

THE HIGH COURT

[2012 No. 696 COS]

IN THE MATTER OF:

AMANTISS ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION)

AND

WILBURY LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF:

THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 26th day of May, 2014

Issue

1. The issue with which this judgment is concerned is who should bear the costs which have been incurred in these proceedings to date.

2. The issues in the proceedings were before the Court on three occasions:

(a) in January 2013, when the issues the Court had to determine at that juncture were dealt with in a judgment delivered on 22nd January, 2013 ([2013] IEHC 21);

(b) in June and July 2013, when the issues in the proceedings which had not been determined in January 2013 were re-entered and the remaining issues were identified in a judgment delivered on 15th July, 2013 ([2013] IEHC 332); and

(c) for hearing of those issues which occurred over three days at the end of July and the beginning of August, 2013, which led to a judgment delivered on 9th May, 2014.

Respective positions adopted by the parties on the issue

3. The issues before the Court on each of the foregoing occasions are outlined in detail in the judgments. On each occasion, the moving party was Seamus Maye, who was the applicant. It is significant that he was the applicant in his capacity as a creditor of Amantiss Enterprises Limited (in voluntary liquidation) and Wilbury Limited (in voluntary liquidation) (the Companies). The respondent initially and on each subsequent occasion was Des Donegan (the Liquidator), who on each occasion was brought before the Court in his capacity as liquidator of each of the Companies. CRH Plc and related companies, which have been referred throughout as the CRH Respondents, and Kilsaran Concrete Products Ltd. (Kilsaran), being creditors of the Companies, appeared and participated in the proceedings on each occasion as notice parties, as I am satisfied they were entitled to do as creditors. They opposed the position adopted by Mr. Maye vigorously, save that, in relation to the three day hearing in July/August 2013, the participation of the legal representatives of Kilsaran was very limited.

4. Predictably, on the question where the burden of the costs of the proceedings should lie, the parties have adopted attitudes as contentious as were adopted by them in every aspect of the proceedings. In summary, the position of each of the parties is as follows:

(a) Mr. Maye contends that he was the victor, the Court having made crucial findings of facts in his favour. He applied for costs against the Liquidator and also against the CRH Respondents and Kilsaran. As regards the Liquidator, he sought costs against the Liquidator personally.

(b) The position of the Liquidator is that costs should not be awarded against him personally and that the costs awarded should be costs in the liquidation. However, I am unclear as to whether the Liquidator's position was that, not only should costs awarded to Mr. Maye, but also the costs he incurred in defending the proceedings, be costs in the winding up.

(c) The CRH Respondents and Kilsaran adopted the same position. Neither sought their or its costs of participating in the proceedings against the Liquidator. The position of each was that costs awarded should be awarded against the Liquidator, not against the Liquidator personally, but as costs in the liquidation.

5. There was dissension between counsel for Mr. Maye, on the one hand, and counsel for the CRH Respondents, on the other hand, as to the genesis of the proceedings which were commenced by an originating notice of motion issued on 18th December, 2012. It was contended on behalf of Mr. Maye that these proceedings were necessitated by the letter of 4th October, 2012 from the solicitors for the CRH Respondents, the contents of which are outlined in the judgment of 9th May, 2014, which, in turn, led to the applications by the CRH Respondents and other defendants in what was referred to as the Competition Proceedings in the earlier judgments to have the appeal to the Supreme Court struck out. The CRH Respondents identified the approach adopted by the Liquidator in October/November 2012, namely, that he did not authorise the appeal and did not support the appeal, as the genesis of these proceedings. The reality is that these proceedings are just one step on the underlying dispute between the Companies, on whose behalf Mr. Maye has been the prime mover, on the one hand, the CRH Respondents and Kilsaran and others, on the other hand. What, in my view, is of more relevance than the immediate cause of the proceedings is the nature of the proceedings.

Issues before the Court previously

6. As is clear from the title to the proceedings, the jurisdiction of the Court being invoked by Mr. Maye was the Court's statutory jurisdiction under the Companies Acts 1963 – 2012. He initiated the application on 18th December, 2012 as a creditor of the

Companies. The reliefs he sought are outlined in paragraph 6 of the judgment of 22nd January, 2013 and each of those reliefs was based on the Court's jurisdiction under the Companies Act 1963 (the Act of 1963). As regards the primary relief sought, orders under s. 309 of the Act of 1963, the Court had only to address the conduct of meetings of the Companies which had already been convened by the Liquidator. However, as regards the reliefs which the Court had to address, they were sought by Mr. Maye as a creditor of the Companies against the Liquidator and the participating notice parties, also as creditors of the Companies, opposed the position adopted by Mr. Maye. In fact, the notice parties have appealed the order of the Court. The issues raised which are addressed in the judgment of 22nd January, 2013 required to be decided by the Court in the liquidation of the Companies. I have no doubt that, if the issue of costs had been determined in January 2013, the proper order to make would have been that any costs awarded would be costs in the winding up.

7. What was left in the proceedings after 22nd January, 2013 were applications pursuant to s. 280 of the Act of 1963 determining questions arising as to the conduct of the appeal by and on behalf of the Companies and directions to the Liquidator in relation to the prosecution of the appeal. An application for an order under s. 277 of the Act of 1963 to remove the Liquidator was not pursued, because the Liquidator indicated a willingness to stand down in the course of the proceedings. Therefore, the substance of what the Court was determining on foot of the hearings in June 2013 and July/August 2013 involved questions arising in the winding up of the Companies on foot of the Court's jurisdiction under s. 280 of the Act of 1963.

8. Having regard to the jurisdiction being exercised, various views were put forward by the parties as to the nature of the proceedings and, in particular, how the respective roles of the Liquidator and the notice parties should be characterised.

9. The approach of counsel for Mr. Maye was to treat the proceedings as ordinary adversarial proceedings, the adversaries being Mr. Maye, on the one hand, and the Liquidator and the CRH Respondents and Kilsaran, on the other hand. It was contended that, as Mr. Maye was the successful party, he should be awarded his costs against his adversaries, on the basis that costs follow the event. Further, it was suggested that the Liquidator's interest diverged from the creditors' interests from 17th October, 2012 onwards and on that basis costs should be awarded against the Liquidator personally.

10. Counsel for the Liquidator submitted that the nature of the proceedings was not similar to normal adversarial proceedings and that the proceedings were of a hybrid nature. As to characterising the position of the Liquidator, observing that the Liquidator stands in a fiduciary position to the Companies, it was suggested that perhaps the best analogy is the circumstances in which a director of a company becomes personally liable, but it was emphasised that there was no allegation of misfeasance against the Liquidator, let alone a finding of misfeasance, so that there was no basis for awarding costs against the Liquidator personally. On that last point, counsel for Mr. Maye referred the Court to the judgment of the High Court (Clarke J.) delivered on 16th March, 2011 in *Moorview Developments Ltd. v. First Active Plc* [2011] IEHC 117.

11. Counsel for the CRH Respondents, with whom counsel for Kilsaran agreed, emphasised that his clients were notice parties in the proceedings who had an interest in the issues and took a position to defend their interest. He suggested that, in identifying the principles which the Court should apply, a useful analogy might be the position of notice parties in judicial review proceedings, where the respondent does not participate and the notice party is the *de facto legitimus contradictor*. While acknowledging that it was not exactly in point, he referred the Court to the decision of the High Court (Finlay Geoghegan J.) in *North Wall Property Holding Co. Ltd. v. Dublin Docklands Development Authority* [2009] IEHC 11. That decision concerned an application for an order for costs by an unsuccessful notice party against an unsuccessful respondent, in circumstances where the successful applicant had sought no order for costs against the notice party. Finlay Geoghegan J. (at para. 16) observed that the costs between the notice party and the respondent were in the discretion of the Court, that each had failed on the position taken by each in the proceedings, and that the Court's discretion must be exercised primarily having regard to the facts of the application. Applying those principles, she made no order as to costs as between the notice party and the respondent.

Conclusion

12. While I have considered each of the authorities referred to earlier, I have not found either to be of particular relevance to the issue which has to be determined in these proceedings. The jurisdiction invoked in these proceedings is a statutory jurisdiction conferred on the Court to determine questions arising in the voluntary winding up of a company, the source of such questions being frequently a dispute between a creditor and a liquidator, or a dispute between one creditor and another creditor. There may be situations in which, having regard to the facts and the outcome, that the Court would determine that it should exercise its discretion and award costs, say, to one creditor against another creditor, rather than making an order that the costs be costs on the liquidation. This is not such a situation.

12. Although the position adopted by Mr. Maye in this case, was, in the judgment of 9th May, 2014, ultimately upheld by the Court, I do not think that it would be appropriate to make in Mr. Maye's favour the order for costs he has sought. In exercising the Court's discretion in this case, I do not think it would be correct merely to have regard to Mr. Maye's successful outcome by the upholding of the position he adopted in these proceedings. There is a much broader picture to be considered, including the underlying dispute between the Companies and the CRH Respondents and Kilsaran in the Competition Proceedings. Regard must also be had to the very unusual features of the applications with which the Court dealt under the provisions of the Act of 1963 referred to earlier, which are outlined in the judgment of 9th May, 2014 at para. 8 *et seq.*

13. Taking an overview of the following factors:

- (a) what has happened since the Companies were put into liquidation, effectively by Mr. Maye, in 1994;
- (b) the fact that, as regards the Competition Proceedings, the activity of the Liquidator in the liquidations was effectively dormant until October 2012;
- (c) that what had been done previously in the names of the Companies in the Competition Proceedings was done at the instigation of Mr. Maye; and
- (d) that what happened subsequent to October 2012, when the Liquidator adopted a position contrary to Mr. Maye in relation to the Competition Proceedings, gave rise to the questions which the Court had to determine, the answers to which significantly affected not only Mr. Maye and the Liquidator, but also affected the CRH Respondents and Kilsaran as creditors;

I consider that the proper course is to award Mr. Maye his costs as against the Liquidator as costs in the liquidation. I consider that it would not be appropriate in the circumstances to make an order for costs against either the CRH Respondents or Kilsaran, who were entitled to participate in these proceedings to protect their respective interests as creditors. Moreover, I can see no basis

whatsoever for making an order for costs against the Liquidator personally.

14. Finally, I am not oblivious to the fact that, as things stand, neither of the Companies has any assets. However, the basis on which Mr. Maye has pursued the reliefs sought in these proceedings is to enable the Companies' causes of action against the CRH Respondents, Kilsaran and others be progressed with the primary objective of swelling the assets of the Companies.