



THE COURT OF APPEAL

Unapproved

No Redactions Needed

Neutral Citation Number: [2021] IECA 154

High Court Record Number: 2015/225 COS

Court of Appeal Record Number: 2019/36

Noonan J.

Haughton J.

Ní Raifeartaigh J.

**IN THE MATTER OF THE COMPANIES ACTS 1963 – 2013
AND IN THE MATTER OF LUCCA FOOD TRADING COMPANY LIMITED
(IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT, 1963
ON THE APPLICATION OF:**

**ANTHONY J. FITZPATRICK IN HIS CAPACITY
AS LIQUIDATOR OF LUCCA FOOD TRADING COMPANY LIMITED
(IN VOLUNTARY LIQUIDATION)**

APPLICANT/APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

Supplemental Ruling delivered by the Court of Appeal on the 21st day of May 2021

1. This ruling of the court is supplemental to the judgment of Haughton J. (delivered on 21 May 2021), with which Noonan and Ní Raifeartaigh JJ. agreed, dismissing the within appeal, and should be read with that judgment.

2. As part of his order of the 1 February, 2019 (perfected on 6 February, 2019) in the High Court the trial judge directed that the appellant liquidator Mr. Fitzpatrick pay to the Revenue Commissioners the sum of €42,116.31 by way of dividend within 7 days, and refused an application for a stay on that payment. That order was made on the basis that there was a sum in excess of €50,000 in the liquidation account. Mr. Fitzpatrick then applied to this court for a stay on that payment, and on consent Irvine J. granted an interim stay on 8 February, 2019 until the hearing of the motion. On the hearing of the motion on 22 March 2019 Irvine J. made an order on consent granting a stay only on the order for costs made in the High Court, and not in respect of the payment of €42,116.31.

3. The reason for lifting the interim stay emerges from Revenue's Written Submissions to this court on this appeal, and no issue was taken by Mr. Fitzpatrick's counsel on this point. It seems that on 8 February 2019 when granting the interim order Irvine J. directed that a copy of the bank account statement in respect of Mr. Fitzpatrick's Liquidator's Account be sent to Revenue by close of business on Monday 11 February, 2019. The bank account statement was not provided until Friday 22 February 2019. It revealed that at some point before making the interim application for a stay over €40,000 had been removed from the liquidation bank account, which now only contained €12,168.51. On the application of Revenue Irvine J. lifted the interim order, stating expressly that she was doing so on the basis that, when granting it, she had understood the entire sum of approximately €50,000 was in the account, and that she was "very surprised" to hear that only €12,168.51 remained.

4. It is appropriate to recount some earlier evidence on this subject. At paragraph 27 of her first replying affidavit sworn 21 October 2015 Ms. Griffin on behalf of Revenue expressed their “very serious concern about the status of the liquidation bank account and the location of the liquidation fund during the time that the Company stands dissolved, and formally ask the Liquidator to put on affidavit the full liquidation bank account records.” Mr. Fitzpatrick’s response to this, at para. 20 of his affidavit sworn on 4 May 2016 was –

“... I am puzzled why the Revenue Commissioners would have any concern about the liquidation funds as same have stood undisturbed in the bank account during the period of dissolution”.

This prompted Ms. Griffin in her second affidavit sworn on 14 July 2016 at para. 5 to “note that the liquidator has failed to produce liquidation bank accounts...”.

Mr. Fitzpatrick addressed this at para. 18 of the affidavit he swore on 24 October 2016. He avers that “as of this date the balance held in my liquidator’s bank account is in the sum of €54,272.45” and he then set out how the balance had become reduced from €60,097.50. He adds –

“I say this bank account has been dormant for some time with no movement thereon save for some bank fees. I say the most recent statement I have in my possession from AIB bank is dated 28th September 2016 displaying a balance in the account of €54,272.45 as at 29th August 2016 representing the total monies on hand.

I say that I have not caused any withdrawal to be made from the bank account since the date of the balance as at 29th August 2016 shown on the statement in my possession.”

He then exhibited the one-page statement referred to by the trial judge, which merely states the balance as of 29 August 2016.

5. It is abundantly clear that the hearing of Mr. Fitzpatrick's application to fix remuneration/expenses in the High Court proceeded on the basis that that balance of €54,272.45 remained in the liquidation account, and that the High Court order for payment of a dividend was made on the same basis.

6. It has never been explained on affidavit or otherwise how €40,000 came to be removed from the liquidation account, when this happened, to whom the monies were paid, and for what purpose. No bank accounts, let alone full bank accounts, have been exhibited or produced covering the period from 29 August 2016, up to 22 March 2019 when it was revealed to this court, and to Revenue, that all of these monies had been paid out of the account. It is not clear whether any of these monies were paid out of the account before the hearing in the High Court – and if so why the trial judge was not informed of the up to date position – or whether they were paid out after the decision of the High Court delivered on 18 January 2019 (and before the stay application was heard by Irvine J. on 22 March 2019).

7. The court is also mindful that something similar happened in *Re Cherryfox Limited* (unreported), in which Haughton J. delivered an *ex tempore* judgment dismissing the appeal, followed by a written judgment on costs delivered on 30 April 2020. In that case Gilligan J. in the High Court measured Mr. Fitzpatrick's fees and remuneration at €43,125 inclusive of VAT, plus €10,157.69 for outlay. Gilligan J. then made a consequential order on the basis that Mr. Fitzpatrick had recovered total funds of €95,444 in the course of the liquidation, and he directed that as the fees/remuneration plus outlay just mentioned totalled €53,282.69, the balance held in the liquidation fund in the sum of €42,161.31 (coincidentally virtually the same figure as in the present case) be paid to the Revenue Commissioners as the sole preferential creditor. In ruling on costs at para. 13 Haughton J. stated: -

“I regret to have to say that if the misconduct principle applies I am of the view, on the balance of probability, that there is evidence of misconduct in failing to comply with the direction of the High Court to pay out €42,161.31 to the Revenue Commissioners, despite the refusal of a stay on the order of the High Court. This has been exacerbated by the failure to give any proper explanation for failing to comply with that order, or to explain why there is now only about €22,000 in the liquidation account.”

In the ensuing paragraphs Haughton J. set out reasons why he considered the reduction of the liquidation account to only €22,000 went beyond mere negligence and amounted to bad faith.

8. In the instant appeal it is clear that, following the order of Irvine J. on 22 March 2019 lifting the stay, Mr. Fitzpatrick did pay the sum of €42,116.31 to the Revenue. It seems that in doing so he utilised, in part, the monies remaining in the liquidation account and paid the balance from other source(s).

9. Nevertheless the court remains concerned that Mr. Fitzpatrick may have made payments in the order of €52,000 from the liquidation account which were not justified while the matter of his remuneration and expenses was before the High Court. It is also not acceptable that Mr. Fitzpatrick, who as a liquidator owed a fiduciary duty to Revenue, did not disclose to Revenue, or put before the High Court, or this court, full bank statements covering the Liquidator’s bank account, and in particular covering the period from 29 August 2016 to 22 March 2019.

10. The court’s concerns are such that we are considering referring these papers to (1) Mr. Fitzpatrick’s accountancy body – which appears to be Chartered Accountants Ireland - which has responsibility for investigating complaints against its members, and (2) the Office of the Director of Corporate Enforcement which also has powers of investigation. These bodies are independent of the court in the carrying out of their functions, and if the court does refer the papers it would of course be entirely a matter for Chartered Accountants Ireland and/or the

ODCE to determine whether to carry out an investigation, the nature of any such investigation, and any consequences that may follow.

11. However, in order to assist the court in considering whether to refer the papers we are affording Mr. Fitzpatrick an opportunity to make a submission. Accordingly if Mr. Fitzpatrick wishes to make any submission on possible referral by the court of the papers to Chartered Accountants Ireland and the ODCE he will have 14 days from the electronic delivery of this judgment in which to notify the Court of Appeal Office (to be copied to the Revenue Commissioners' solicitors) accordingly, and in that event the court will arrange an oral hearing and consider his submissions.

Mr. Justice Seamus Noonan

Mr. Justice Robert Haughton

Ms. Justice Úna Ní Raifeartaigh