[2020] IEHC 366

THE HIGH COURT

[No. 2018/279 COS]

IN THE MATTER OF DOMINAR GROUP LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 638 OF THE COMPANIES ACT, 2014

BETWEEN

PRINT AND DISPLAY LIMITED

APPLICANT

AND

LIAM DOWDALL

RESPONDENT

AND

MICHAEL CURNEEN

NOTICE PARTY

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 24th day of July, 2020

1. On 8th May, 2020, I delivered a judgment on the applicant's motion seeking an order pursuant to s.638 (1) (b) of the Companies Act, 2014 for the removal of the respondent as liquidator of Dominar Group Ltd (in voluntary liquidation) ("the Company"). In that judgment, which should be read in conjunction with this judgment, and which is cited at [2020] IEHC 208 and was delivered electronically, I refused the application, and invited submissions from the parties as to the orders to be made, particularly in relation to the issue of costs.

2. In the event, both sides made detailed written submissions, with the respondent proffering supplemental submissions in response to the submissions of the applicant. The submissions related entirely to the issue of costs, and whether a stay should be placed on any order made.

3. The respondent, having had the application determined in his favour, submits that costs should follow the event, but in considering whether to depart from this fundamental principle, the court is required to consider "whether the requirements of justice indicate that the general rule should be displaced" [*Fyffes Plc v. DCC* Plc [2009] 2 I.R. 417 at p.679]. The respondent refers to the non-exhaustive criteria in s. 169 of the Legal Services Regulation Act, 2015 to be considered by the court in determining whether to depart from the rule.

4. The respondent submits that the judgment of the court "represents a wholesale rejection by the court of the fundamental basis for the applicant's claim" [para. 3.11 written submissions], and that "it is clear that the applicant's claim was fundamentally misconceived" [para. 3.12]. It is submitted that the applicant bears the onus of demonstrating that there are grounds to depart from the rule that costs follow the event, and that there are no such grounds, having regard to the factors set out at section 169 of the Legal Services Regulation Act, 2015, and that there has been nothing in the conduct of the liquidator "either prior to or in the course of proceedings which would warrant fixing him with the costs of this failed attempt to remove him from office" [para. 4.1 submissions].

5. The applicant relies heavily on the decision of Clarke J. (as he then was) in *Veolia Water UK Plc & Ors v. Fingal County Council* [2006] IEHC 240 ("*Veolia*"). The applicant submits that the "overall principle" to be applied by the court is as set out in that judgment:

> "… it is incumbent on the court, at least in complex cases, to at least give consideration to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having being incurred before awarding costs. Furthermore, it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side". [para. 2.2].

6. The applicant then sets out a number of factors in the proceedings that bear consideration. These may be summarised as follows:

   (a) That the application in the proceedings to cross-examine, in respect of which costs were reserved by O'Connor J., comprised a distinct contested event, which was decided in the applicant's favour, and there were "significant elements of the oral evidence [which] did not appear on affidavit …".

   (b) The notice party chose not to participate in the proceedings or express a view of any sort until his belated affidavit of 15th January, 2020. The applicant contends that "the landscape changed at a point when the applicant was entitled to form a view and pursue a case which contemplated no objection from the notice party".

   (c) "Significant new information" came to light during the course of the hearing which could have been disclosed beforehand "and would have had a bearing on the litigation strategy adopted".

   (d) "The respondent chose not to disclose certain information by way of documentary records notwithstanding his having had an opportunity to do so".

   (e) By letter of 28th June, 2018, the applicant's solicitors wrote to the respondent setting out their concerns prior to bringing the application. No substantive response was received, and the applicant issued its application on 16th July, 2018. It was not until the respondent's affidavit of 2nd November, 2018 "that the respondent's position in respect of the application became clear".

   (f) The process of advancing the sale of the Osmanska lands was advanced late in the process of the litigation, which had the effect that "the landscape changed". It is urged that the court, in making its decision with regard to costs, should consider the matter "against the backdrop of the case as it presented to the applicant before the bulk of the costs were incurred".

7. A number of passages from *Veolia* are cited by the applicant in support of its position. The applicant also seeks a stay on execution of costs in the event of an appeal.

8. The respondent in his supplemental submissions responded to each of the matters raised by the applicant. As regards the cross-examination motion, the respondent submits that the costs of this motion should be costs in the cause. It is submitted that leave to cross-examine was given in relation to only one of the five issues in respect of which cross-examination was sought, with O'Connor J. leaving it to the trial judge in respect of one other issue as to whether cross-examination would be required. It is suggested that the motion was therefore "far from an unqualified success for the applicant". The point is also made that "had the proceedings never been brought (as they should not have been), these costs would not have been incurred". The respondent submits that the late participation of the notice party in the hearing was "not the fault of the liquidator". The applicant, it is submitted, does not say how its litigation strategy would have differed if evidence had been supplied earlier, and points out that the evidence regarding PPKZ on which the applicant relies resulted in criticism from the court, rather than favouring the respondent.

9. As regards disclosure of documentary records, the respondent relies on the fact that the court "rejected the allegation that the liquidator did not conduct the liquidation in a transparent manner", and points out that no discovery was sought by the applicant. The respondent also submits that the respondent's office replied to the letter of 28th June, 2018, stating that the respondent was on annual leave. Notwithstanding this, the proceedings issued fourteen days later without the respondent having an opportunity to reply.

10. In relation to the submission that the sale of Osmanska was advanced very late in the litigation, the respondent points out that the applicant was notified on 20th June, 2018, before the proceedings issued, that Osmanska was free of restitution claims, so that the sale might be completed, and makes the point that "… the applicant has never adequately explained why it waited until July 2018 to seek the liquidator's removal".

11. Finally, the respondent opposes the application for a stay on any costs awarded, stating that "the question of any stay should be left for a determination by the Court of Appeal in the event of an appeal".

Conclusions

12. There can be no doubt that the "event" as regards costs in the present case is the refusal of the application. The only question is whether, and if so by how much, I should depart from the rule that costs follow the event.

13. Before dealing with the costs of the hearing before me, it is appropriate to deal with the costs of the application to cross-examine, which were reserved to the trial judge by O'Connor J.

14. Section 169 (1) of the Legal Services Regulation Act, 2015 states as follows:

> "A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court

orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases,
(d) whether a successful party exaggerated his or her claim,
(e) whether a party made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation".

15. Under O.99 r.2 (1) (substituted by Article 3 (xxv)) and Schedule 1 of the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), with effect from 3rd December, 2019, costs are in the discretion of the court. Under r.2 (3), the High Court is required to make an award of costs upon determining any interlocutory application "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". Rule 3 (1) requires the High Court to have regard to the matters set out in s. 169 (1) where applicable "in considering the awarding of the costs of any action or step in any proceedings". It would seem therefore that s. 169 (1) also applies to interlocutory applications.

16. In the ex tempore judgment of O'Connor J. at [2019] IEHC 637, it is clear that, having had the benefit of written submissions which he requested, the court considered five categories of issues in respect of which the applicant sought to cross examine the liquidator. In respect of these categories, the applicant failed to satisfy the court in three instances that cross examination was required. In relation to the remaining two, the court considered that the judge hearing the removal application might benefit from evidence from the liquidator under cross examination as to whether he failed to preserve and safeguard the assets of the company, and granted leave to cross examine on this issue, while indicating that the extent of such cross examination was a matter for the judge hearing the removal application to determine. The court also considered that the question of whether cross examination of the liquidator regarding the financing for the removal of waste from the Ozmanska site was necessary was best left to the judge hearing the removal application.

17. It is clear from this ruling that, while the applicant succeeded to some degree on the motion, the application essentially involved a debate about the extent to which cross examination should be allowed. While it was necessary for the applicant to prosecute the motion to obtain an order for cross examination, the extent of the cross examination sought was significantly curtailed.

18. In the event, I allowed extensive cross examination of the respondent in the categories permitted by O'Connor J. However, while there were aspects of the respondent's evidence of which I was critical, ultimately the evidence given by the respondent did not assist the applicant in obtaining the relief it sought, and there is some force in the point made on behalf of the respondent in submissions that the costs of the interlocutory application would never have been incurred if what I ultimately deemed to be an unmeritorious application had not been pursued.

19. In all the circumstances, I consider that it is appropriate to regard the costs of the application heard and determined by O'Connor J. as costs in the cause, and this will be reflected in the order of the court.

20. While the late intervention of the notice party was not ideal for the reasons set out at para. 204 of my judgment in the substantive application, it can have come as no surprise to the applicant that Mr. Curneen strongly supported the respondent. This was not a "landscape change" as submitted by the applicant.

21. Also, while it is the case that information emerged on certain issues during the course of the hearing which had not hitherto been known to the applicant, it is not evident to me that the respondent was obliged to divulge such information, or indeed that it would have materially affected the decision taken in July 2018 to proceed with the application. In fact, it seems to me that, had the applicant known of the evidence which emerged on cross examination in relation to the process of making the decision regarding the discontinuance of the PPKZ proceedings, it would have been more likely to proceed with the application rather than less so.

22. The applicant suggests that the respondent "chose not to disclose certain information by way of documentary records notwithstanding his having had an opportunity to do so". However, no discovery of documents was sought in the matter, and I have held that there was no material lack of transparency by the respondent in his conduct of the liquidation: see paras. 193 to 197 in particular.

23. I do not consider that the failure by the respondent to give a substantive response to the applicant's solicitors letter of 28th June, 2018 affects the issue of costs. The applicant's solicitors were informed by letter of 2nd July, 2018 that the respondent was on annual leave. Notwithstanding this, the application issued on 16th July, 2018. Given the delays to that point, and the fact that the application had already been threatened twice in 2015, the respondent cannot be held responsible for the fact that the applicant decided to go ahead with the application despite the absence of a substantive reply to the letter of 28th June, 2018.

24. Neither do I consider that the process of advancing the sale of the Osmanska site was a "change of landscape". The notification on 20th June, 2018 by the respondent of the fact that the site was now free of restitution claims made it clear that the last obstacle to realisation of the last asset of the company was now removed. It is not apparent to me that the significant advancement of the sale process, albeit late in the day, materially

affected the applicant's decision to prosecute the matter. Indeed, as I pointed out in para. 145 of my judgment, counsel for the applicant "expressed the view that the issue of the sale of Osmanska 7 did not have 'any bearing [on] the reason or rationale behind this application …'".

25. As regards the applicant's application for a stay on execution of costs in the event of an appeal, the court has to maintain a balance so that justice will not be denied to either party. This can be difficult to achieve. However, in view of the complexity of the issues in the case and the fact that substantial legal issues were involved, I think it would be prudent and appropriate to grant the stay sought. The liquidation has proceeded at a funereal pace to date for the reasons explained in the judgment, and outstanding issues such as realisation of assets and applications by the respondent to court for fees- which applications seem inevitable for the reasons set out in the judgment – may yet take some considerable time to resolve. It may well be that that the outcome of any appeal may affect the respondent's entitlement to fees one way or the other. It is to be hoped that any appeal would be prosecuted with expedition so that the finalisation of the liquidation could be achieved sooner rather than later.

26. The order of this court, then, will be as follows:

- An order dismissing the application;
- An order for costs, to include all reserved costs, in favour of the respondent, to be adjudicated upon if not agreed; and
- An order staying execution of the aforesaid order for costs until the expiry of the period for appeal, and if such an appeal is lodged, the stay to continue until the determination of the appeal.