THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 297
Record Number: 2019/436

Haughton J.
Murray J.
Binchy J.

IN THE MATTER OF BEAUTY HOLDINGS LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF HAIRSPRAY WHOLESALERS LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 261 OF THE COMPANIES ACT 1963

BETWEEN/

JIM LUBY

APPLICANT/RESPONDENT

- AND –

GARY LENNON

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of November 2020

1. Beauty Holdings Limited ("Beauty") and Hairspray Wholesalers Limited ("Hairspray") were placed in members' voluntary liquidation on 31st May 2013 and 1st May 2013 respectively. The appellant was appointed liquidator of each company. In the course of the liquidations, it became apparent that both companies were insolvent, as a result of which, on 6th May 2014, the liquidations of the companies were in each case converted into

a creditors' voluntary liquidation, and the respondent (to this appeal) was then appointed liquidator of both companies.

2. A dispute subsequently ensued between the appellant and the respondent as regards the quantum of fees charged by the appellant in the course of the liquidations, up to the point that the liquidations were converted into creditors' voluntary liquidations and were taken over by the respondent. Total fees paid to the appellant came to €234,264 exclusive of VAT for work done during the 12 month period. The respondent contended that the fees paid to the appellant during the period were excessive, and furthermore that the appellant had undertaken a great deal of work which was unnecessary and should not have been undertaken once it became apparent to the respondent that the companies were insolvent.

3. This dispute resulted in proceedings being issued by the respondent against the appellant by way of notice of motion pursuant to s. 261 of the Companies Act, 1963 whereby he sought repayment from the appellant in the sum of €122,126.21 inclusive of VAT in the case of Beauty and €31,677.42 inclusive of VAT in the case of Hairspray. On 21st December 2017, the parties entered into an agreement (the "Agreement") whereby they agreed to the appointment of an independent expert to determine the issues in dispute. That expert was Mr. Jim Stafford (the "Independent Expert"), a chartered accountant, whose credentials in insolvency practice are well established. Mr. Stafford delivered a report dated 13th March 2018 (the "Report"), in which he addresses the matters referred to him by the Agreement for determination. In the Report, Mr. Stafford expresses a view as to the fees that in his opinion were properly payable to the appellant in connection with the liquidations of the companies. From this, the respondent extrapolated that the appellant was liable to pay to the respondent, as liquidator of the companies, the total sum of €153,803.63 by way of reimbursement of fees (and VAT) which the appellant drew down from the companies during his tenure as liquidator.

4. The appellant took issue with Mr. Stafford's conclusions and instead of making payment to the respondent, entered into correspondence with both Mr. Stafford and the respondent in relation to the Report. This correspondence did not result in any conclusion and eventually the matter came back before O'Connor J. in the High Court, by way of a notice of motion for judgment issued by the respondent within the existing proceedings already issued by him under s. 261 of the Companies Act, 1963. O'Connor J., in an *ex tempore* decision of 23rd May 2019, held in favour of the respondent and ordered the appellant to pay the respondent the sum of €122,126.21 in the case of Beauty, and the sum of €31,677.42 in the case of Hairspray. The court further ordered the appellant to pay the costs incurred by the respondent in connection with the motion. It is against that decision that the appellant now appeals.

Relevant terms of the Agreement

5. Pursuant to clause 1 of the Agreement, the parties required the Independent Expert to determine the following issues:

(i) "A reasonable fee having regard to market hourly rates and the number of hours which would generally be spent by a liquidator carrying out a members' voluntary liquidation of a similar entity up to the date of conversion to a creditors' voluntary liquidation, on the assumption that no VAT recalculation was carried out by the liquidator; and

(ii) Whether [the appellant] ought to have undertaken the tasks that he did as liquidator prior to the conversion of each liquidation to a creditors' voluntary liquidation; and

(iii) Whether [the appellant] ought to have undertaken the tasks that he did as liquidator and in particular the recalculations of the VAT liabilities of the

Companies without the consent of the directors and/or the creditors of the companies; and

(iv) If it was necessary for [the appellant] to carry out a VAT recalculation for each company prior to conversion to a creditors' voluntary liquidation, the level of fee that might reasonably be charged by the liquidator having regard to the fact that the Companies were likely to be insolvent and transpired to be insolvent."

6. Clause 5 of the Agreement provides as follows:

"5. **Repayment of any remuneration**

[The appellant] shall repay to each Company the sum(s) (if any) as determined by the Independent Expert within a period of 60 days from the date of the Expert Determination or any other period as agreed in writing between the Parties.

In the event that [the appellant] fails to pay any such sum within the 60 day period or any other period as agreed in writing between the Parties, [the appellant] shall consent to judgment in the Proceedings in the amount as determined by the Independent Expert."

7. In the Report, the Independent Expert determined the questions above as follows:

(i) He stated that members' voluntary liquidations are generally very price sensitive and are also competitively priced. Usually they would command a price of about €5,000 plus VAT. In the case of the companies herein, he opines that if the appellant had quickly determined that the companies were insolvent and had carried out no VAT re-calculation work, then the liquidations could have been converted into creditors' voluntary liquidations for a fee in the region of €10,000 - €15,000 plus VAT in each case.

(ii) The Independent Expert expressed the view that it was reasonable for the appellant to have taken the steps that he did as liquidator of each company, prior

to converting the liquidations to a creditors' voluntary liquidation in each case. He identified six reasons for this conclusion.

(iii) The Independent Expert confirmed that it was correct for the appellant to carry out the tasks that he did as liquidator, and in particular the re-calculation of VAT liabilities, without the consent of the directors. From the documents that he reviewed, he was satisfied that the directors and "connected" creditors knew that the liquidator was undertaking the work involved. However, he also concluded that the appellant failed to notify the relevant parties of the extent and cost of the work that he was carrying out.

(iv) It is the reply to the fourth question by the Independent Expert that has given rise to the greatest controversy between the parties. The Independent Expert states that it was made clear to the appellant prior to him accepting his appointment as liquidator that the companies had not submitted correct VAT returns. He said that a review of the 2009 accounts for Beauty filed in the Companies Registration Office would have raised further alarm bells, as the profit and loss account did not reconcile with the balance sheet. He states that given the advance notice that the appellant had of the failure by the companies to maintain proper books and records, he "should have proceeded with caution." When a liquidator determines that proper books and records have not been maintained, it can be a pointless exercise "attempting to reconcile the irreconcilable". He states: "My review of Mr. Lennon's timesheets show that he spent considerable time attempting to reconcile the Companies' computerised records with the primary records such as bank statements. Mr. Lennon's time records on Beauty for February and March 2014 show that he spent 156 hours (at a cost of €39,000) on" in the words of the appellant: "Detailed examination between Excel bank statements,

recalculated VAT returns and Sage accounts. Item by item review. Amend VAT calcs for errors. Producing corrected VAT returns per VAT period 09-13."

8. The Independent Expert then continued:

"In my view, he should have determined after, say, twelve hours of work over the 2 Companies that such a reconciliation was not going to produce reliable accounts and that he should have advised the directors at that stage that it would be necessary to prepare proper accounts from the start of the relevant periods. Preparing accounts from the start of the relevant periods would have involved a team of more junior staff at less cost, and some of the Companies' own staff could have been utilised."

9. All of this led the Independent Expert to conclude that the appellant had spent far too much time in carrying out the VAT re-calculations. In his answer to the fourth question, he states:

"Given the directors' failure to maintain proper books and records, it is simply not possible to produce a fully accurate set of accounts for each accounting period."

10. He then proceeds to set out the time that he estimates should have been spent in carrying out VAT re-calculations for each company. These estimates lead him to conclude that, in the case of Beauty, the appropriate fees payable to the appellant for carrying out the VAT re-calculation work required should have been of the order of €43,779.40 and, in the case of Hairspray, the appellant should have charged a fee of €35,441.

11. The Report did not expressly state the amount by which the fees charged by the appellant exceeded those which the Independent Expert considered appropriate. However, the respondent calculated this figure by allowing to the appellant the maximum fee (together with the appropriate corresponding amount of VAT thereon) payable for carrying out a members' voluntary liquidation in the case of each company i.e. €15,000 plus VAT) and by separately allowing to the appellant, in full, the additional fees considered by the

Independent Expert as being reasonable in relation to the work associated with the VAT re-calculations. By adding these figures together, in the case of each company, and then subtracting those figures from the amount actually charged and retained by the appellant, the respondent arrived at the balance that he claims is payable by the appellant to the respondent as liquidator of the companies.

12. Following the issue of the Report, solicitors for the appellant wrote to solicitors for the respondent expressing concern, inter alia, that the Independent Expert had not been provided (by the respondent) with all documentation that should have been provided to him for the purpose of preparing the Report, and as required by the Agreement. In reply to this, the respondent took the position that the Agreement identified those documents that were to be made available to the Independent Expert, and that the respondent had provided the Independent Expert with all such documentation as he had requested. This correspondence continued between April and September 2018, with allegation and counter allegation in particular concerning documents which the appellant claims he had given the respondent in 2014, and which he claims should have been, but were not, provided to the Independent Expert. The Independent Expert was involved in this correspondence, and he agreed to consider further documentation, if provided. While his solicitors protested that the appellant no longer had the documents in question (having delivered them to the respondent), nonetheless, they stated that the appellant would collate whatever documents he could from his computer systems, and provide them to the Independent Expert. That was on 20th September 2018. No documents were subsequently provided, by the appellant, notwithstanding reminders to his solicitors.

13. In a letter dated 4th May 2018, the solicitors for the respondent stated that:

> "Based on the contents of the Report and our calculations and in accordance with the terms of the Agreement, the sum of €153,803.63 is now repayable by your client."

The solicitors provided a table with a breakdown of the calculation of that figure. At no stage in the correspondence mentioned above did the appellant, through his solicitors dispute this calculation. Nor, for that matter, did the appellant do so before the court below, or in the course of this appeal. The entire focus of his opposition to the Report (in the correspondence exchanged after the issue of the Report) was based on what he considered to be the inadequacy of the documentation provided to the Independent Expert. The appellant does however object to the fact that the amount claimed is a sum calculated by the respondent, rather than by the Independent Expert.

14. At a later stage, the appellant contended that the Report was not final, because it was not signed and also because it contained a clause whereby the Independent Expert reserved the right to review his conclusions in light of any information that might later be provided. However, while Mr. Stafford remained amenable to reviewing his report, it is clear that he considered it to be final at the time of issue, and saw no reason to adjust it thereafter. In a letter sent by email to the appellant dated 11th March 2019, he stated:

> "I have carefully reviewed your letter [of 6th March 2019] and it does not contain any new information that would require me to adjust my report."

He then goes on to explain why he considered that the appellant spent too much time attempting to reconcile the accounts of the companies, when it was clear this was going to be a fruitless exercise.

Judgment of the High Court

15. In his decision, O'Connor J. set out briefly the background to the dispute and the relevant clauses of the Agreement. O'Connor J. identified the three objections relied upon by the appellant in the court below in resisting the application of the respondent for judgment. These were:

> "(a) the expert did not do what he was asked to do;

(b) the expert did not consider the books and records and the affidavit [of Mr. Lennon] that he should have done; and

(c) the report is not conclusive as the expert has made it clear that he needs to consider the matter further (email of 21st March 2019 [from Mr. Stafford to Mr. Luby which was copied to each of the solicitors involved]).”

16. O’Connor J. found that para. 1(d), which he said is the most controversial clause, is clear. Moreover, he found that the Independent Expert determined the issue that he was required to determine by para. 1(d) of the Agreement.

17. Having referred to the voluminous correspondence exchanged subsequent to the delivery of the report, in particular in relation to the allegations of the appellant that the Independent Expert was not provided with all of the documentation referred to in the schedule to the Agreement, O’Connor J. noted that the Agreement does not require the respondent or his solicitors to deliver papers generated by the appellant. He found that it was clear that the Independent Expert had knowledge of how the companies worked and that he was free to ask for whatever documentation he felt was required for his task. O’Connor J. noted that the Independent Expert stated that: “*it can be a pointless exercise attempting to reconcile the irreconcilable*”.

18. O’Connor J. also referred to a letter of 6th March 2019 sent by the appellant to the Independent Expert. In this letter, which O’Connor J. described as being a “five page tightly typed letter”, the appellant identifies documents that he says should have been given to the Independent Expert and explains why he considers this to be so. In the letter, the appellant expresses particular concern over the failure of the Report to include a review of his working papers, because this denied the Independent Expert the opportunity to review contemporaneous workings, as a result of which the Independent Expert was required to make assumptions based on his own experience of insolvency work. The appellant sets out

the difficulties that he encountered following his appointment as liquidator, in establishing the financial position of the companies. The appellant concludes this letter by saying that he is extremely concerned that the Report does not reflect the true nature of the work necessarily undertaken by the appellant to satisfy his obligations as liquidator, and he asked the Independent Expert to reconsider his approach to the matter.

19. O'Connor J. then noted that the Independent Expert replied to the appellant's letter of 6th March 2019, by email of 11th March 2019 stating that he had carefully reviewed the appellant's letter, and that it did not contain any new information that would require him to adjust the Report.

20. O'Connor J. concluded that while the Independent Expert had indicated a willingness to look at matters afresh, that would require a new agreement between the parties. In the concluding passage of his *ex tempore* judgment, O'Connor J. stated:

> "Mr. Lennon was advised upon and contributed to the 2017 agreement. He may not like the result but that was a genuine effort to adopt an Alternative Dispute Resolution approach which the Court will not interfere with lightly. Mr. Lennon agreed to that approach. Mr. Stafford's reputation and integrity have not been challenged and for all these reasons, Mr. Luby is entitled to orders which the Court will hear counsel now in order to be as specific as possible."

Notice of appeal and submissions of appellant

21. In his notice of appeal, the appellant asks this Court to set aside the order of the High Court on grounds which may be summarised as follows:

1) The trial judge did not apply the correct principles when addressing a challenge to an expert's determination;
2) The trial judge erred in failing to determine that the Independent Expert had not answered the questions he was required to answer and/or had departed from the

instructions given to him in a material way. In particular, he misunderstood the fourth question;

3) The trial judge erred in law and/or fact in determining that the Independent Expert had answered the fourth question;

4) The trial judge failed to attach any or sufficient weight to the failure of the respondent, in breach of the agreement between the parties, to provide all material documentation to the Independent Expert;

5) There are a number of grounds of objection based on the alleged inadequacy of the documentation provided by the respondent to the Independent Expert, and the failure on the part of the trial judge to have regard to the willingness on the part of the Independent Expert to review further documentation (after delivery of the Report);

6) The trial judge erred in fact and/or in law when he determined that the request made by the appellant to the Independent Expert, to review documentation (which the appellant claimed was omitted and should have been sent to the Independent Expert), amounted to a request for "a new agreement".

22. In his written submissions to the Court, the appellant submits that the Independent Expert did not answer the question that he was required to answer. In particular, he submits that question (d) contains a conditional statement which, if satisfied, required the Independent Expert to set out the total fees applicable to the liquidations, having regard to the fact that the companies were likely to be insolvent and turned out to be insolvent.

23. Since the conditional element was satisfied by reference to the response of the Independent Expert to question (b), the Independent Expert should have given full details of all fees payable to the appellant in the liquidation, and not just the fees payable in respect of the VAT re-calculations. In failing to address all work undertaken by the appellant, it is

submitted that the Independent Expert did not carry out the work required of him by the Agreement.

24. Nor does the Report contain a determination for the purposes of clause 5 of the Agreement. Furthermore, it is contended that not all documents necessary for his task were provided to the Independent Expert, and were not therefore reviewed by him.

25. The appellant further submits that the calculation made by the respondent of the amount allegedly due to be repaid by the appellant to the respondent has at no time been affirmed by the Independent Expert, and that the calculation is a speculative interpretation of the Report.

26. The appellant relies upon the decision of the High Court in the case of *James O'Mahony v. Patrick O'Connor Builders (Waterford) Limited & Ors* [2005] 3 I.R. 167 and in particular the following passage from the judgment of Clarke J. (as he then was):

> "There is no doubt that there is ample authority for the proposition that where parties agree to be bound by the report of an expert, such report cannot be challenged in the courts on the ground that mistakes have been made in its preparation unless it can be shown that the expert had departed from the instructions given to him in a material respect."

27. The appellant submits that the Independent Expert has so departed from the instructions given to him in failing to reach a determination pursuant to clause 5 of the Agreement and in failing to investigate the actual work carried out by the appellant. He also claims that the Independent Expert failed to investigate the amounts paid out by the companies in liquidation to the appellant, and did not therefore arrive at any conclusion as to the amount, if any, to be repaid by the appellant.

28. In his submissions to the Court, the solicitor for the appellant submitted that it is clear from the authorities including the recent decision of the Supreme Court in *Dunnes Stores v.*

McCann [2020] IESC 1, which affirms the decision of Clarke J. in *O'Mahony* that, while in general terms an expert's determination is beyond challenge in the courts, nonetheless the courts must quash such a determination where it is established that the expert has fallen into error. In this case, it is submitted that the Independent Expert fell into error in failing to answer specifically the fourth question posed to him in the Agreement. While the Independent Expert did assess the value of the work the appellant had undertaken in terms of the VAT re-calculation, he did not consider what would amount to a reasonable fee payable to the appellant for all of the work undertaken by him in the liquidations of both companies. This, it was submitted, was a fatal flaw which must result in the quashing of the Report and the setting aside of the judgment against the appellant.

29. While the appellant was not expressly asking the Court to refer the matter to plenary hearing, he agreed the Court could do so if it considered it appropriate to quash the Report and set aside the judgment against the appellant. Having regard to all of the above, and the decision of this Court in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 in which the principles applicable to summary judgment were summarised by McKechnie J., in the High Court, the appellant argues that it cannot be said that the appellant has no defence to the summary proceedings issued against him.

Submissions of the respondent

30. In simple terms, the respondent submits that the Independent Expert has addressed and answered all the questions required by the Agreement. There is no dispute between the parties as to the amount of the fees drawn by the appellant in the liquidations of the companies. The appellant himself acknowledges the remuneration that he received in an affidavit sworn by him in these proceedings on 22nd February 2019, and these are the same fees referred to by the respondent in his grounding affidavit whereby he applied for summary judgment as against the appellant.

31. Accordingly, it is the respondent's submission that when the fees which the Independent Expert has identified as being reasonably payable to the appellant for his work done in the liquidations of the companies, are deducted from the amount actually drawn down by the appellant, that gives rise to the amounts payable by the appellant to the respondent in each liquidation, and these are the same amounts in respect of which judgment was granted by O'Connor J. i.e. €122,126.21 in the case of Beauty, and €31,677.42 in the case of Hairspray – a total sum of €153,803.63.

32. In relation to the submission of the appellant that the respondent did not do what was required of him by question (d) of the Agreement, the respondent submits that, having determined that it was proper for the appellant to undertake the task of re-calculating the VAT liabilities of the companies, the Independent Expert did then proceed to determine the level of fee that would reasonably be charged by a liquidator (for that task) having regard to the fact that the companies were likely to be insolvent, and transpired to be insolvent. This, it is submitted, required an objective assessment, but it did not require the Independent Expert to carry out a thorough review of each document reviewed by the appellant or generated in the liquidations. The respondent places reliance on the observation of the Independent Expert that:

> "When a liquidator determines that proper books and records have not been maintained, it can be a pointless exercise attempting to reconcile the irreconcilable."

33. The respondent submits that when the fees for the work necessarily undertaken in relation to the VAT recalculation are added to the fees suggested by the Independent Expert in answer to question 1(a), the resulting sums are the fees recommended by the Independent Expert in the liquidations as a whole.

34. The respondent further submits that the trial judge was correct in finding that the appellant's complaints in respect of the information reviewed by the Independent Expert, in

the words of O'Connor J.: "fail(s) to acknowledge that the 2017 agreement does not require Mr. Luby or his solicitors to deliver papers generated by Mr. Lennon. … Mr. Stafford could have, if he required, requested copies, even though it might by argued that he did not know that they existed. It is clear that Mr. Stafford had knowledge of how the companies worked."

35. As regards the interpretation of the Agreement, the respondent relies upon the decision of the Supreme Court in *Jackie Greene Construction Limited v. Irish Bank Resolution Corporation Limited (In Special Liquidation)* [2019] IESC 2 in which case the Supreme Court accepted that the interpretation of settlement agreements does not differ from the law generally relating to the interpretation of contracts. In that case, having reviewed earlier authorities, Clarke CJ. stated at para. 5.4:

> "As is clear from those authorities, it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal arrangement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in the light of the context in which the language is used."

36. In this case, the respondent submits that the Agreement is abundantly clear in relation to the tasks assigned to the Independent Expert, and that in the Report he addressed all of the issues required to be addressed by him pursuant to the Agreement.

37. Insofar as the appellant urged the Independent Expert to carry out a full review of all papers considered by and generated by the appellant in the course of the liquidation of the companies by him, it is submitted that this was not the task agreed between the parties as recorded in the Agreement. Moreover, there would have been little benefit to the creditors in such an exercise, having regard to the costs of same.

38. Finally, the respondent submits that it is clear that the appellant has no defence to the claim, having agreed to the assessment by the Independent Expert of the level of fees that would reasonably be charged by a liquidator in the circumstances. Moreover, he agreed to consent to summary judgment in the Agreement in the event that he failed to repay the amount due following the assessment by the Independent Expert, within the time provided for by the Agreement.

Discussion and decision

39. Although the objections of the appellant based around the alleged insufficiency of documentation provided to and considered by the Independent Expert were not pursued at the hearing of this appeal, I think it appropriate to address this objection, in light of the fact that it is raised by the appellant in his grounds of appeal and also in his written submissions, and also because it was the subject of such a considerable volume of correspondence between the parties and the Independent Expert, following upon the delivery of the Report. Having carefully reviewed this correspondence, it is not immediately apparent to me that the documentation which the Agreement contemplates was to be made available to the Independent Expert, was not in fact made available to him; in fact, the contrary appears to be the case. Clause 2 of the Agreement provides that the Independent Expert shall have access to the documentation listed in the schedule attached to the Agreement. Eleven categories of documentation are identified in the Agreement. It appears from the correspondence that there were some 32 boxes of documentation involved. It also appears from the correspondence that the solicitors for the respondent purported to send all of the documentation to the Independent Expert in a letter sent to him dated 11th January 2018. However, it seems that the documents were not in fact sent with that letter, but merely a schedule identifying the documents contained therein. In an email of 26th February 2018, sent by the Independent Expert to the solicitors for the respondent, and copied to the

solicitors for the appellant, the Independent Expert stated that he was not going to review all 32 boxes, but that he did need to examine some of them in order to determine what "raw" data was available to the appellant in carrying out his investigations. He asked for delivery of seven specific boxes.

40. The appellant expressed concern that his working papers were not delivered for examination by the Independent Expert. However, according to the solicitors for the respondent, one of the seven boxes delivered did in fact contain original working files of the appellant, although it must be said that it is clear that that one box contained just a fraction of all of his working papers. It is also clear, however, that the Independent Expert was provided with the appellant's time records in connection with the liquidations.

41. The appellant also expressed concern that a comprehensive affidavit which he swore on 25th January 2018, and which was expressly identified at clause 3 of the Agreement, was not delivered to the Independent Expert as contemplated by the Agreement. However, the respondent says in reply to this complaint that this was a matter for the appellant himself. Moreover, the affidavit was provided to the Independent Expert after delivery of the Report and he stated that he saw no reason to adjust his report in the light of the same.

42. The appellant also raised complaints about the failure to provide the Independent Expert with certain emails which he said he had previously provided to the respondent, when the respondent was appointed liquidator in 2014. There appears to be some dispute about whether or not the appellant ever in fact provided these emails to the respondent. In any case however, he was given an opportunity to provide them to the Independent Expert after delivery of the Report (and the Independent Expert expressed a willingness to consider the same), but this never occurred. The last letter in relation to the possibility of the Independent Expert reviewing further documentation is a letter of 17th May 2019 from the appellant to the Independent Expert. The appellant concludes this letter in the following terms:

> "When, earlier this year, it became apparent that the papers would not be forthcoming, I wrote directly to you and set out my specific concerns and asked you to carry out a full review based on an examination of all the paper records contained in the 32 boxes in the custody of Mr. Luby and for the purpose of producing a report that took account of the actual work needed to carry out the assignments, which you have already confirmed that I was mandated to do.
>
> In summary, I would once again confirm that I am quite happy to pay for the additional costs you incur in carrying out a full review of the papers for the purposes of providing a revised report that takes into account all of the specific difficulties that I encountered following my appointment as liquidator of both companies."

43. As is apparent from the above, the Independent Expert had previously determined, at the beginning of his assignment, that he did not wish to review all 32 boxes of documentation. He considered that this would be a wasteful exercise. This is clearly a matter at the discretion of the Independent Expert, and indeed it is precisely the kind of judgment that one expects an independent expert to undertake in the discharge of whatever tasks are assigned to him/her. It is equally clear from this extract from the correspondence, as indeed it is from other letters sent by the appellant to the Independent Expert, that at the heart of his grievance lies his belief that the manner in which the Independent Expert undertook his task was inadequate, and a much more detailed review of the documentation was required.

44. I am satisfied from my review of the correspondence that the Independent Expert had available to him the vast bulk of, if not all of, the documentation contemplated by the Agreement. Furthermore, subsequent to the issue of the Report, the Independent Expert was provided with the affidavit of the appellant of 25th January 2018 and also considered other very detailed correspondence from the appellant, in particular the appellant's letter of 6th

March 2019. Notwithstanding all of this, the Independent Expert stated that he did not see any necessity to adjust his report, but he remained open to considering further documentation. That was left in the hands of the appellant, who did not provide any further documentation.

45. Furthermore, the Agreement expressly dealt with the documentation to be made available to the Independent Expert. The appellant, himself an experienced insolvency practitioner, had the benefit of legal advice at that time that he entered into the Agreement. The Agreement identified documentation that would be made available to the Independent Expert, but left it to him to decide the materials which he considered necessary for his task. Having agreed to proceed in this manner, it is not open to the appellant afterwards to complain that the Independent Expert did not receive and consider **all** documentation considered relevant by the appellant, as well as all documentation generated in the course of the liquidations. Moreover, it is not difficult to understand why, as was submitted on behalf of the respondent, this would be wasteful having regard to the very large volume of documentation involved.

46. If the appellant had an objection to this approach, he could have raised this objection when, following upon the issue of a letter of 28th February 2018 from the Independent Expert to the solicitors for the respondent in which the Independent Expert requested certain documentation, which was copied to the solicitors for the appellant. In that letter he also stated that he would not be reviewing all documentation generated in the liquidation. The appellant did not raise any objection to this approach, at that time. It is hardly insignificant that the objection that he has raised under this heading was not raised until after the issue of the Report by the Independent Expert.

47. For all of these reasons, I consider that the appellant was correct not to pursue, at the hearing of this appeal, his objections grounded upon the sufficiency or insufficiency of

documentation provided to the Independent Expert. Had he done so, the argument would have been rejected. Instead, the appellant correctly focused upon his other principal ground of appeal which in substance is that the Independent Expert failed to answer the question posed in para. 1(d) of the Agreement, and instead answered a question that he was not asked i.e. the Independent Expert opined as to a reasonable fee for the VAT re-calculation work undertaken by the appellant instead of expressing an opinion on a reasonable fee for all of the work undertaken by the appellant in the liquidation of the companies. This, it is submitted, was a fatal error on the part of the Independent Expert, as a consequence of which the Report must be quashed by this Court. In failing to do so, it is submitted, O'Connor J. fell into error.

48. Before considering that issue, it is appropriate firstly to address the legal principles applicable to expert determinations, as to which the parties are in substantial agreement. In general terms, the parties accept that the courts are very slow to interfere with the decision of an expert appointed by the parties to resolve a dispute, unless the expert has acted outside the jurisdiction conferred by the reference. As Dunne J. said at para. 60 of her decision in *Dunnes Stores v. McCann*:

> "It is important to emphasise that in every case, it will be necessary to construe the precise terms of the contract to see what the parties actually agreed between them as to the role of the expert. Thus, one needs to consider precisely what disputes were intended to be referred to the expert, whether the dispute that has arisen is one that is intended to be resolved by expert determination and whether there is any other relevant term in the contract as to how the expert is to reach his determination. It is important to bear in mind that if the expert goes outside the terms of his mandate, his decision will be invalid."

49. In this case, there is no disagreement between the parties as to the dispute that was referred to the expert. The expert was required to consider whether certain categories of work referred to in clause 1 of the Agreement should properly have been undertaken by the appellant at all, and he was also asked to express an opinion on the fees reasonably chargeable for the matters referred to in paras. 1 (a) and 1 (d) of the Agreement. However, there is disagreement as to the interpretation of para. 1 (d) to the extent that, in the submission of the appellant, the Independent Expert should have determined a fee for all work actually undertaken by the appellant in the course of the liquidations of the companies, having arrived at a conclusion that it was reasonable for the appellant to have undertaken the categories of work described in paras. 1 (b) and 1 (c) of the Agreement (subject to the qualification that the companies were likely to be and proved to be insolvent). In not doing so, the appellant says, the Independent Expert fell into error.

50. Although the respondent denies that the Independent Expert has failed to determine any sum as being repayable for the purposes of clause 5 of the Agreement, it is a fact that nowhere in the Report is it stated that the appellant shall pay to the respondent any sum at all. That this is so is almost certainly due to a lacuna in the Agreement, because nowhere in the Agreement is it expressly stated that the Independent Expert shall determine the amount repayable by the appellant to the respondent in the event that he considers the fees charged by the appellant in connection with the liquidations of the companies to be excessive.

51. However, there can scarcely be any doubt that that was the whole purpose of the Agreement. The respondent contended that the appellant had overcharged for his services, and, when agreement could not be reached in this regard, he issued proceedings to recover the amount overpaid. The purpose of the Agreement was to have the Independent Expert assess whether or not the fees charged were excessive, and if so by what amount. The Report does not specifically identify the amount by which the fees charged were, in the view of the

Independent Expert, excessive, and nor does it is refer to the amount of the fees actually charged and received by the appellant. However, it is possible to extrapolate these figures, without any difficulty, by reference to the sums which the appellant himself acknowledged that he received in his affidavit of February 2019 and the conclusions of the Independent Expert as recorded in the Report.

52. That said, the exercise is not without some complications. Firstly, in para. 7(i) of the Report the Independent Expert provides a range of fees, between €10,000 to €15,000 plus VAT in connection with the liquidation of each of Beauty and Hairspray. This is on the assumption that the liquidator quickly determined that the companies were insolvent and that he had carried out no VAT re-calculation work. To the extent that any uncertainty is created in his indicating a range of fees rather than a specific fee, this uncertainty was removed by the respondent allowing to the appellant the maximum fee in that range, i.e. €15,000 in respect of each liquidation.

53. The second complication arises out of the wording of clause 1 (d) of the Agreement which, it will be recalled, states:

> "If it was necessary for the respondent to carry out the VAT recalculations prior to the conversion to a creditors' voluntary liquidation, the level of fee that would reasonably be charged by the liquidator having regard to the fact that the Companies were likely to be insolvent and transpired to be insolvent."

As stated above, the appellant argues that this clause required the Independent Expert to stipulate a fee for all of the work required in each liquidation, including VAT re-calculations, and not just an appropriate fee for the work associated with the VAT re-calculation, as appears (in answer to this question) at para. 7(iv) of the Report.

54. This difficulty of interpretation only arises if the answer provided by the Independent Expert at para. 7(iv) of the Report is taken in isolation. So therefore, at para. 7(i) of the

Report, the Independent Expert provides an assessment of fees that might reasonably have been charged in *these* liquidations, excluding VAT re-calculation work. This is obvious from the wording used in para. 7(i) of the Report as follows:

> "In these two cases, if the liquidator had quickly determined that the Companies were insolvent and had carried out no VAT recalculation work, my view is that the Companies could have been converted into creditors' voluntary liquidations for a fee in the region of €10,000 to €15,000 plus VAT each. However, for reasons set out below, it was necessary for Mr. Lennon to have carried out the 'VAT recalculations'."

55. In answer to question 1(a), the Independent Expert arrived at a conclusion in relation to what is a reasonable fee for each liquidation, excluding the VAT re-calculation work, having formed the conclusions that he did in the following paragraphs of the Report. This included a conclusion that it was reasonable for the appellant to have carried out the tasks that he did, prior to the conversion of each liquidation to a creditors' voluntary liquidation. Importantly, however, the suggested fee of between €10,000 to €15,000 for each liquidation was based on the proposition that the appellant should have quickly determined that the companies were insolvent, a proposition that is not denied by the appellant. It is clear from the Report and indeed the correspondence subsequently exchanged between the parties and the Independent Expert, that once a liquidator has established that a company is insolvent, he has to be careful as regards the extent of the work undertaken in the liquidation, so that the work done does not unnecessarily reduce the funds available for distribution to creditors.

56. In para. 7(iv) of the Report, the Independent Expert then addresses the quantum of fees that he considers should reasonably have been charged in connection with the VAT re-calculation. He expresses a view as to the number of hours that should have been spent at this task, and calculates the fees that in his opinion should reasonably have been charged by reference to the number of hours reasonably required for the work in all of the circumstances.

57. Accordingly, while it is true to say that the Report does not specify the quantum of fees reasonably chargeable by the appellant for his work done in the liquidations, this can easily be calculated by adding the sums provided by the Independent Expert in his answers to questions 1(a) and 1(d) of the Agreement, provided that the appellant is given the benefit of the maximum sum in the range provided by the Independent Expert in answer to question 1(a), and this the respondent has done.

58. While it is also true to say that the Independent Expert has not stated in the Report any amount to be repaid by the appellant to the respondent, this too can be easily calculated by a process of simple mathematics. Having identified the fees reasonably chargeable by the appellant in the liquidations in accordance with the Report (as described above), it is possible, by reference to the fees which the appellant himself has acknowledged that he charged and received, to calculate the extent of overpayment of fees. While the appellant takes issue with the fact that the Report does not specify the amount to be paid by him to the respondent, he does not take any issue with the manner of calculation of the amount claimed based on the fees determined by the Independent Expert. It is clear that his real grievance is with the quantum of fees which the Independent Expert determined as being reasonable for the work done.

59. While the mechanics of all of this may not be perfect, and while it would have been desirable that the Agreement expressly asked the Independent Expert to identify the amount to be repaid by the appellant, it would in my opinion by absurd to quash the Report and/or to make an order referring the proceedings to plenary hearing on the basis that the Independent Expert had not reached any conclusion on the matters referred to him, or that he had acted outside of jurisdiction. He clearly did address and reach conclusions on the matters referred to him, and while he did not add up the fees that he felt were reasonably chargeable by the appellant, and while he did not calculate and state the amount to be paid

by way of refund from the appellant to the respondent, nonetheless, this amount was readily calculable once the Independent Expert had identified the tasks reasonably undertaken by the appellant, and an appropriate fee for that work.

60. Finally, the appellant also raised an objection to the effect that the Report has not been signed by the Independent Expert and is not final. In regard to the latter point, the appellant places some reliance on a statement in the Report on the part of the Independent Expert in the following terms:

> "I believe the factual nature of my report to be accurate. However, I retain the right to adjust my report in respect of any further or conflicting information which may subsequently become available."

61. Insofar as this may suggest that the Report is in some way conditional, the Independent Expert himself, in an email of 11th March 2019 addressed to the appellant (and copied to the respondent), which was sent in reply to a lengthy letter sent by the appellant, stated that:

> "I have carefully reviewed your letter and it does not contain any new information that would require me to adjust my report."

62. It could hardly be more clear that the Report is indeed final, and the fact that it has not been signed by the Independent Expert is of no significance, in circumstances where he clearly issued the Report to the parties, issued an invoice and received payment for the same, from the respondent at least (the papers are unclear as to whether the appellant paid his share of the costs of the Report, but I note that the judgment of the High Court refers, at para. 10 thereof, to "payment of Mr. Stafford's fees and the release of his report"). While the Independent Expert reserved to himself the entitlement to review the Report in the light of any information that might come to light at a later stage, and while he expressed a willingness to review further materials that the appellant wished him to review, the appellant did not

pursue that course. The Report therefore stands as issued, and indeed the Independent Expert said as much in his email to the appellant of 11th March 2019.

Conclusion

63. I am of the view that the Independent Expert has, in the Report, identified the fees that should reasonably have been charged by the appellant in respect of the work undertaken by him in the liquidations of both companies. Furthermore, it is clear that any ambiguity in his report has been resolved in favour of the appellant. That being the case, it is a simple exercise to identify the extent of overpayment of fees, and the balance which should be repaid by the appellant to the respondent. That is the balance now sought by the respondent in the motion dated 19th December 2018, and in respect of which judgment was given by O'Connor J. In the Agreement the appellant consented to judgment if the amount payable by him pursuant to the Agreement was not paid within 60 days of the date of the expert determination. Against all of that background, I consider that the appellant has no defence in these proceedings, and this appeal should be dismissed.

64. Finally, by way of general observation, the process of expert determination has been described as a "simple, informal, cost effective, confidential and final form of dispute resolution". This was referred to by Hogan J. in the Court of Appeal in his decision of *Dunnes v. McCann* [2018] IECA 238 which is quoted by Dunne J. at para. 22 of her judgment in the same proceedings in the Supreme Court. Hogan J. also referred to the procedure as being slightly "rough and ready" in character. The statement of the Independent Expert to the effect that he reserved the right to review his report in light of further information should be seen in view of those descriptions of the process. It would have been better if he had not made that observation, because his task was to deliver a final determination, and to do so without opening up the possibility of further discussion and submissions, or casting doubt

upon the finality of his report. Be that as it may, his email of 11th March 2019 brings finality to the issue, if it were needed.

65. Similarly, to the extent that clause 1(d) of the Agreement was ambiguous, and that the Agreement did not expressly require the Independent Expert to state a sum to be repaid by the appellant to each company, as clearly envisaged by clause 5 of the Agreement, that does not undermine or effect the conclusions of the Report, in circumstances where (a) the task assigned to the Independent Expert was clear, (b) he discharged that task within jurisdiction and (c) the amount to be repaid by the appellant to the respondent is readily ascertainable from the conclusions in the Report as to the fees reasonably payable to the appellant for his work in the liquidations of the companies.

66. As regards costs, the appeal has failed, and subject to consideration of any submissions the appellant may wish to make within fourteen days from the date hereof, the appropriate order is that costs should follow the event, and that the respondent, having been entirely successful in this appeal shall be entitled to recover from the appellant the costs incurred by him both in this appeal, and in the court below, when taxed and ascertained.

67. Since this decision is being delivered electronically, Haughton and Murray JJ. have authorised me to record their agreement with the terms of this judgment.