[2019] IEHC 50

THE HIGH COURT

[2010 No. 196 COS]

IN THE MATTER OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF LANCE INVESTMENTS LIMITED (IN LIQUIDATION) AND LANCE HOMES LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION OF CARL DILLON (LIQUIDATOR)

THE HIGH COURT ON CIRCUIT

[2017 No. 245 CA]

IN THE MATTER OF THE MULTI UNIT DEVELOPMENT ACT, 2011

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN/

LEE TOWERS MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

LANCE INVESTMENTS LIMITED (IN LIQUIDATION), LANCE HOMES LIMITED (IN LIQUIDATION), AND IRISH IMMIGRATION FUND LIMITED

DEFENDANTS

NO. 2

JUDGMENT of Ms. Justice Baker delivered on the 1st day of February, 2019

1. This is my ruling on the costs of the application for directions brought by the liquidator of Lance Investments Limited and Lance Homes Limited ("the Companies") pursuant to s. 631 of the Companies Act 2014 (the Companies Act) and the appeal from an interim Mareva injunction made by the Circuit Court against the Companies and the liquidator on 26 July 2017.

2. I delivered judgment on 19 July 2018, *In re Lance Homes Ltd. (No. 1)* [2018] IEHC 444, in the application pursuant to s. 631 of the Companies Act and the logical consequence of that judgment was that the appeal from a Mareva injunction had to be allowed.

3. The application for directions by the liquidator raised a somewhat difficult question for determination which I considered White J., in *In re Bohergar Developments Ltd* [2014] IEHC 136, did not answer. The question essentially related to the interplay between the Multi-Unit Development Act 2011 ("the MUD Act") and the provisions of the Companies Act, in particular s. 617, which deals with the costs, charges, and expenses in the liquidation, whether the provisions of the MUD Act had the legal effect of displacing the scheme of priorities for which the Companies Act provides. The conclusion of my judgment was that the MUD Act did not displace the scheme of priorities provided in the Companies Act, that the costs ordered to be paid to Lee Towers by the Companies by the Circuit Court in an application under the MUD Act by the management company, Lee Towers Management Company Limited ("Lee Towers"), did not, save for one part thereof, fall to be treated as priority costs, charges, and expenses in the liquidation and that the costs were to be treated to be as unsecured liabilities of the companies.

4. Briefly, the Circuit Court proceedings had sought mandatory orders directing the Companies and the other defendant, Irish Immigration Fund Limited ("IIF") to transfer to Lee Towers the common areas and the reversions on the purchase leases in the relevant part of the development constructed by the Companies in Cork City and in respect of which the development scheme agreements were made in or around January 2001.

5. The Circuit Judge made orders on 5 July 2017 directing the execution of a deed of conveyance of the common areas and reversions but also directing that the companies and would complete the development in accordance with the development agreement and their respective obligations pursuant to the Planning and Development Act 2000, as amended, the Building Control Act 1990, as amended, to the satisfaction of the consulting engineer of the plaintiff. At para. 10 of my principal judgment I referred to those orders as "remedial orders" and broadly speaking, the Circuit Court order directed works on external walls to deal with fire safety requirements, fire separation generally, and other remedial works to remedy defects in the roof, lobbies, and other internal common areas.

6. Judge O'Brien, after giving his judgment in the Circuit Court, awarded the costs of the proceedings against the companies and IIF jointly and severally to be taxed in default of agreement. The costs were taxed by the County Registrar for the County of Cork and affirmed on appeal by Judge Ó Donnabháin. Lee Towers' original Bill of Costs claimed a total of €191,823.34 and these were taxed in the sum of €132,423.96 and affirmed on appeal.

7. The liquidator took no part in the taxation of the costs or in the appeal of the taxation and for present purposes, it is material to note that no order apportioning the costs between the Companies and IIF was made.

Questions to be determined in this ruling

8. The parties agree that the following issues arise for determination at this juncture:

   (i) the costs of the application pursuant to s. 631 of the Companies Act;

   (ii) the costs of the appeal by the liquidator of the Circuit Court Mareva injunction;

   (iii) an order was made by Barrett J. sanctioning Lee Towers to commence the proceedings against the Companies and directing that before any disbursement was made pursuant to any order of the Circuit Court, that application be made to the High Court. The costs of the leave application, therefore, fall now to be considered, as does the measurement and apportionment of these costs, to be deemed to be costs in the liquidation;

   (iv) the measurement of the portion of Circuit Court proceedings to be deemed as costs and expenses in the winding up of the Companies.

9. The costs order of the Circuit Court as taxed is not under appeal but what is in question is the measurement of that part of those costs as may properly be deemed to be the costs and expenses in the liquidation, having regard to my conclusion at paras. 110 *et seq*. of

the principal judgment that part of the costs of the Circuit Court proceedings are to be treated as being entitled to priority, that part as may fairly be attributed to the application for specific performance of the management company agreement by which the Companies were required to divest themselves of the legal title to the reversion and the common areas to Lee Towers.

10. I will deal with each of these questions in turn.

The costs of the application pursuant to s. 631 of the Companies Act

11. The liquidator seeks an order that his costs of bringing the application for directions be treated as costs of the winding up of the Companies. There is no great opposition to the making of that order which I consider ought to be made in the circumstances.

12. Separately, the liquidator seeks an order for costs of the directions application against both Lee Towers and IIF who both, in turn, seek an order for costs against the Companies.

13. Counsel for the liquidator argues that the correct starting point to the consideration of the costs question must be O. 99, r. 1 of the Rules of the Superior Courts ("RSC") which provides as follows:

> "Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
>
> (4) Subject to sub-rule (4A) [interlocutory applications], the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

14. It is argued for that purpose, the application for directions must be seen as akin to an *inter partes* application by which the liquidator sought directions as to whether the order of the Circuit Court requires him to carry out the remedial works and whether the order for costs made by the Circuit Court fell to be treated as a cost or expense in the liquidation within the meaning of s. 613 of the Companies Act.

15. The liquidator was obliged to bring the application, and indeed no further step could have been taken on foot of the order of the Circuit Court without directions of the High Court as a result of the order made by Barrett J. on 17 November 2014.

16. The application for directions was fully contested and the position adopted by Lee Towers was that the remedial orders and the costs order gave Lee Towers the status of preferential or priority creditor and that the Circuit Court costs and the costs of carrying out the remedial works are to be treated as costs, charges, and expenses in the liquidation within the meaning of s. 617 of the Companies Act.

17. Lee Towers was not successful in that argument, save with regard to one aspect of the costs of the Circuit Court case that part thereof may be fairly treated as being attributable to the costs of seeking specific performance of the agreement to make title.

18. Equally, IIF made the argument, essentially in support of Lee Towers, that the remedial works and Circuit Court costs fall to be treated as priority liabilities of the Companies and, in essence, that Lee Towers was not to be treated as an unsecured creditor.

19. In those circumstances, the liquidator argues that he was broadly successful in the main "event" which arose for determination in the application for directions, namely that he succeeded in his argument that Lee Towers was for the most part to be treated as an unsecured creditor. He argues, in those circumstances, that the principles explained by Clarke J. in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 IR 81, are to be applied and that clearly identifiable, separate, and discreet issues arose for consideration, which the liquidator won.

20. Counsel for Lee Towers argues that the principles explained by Clarke J. in *Veolia Water v. Fingal County Council* are not applicable, as the proceedings determined in the High Court were a statutory application by the liquidator and are not to be characterised, therefore, as *inter partes* litigation. He argued, with some logic, that the liquidator ought to have sought directions earlier before the Circuit Court gave its judgment and while that argument has some attraction, having regard to the result of the Circuit Court case, I consider it likely that the liquidator would have had to return to this Court for directions as to the manner in which the Circuit Court order for the carrying out of the remedial works and the Circuit Court costs were to be treated, because of the complexity of the matters in issue and also because of the order of Barrett J.

21. Counsel for Lee Towers argues that the application is more akin to a judicial review than inter partes litigation and that the judgment of Cregan J. in *Eircom Ltd v. Commissioner for Communications Regulation* [2015] IEHC 51, is authority for the general proposition that the court should consider whether it is reasonable for a notice party to seek to be joined in the proceedings, and that Cregan J. considered that the regulatory context with which the application was brought was relevant.

22. Counsel for Lee Towers argues that it fully participated in the hearing and that this was both necessary and justified, and I agree with that observation primarily because the matter in issue was of some legal novelty and it would have been less than satisfactory had the application for directions by the liquidator been heard and determined without the benefit of a counter argument and submissions. However, the judgment of Cregan J. is primarily focused on the role of a notice party as is my judgment in *Doyle v. Private Residential Tenancy Board* [2016] IEHC 36 on which both Lee Towers and IIF rely. The question for consideration in that case as in *Eircom v. ComReg* was whether it was reasonable for a notice party to participate in litigation, but also whether the interests of the notice party were broadly those of the respondent to those proceedings.

23. It seems to me that the question of how the costs of an application for directions are to be treated has been comprehensively determined in the judgment of the Court of Appeal in *In re Ballyrider (in Voluntary Liquidation): Revenue Commissioners v. Fitzpatrick* [2017] IECA 115. That judgment was given supplemental to a judgment in the substantive issue in dispute in relation to orders removing Mr. Fitzpatrick as liquidator of

Ballyrider Ltd. The Court of Appeal dismissed the appeal against the removal of the liquidator pursuant to s. 227 of the Companies Act 1963 but allowed the appeal against consequential orders to pay over monies no longer retained in the liquidation. There, as here, the application brought was by originating notice of motion and Finlay Geoghegan J., giving the judgment of the Court, considered that the application was one to which the provisions of O. 99, r. 1 RSC applied, although I note that neither party submitted that it "did not apply as such". The Court of Appeal rejected the argument made by counsel on behalf of the liquidator that, as a matter of principle, in a successful application to remove a liquidator pursuant to s. 227 of the Companies Act 1963, the starting point for the exercise by the court of its discretion is other than that provided in O. 99, r. 1 RSC. She considered that there was no basis for exempting a liquidator faced with an application to remove him or her from having to take a decision to resist the application. She considered that the liquidator was, in essence, as had been determined by the trial judge, acting in his own interests including his professional reputation as a liquidator.

24. The Court of Appeal considered that the starting point in that type of application was that costs should follow the event but that the court could in its discretion consider all relevant circumstances. Finlay Geoghegan J. considered that the exercise of discretion necessitated a consideration of whether one party had been successful in the application and to take into account the nature of the consequential orders made by the court which was, in her view, a significant one on which the High Court had heard expert evidence.

25. I consider that the judgment of the Court of Appeal in that case is authority for the broad proposition that an application under the precursor of s. 631 of the Companies Act, s. 280 of the Companies Act 1963, is to be treated as litigation in respect of which the court may identify an "event" and the provisions of O. 99, r. 1 RSC provide that, subject to the discretion of the court, the costs should otherwise follow that event.

26. In my view the "event" in the present case was the finding in the principal judgment that the costs of the remedial orders and the costs of the Circuit Court were not to be treated as costs and expenses carrying priority in the liquidation, save with regard to one aspect thereof.

27. I reject the argument made by counsel for Lee Towers and, to a lesser extent, by counsel for IIF, that there were factors in the present case which might warrant a departure from the general provisions of O. 99, r. 1 RSC. While it is the case that the application for directions involved issues of statutory construction concerning the interplay between the MUD Act and the scheme of priorities in a winding up of insolvent companies, the fact that the points had not previously been determined is not, of itself, a reason to treat the application as novel, special, or one that raised unusual features. The position adopted by Lee Towers was one it took reasonably but in its own commercial interest and in furtherance of its application that the Companies carry out works and complete the development. The interests were commercial in a true sense.

28. Counsel for Lee Towers makes the argument that the proceedings were of significant public importance and the Court could take judicial notice of the general fact that there

are many unfinished developments in the country where the developer has become insolvent and is in liquidation and that the question concerning the interplay between the MUD Act and the general scheme of the Companies Act required to be resolved.

29. Reliance is placed on the principles explained in *Collins v. Minister for Finance* [2014] IEHC 79 and *T. v. Ireland* [1995] 1 IR 321, and the principle explained by Clarke J. in *Cork County Council v. Shackleton* [2007] IEHC 334, at p. 7, that:

> "4.2 Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.
>
> 4.3 However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority."

30. He does not go so far as to argue that the liquidator is a public authority, but rather that the liquidator raised matters of considerable public importance and that that element of public importance displaced the rule that costs follow the event.

31. I am not persuaded by the argument of counsel that, albeit that the application for directions raised matters of some legal novelty, the case could properly be described as a test case primarily because it seems to me that Lee Towers and IIF did have personal interests to advance in the application. I accept that it was reasonable for Lee Towers to engage in the litigation, but it did so taking all of the risks that any litigant takes, as did the liquidator in *In re Ballyrider*.

32. In those circumstances, it seems to me there was an "event" in which the liquidator primarily succeeded, albeit the liquidator did not persuade me that all of the costs of the Circuit Court proceedings ought not to be without priority. In those circumstances, it seems to me that on this question the answer must be that the liquidator is entitled to its costs against Lee Towers and against IIF, but to take account of the fact that Lee Towers was partly successful, the liquidator should be entitled to 80% of his costs against Lee Towers. That calculation is made on the basis that while it is true to say that Lee Towers did succeed in one of the "events" before the High Court, the specific performance action was the least troublesome or least difficult aspect of the matter and throughout the hearing in the High Court, Lee Towers persisted in its argument, in which it did not succeed, that the MUD Act had a wholly retrospect effect and imposed an obligation on a liquidator to ensure completion of a development partially completed prior to liquidation, and that the mandatory orders granted by Cork Circuit Court displaced the statutory scheme of priorities.

The cost of the appeal of the Circuit Court Mareva injunction

33. I accept what is argued by counsel for Lee Towers that the appeal of the Mareva injunction did not fall to be directly considered by me in the course of the hearing of the primary motion under s. 631 of the Companies Act. It is, however, clear from the conclusions I came to that the Mareva order and the application for sequestration and attachment brought before Judge O'Brien in the Circuit Court were not properly constituted having regard to the order of Barrett J. on 17 November 2014, which had the effect that execution of any judgment by Lee Towers was to be stayed pending further order of the High Court. In those circumstances, a Mareva injunction and an application for sequestration and attachment was not appropriate and, to that extent, the liquidator succeeded in his appeal, albeit the appeal did not have to be specifically argued in the light of my general view as to the legal effect of the order of Barrett J.

34. In those circumstances, having regard to the fact that the hearing of the appeal took up no time or additional resources, it seems to me that the correct order is to make no order as to costs on the appeal and to vacate the order for the Mareva injunction and any order for costs made by Judge O'Brien.

The costs of the leave application

35. Barrett J. granted leave to commence the Circuit Court proceedings on 17 November 2014. Having regard to my conclusions in the principal judgment, proceedings to compel the Companies to assure the title to the reversion and common areas were justified, I consider that the costs of the leave application should be deemed to be a cost and expense in the liquidation. It may, at first glance, appear that the appropriate order is to award Lee Towers part of those costs, but it seems to me that the costs of the leave application would have been broadly the same had the application been one to commence proceedings for specific performance *simpliciter*.

The measurement and apportionment of the Circuit Court costs

36. This question raises a matter of principle and a practical question. The question to be determined is the *quantum* or measurement of the costs as may reasonably be attributable to the costs of prosecuting the claim for specific performance of the management company agreement for the transfer of the common areas and reversions as provided in para. 119 of the principal judgment.

37. Messrs. Behan and Associates, legal costs accountants on behalf of the liquidator, propose a solicitor's professional fee of €6,000, €2,500 for counsel and €400 outlay. Noel Roarty, legal costs accountants for Lee Towers, propose an instruction figure of €27,750, €11,070 for counsel, and €1,776 outlay. Hughes Flynn, legal costs accountants for IIF, propose an instruction figure of €28,300, €11,00 for counsel and €3,000 outlay. All the figures are exclusive of VAT, which is payable.

38. The difference in figures is quite marked and the question for me is how the costs of what I might term a "straightforward" application for specific performance under the MUD Act are to be measured.

39. I accept the argument of counsel for the liquidator that the authorities support the proposition that the costs are to be measured with a degree of close scrutiny, and that

the court is not to "rubber stamp" a figure (*per* Kelly J. in *In re Missford Ltd* [2010] IEHC 240, [2010] 3 IR 756, at p. 4) and that the exercise requires that the court determine the value of the work done and the reasonable remuneration to be allowed having regard to "the nature of the work carried out, the complexity of the work and the importance of value of the work to the client", *per* Finlay Geoghegan J. in *In re Sharmane Ltd* [2009] IEHC 377, [2009] 4 IR 285, at para. 36.

40. In the circumstances, and because the action for specific performance of the agreement to assure the common areas and the reversions involved a degree of legal and factual complexity, and because there is relatively little assistance in the authorities regarding the operation of the MUD Act, I am satisfied that the instruction fee and counsel's fee as proposed by Behan is too light.

41. Accordingly, I propose the following measurement: instruction fee €11,000, counsel €4,500, outlay €1,000, motion fee for junior counsel not otherwise engaged with the litigation €250. All figures to be subject to VAT.

42. It is true that the maps of the common areas raised a question of some complexity in respect of which Messrs. Behan is prepared to allow the figure of €1,500 plus VAT. Messrs. Roarty do not provide a separate figure for this, but €1,600 plus VAT is proposed by Messrs. Hughes Flynn. I propose a figure of €2000, plus VAT in respect of mapping.

43. Because of the view taken in the principal judgement that the only relevant costs to be measured are those of the action for specific performance *simpliciter* and not those in respect of the works of repair, I do not consider that the fees of engineering experts are to be allowed.