need for me to deal with that matter again.
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> 4. that to make an order for costs is putting a further burden on the creditors who have already suffered massive losses in the companies' collapse.
>
> 5. that there were many very serious and genuine concerns raised by the liquidator in his affidavit grounding the application for declarations.

22. These two last matters are certainly so in the present case, but yet are not such as to persuade me that costs should not follow the event under O.99, r.1 of the Rules of the Superior Courts

23. I am satisfied that Mairin Colleary should be awarded her costs, and in the light of her request that should an order be made she is content that it be limited to a sum of €10,000 and VAT, I therefore measure costs in that sum and order accordingly against the liquidator.

24. As far as Gerard Connolly is concerned, I am also satisfied that costs should follow the event. I am also of the view that in his case it was not obvious by April 2003 that an application should have been brought against him given the extent and duration of involvement as a director, and possibly the completion of investigations may have shown the liquidator that this respondent was one at least who had acted honestly and responsibly.

25. I accept that the liquidator was not relieved of the duty to bring the application, but the fact that he was not so relieved should not result in him having to defray the cost of discharging the onus upon him to show that he acted honestly and responsibly. It would appear that at some stage an effort was made to have the application made against him to be dealt with separately in order to shorten the extent of the paperwork and the duration of the application, since his involvement was relatively brief, but as things turned out he was involved in the entire application in respect of all the respondents, thereby exposing him to a much larger sum for costs than would have been the case if the application had proceeded only against him.

26. The STA directors are also entitled to an order for their costs against the liquidator on the basis that I see no reason why costs should not follow the event. I so order. There is no special feature in their regard which would persuade me to make a different order.

27. I so order.