

**THE HIGH COURT
CHANCERY**

[2021] IEHC 306
[2019 No. 122 COS]

**IN THE MATTER OF UNITED POWER LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF SECTION 645 OF THE COMPANIES ACT 2014**

BETWEEN

ANTHONY FITZPATRICK

APPLICANT

AND

AIDEN MURPHY (AS OFFICIAL LIQUIDATOR)

RESPONDENT

AND

THE REVENUE COMMISSIONERS

NOTICE PARTY

RULING of Mr. Justice David Keane delivered on the 5th May 2021

Introduction

1. On 24 March 2021, I gave judgment on the application of Anthony Fitzpatrick for an order pursuant to s. 645 of the Companies Act 2014 ('the 2014 Act') fixing his remuneration for the work he carried out as provisional liquidator of United Power Limited ('the company') in the sum of €126, 206.01. That application was opposed by both Aiden Murphy, the official liquidator of the company, and the Revenue Commissioners ('Revenue'), a significant creditor of the company, on the basis that the remuneration sought was excessive. In the event, having considered the evidence and arguments, I made an order fixing Mr Fitzpatrick's remuneration in the sum of €48,804.12.
2. This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2021] IEHC 204.
3. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to file concise written submissions, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.
4. Mr Fitzpatrick, Mr Murphy and Revenue each filed concise written submissions within the period allowed. All of the submissions received are directed to the appropriate orders I should make on the legal costs of the application.

The position of each of the parties on costs

5. Mr Fitzpatrick seeks an order for his costs of the application as costs in the liquidation of the company.
6. Mr Murphy seeks an order for his costs of the application against Mr Fitzpatrick or, in the alternative, an order for his costs of the application as costs in the liquidation of the company.

7. Revenue seeks an order for its costs of the application against Mr Fitzpatrick; an order prohibiting Mr Fitzpatrick from having recourse to the assets of the company to discharge either his own costs of the application or the costs of other parties for which he is liable; and an order setting off Revenue's costs of the application when agreed or adjudicated against the remuneration due to Mr Fitzpatrick, as provisional liquidator, under s. 645 of the Companies Act 2014 ('the 2014 Act').

Applicable principles on costs

i. general principles

8. Order 99, rule 2(1) of the Rules of the Superior Courts ('RSC'), as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), confirms that, subject to the provisions of statute, the costs of and incidental to every proceeding in the Superior Courts shall be at the discretion of the court concerned.

9. Order 99, rule 3(1) of the RSC provides in material part:

'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

10. Section 169(1) of the 2015 Act states:

'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.'

11. In *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183, (Unreported, Court of Appeal, 8 July 2020) ('Chubb') (at para. 19), Murray J distilled from those provisions the following principles on the costs of concluded proceedings:

- '(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O. 99, r.2(1)).
- (b) In considering the awarding of costs of any action, the Court should '*have regard to*' the provisions of s.169(1) (O. 99, r.3(1)).
- (c) In a case where the party seeking costs has been '*entirely successful in those proceedings*', the party so succeeding '*is entitled*' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
- (d) In determining whether to '*order otherwise*' the court should have regard to the '*nature and circumstances of the case*' and '*the conduct of the proceedings by the parties*' (s.169(1)).
- (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
- (f) The Court, in the exercise of its discretion may also make an order that where a party is '*partially successful*' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).
- (g) Even where a party has not been '*entirely successful*' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O. 99, r.3(1)).
- (h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).'

ii. *relevant factors in this case*

- 12. On 5 September 2019, Revenue made an open offer to Mr Fitzpatrick that, subject to the court's view, it would not object to an order fixing his remuneration in a sum not exceeding €37,000, together with the sum of €13,196.60 as his legal costs of both the failed interim injunction application and the necessary application under s. 645 of the 2014 Act for that order.
- 13. On 30 September 2019, Mr Fitzpatrick rejected Revenue's offer, reiterating his claim to €91,877.57 (evidently representing €89,126.25 in remuneration and €2,751.32 in expenses and outlay) plus VAT, together with €13,196.60 as his legal costs of the failed interim injunction application, while insisting on his entitlement to seek a separate order for the costs of the s. 645 application.
- 14. In the event, I fixed Mr Fitzpatrick's fees in the amount of €37,000, rather than €89,126.25, and his expenses and outlay (which were not in dispute for the purpose of the application) in the amount of €2,751.32, while rejecting both his claim to the legal

costs of the failed interim injunction application and his claim that such costs were within the scope of the provisional liquidator's 'remuneration' that the court might fix under s. 645.

15. It follows that Revenue was entirely successful in its opposition to Mr Fitzpatrick's application and he was entirely unsuccessful in persisting in his claim to have his remuneration fixed in a sum (greatly) in excess of that which Mr Murphy and Revenue were prepared to accept as reasonable. I can find nothing in the nature and circumstances of this case, or in the conduct of the parties, that would warrant the exercise of the discretion to depart from the general rule that a successful party is entitled to an award of legal costs against an unsuccessful opposing party.
16. I do not accept Mr Fitzpatrick's submission that the figure of €37,000 proposed by Revenue was, or was intended to be, inclusive of fees and outlay and of VAT on that aggregate amount. That it was not is evident from the explanation of that figure set out in the Murphy fee review of 30 August 2019, a copy of which Mr Fitzpatrick had already received as an exhibit to the first Murphy affidavit when that offer was made. Thus, I reject Mr Fitzpatrick's submission that, in obtaining an order for €48,804.12 (representing fees of €37,000, plus expenses and outlay of 2,751.32, together with VAT at 23% on the aggregate amount of €39,751.32), he should be seen as having 'beaten the offer.' In any event, Revenue's offer, which Mr Fitzpatrick rejected, included a further €13,196.60 for the legal costs of the failed interim injunction application and of the s. 645 application, so that even on the construction of that offer for which Mr Fitzpatrick contends (but which I do not accept) he has failed to beat it.
17. Similarly, I reject Mr Fitzpatrick's submission that the all-in figure of €13,196.60 that Revenue was prepared to agree for his legal costs of both the failed interim injunction application and the application then in train for an order fixing his remuneration was, or has been shown to be, inadequate. I have found that Mr Fitzpatrick was not entitled to his costs of the injunction application and could not, in any event, have claimed such costs as part of his remuneration for the purposes of s. 645 of the 2014 Act. If Mr Fitzpatrick had applied to have his remuneration fixed at the level proposed by Revenue (and ultimately accepted by the court), that application would have been brief and unopposed, and his legal costs in bringing it correspondingly modest. The report from a firm of legal costs accountants that Mr Fitzpatrick has now produced to the court (without seeking or obtaining leave to do so), assessing the legal costs he has incurred in the protracted s. 645 application that he chose to make to have his remuneration fixed at a substantially higher level, cannot avail him precisely because he was entirely unsuccessful in that application. In short, Mr Fitzpatrick failed to beat Revenue's offer on costs as well as its offer on an appropriate level of remuneration.
18. *Re Lucca Food Trading Company* [2019] IEHC 11, (Unreported, High Court (Allen J), 18 January 2019) concerned an application under s. 280 of the Companies Act 1963 by the liquidator of that company (coincidentally, Mr Fitzpatrick) to have the remuneration to which he was entitled in that capacity determined by the court. The liquidator claimed

remuneration of €74,638.37, inclusive of VAT, cut back to €59,324.64, because that was the total amount of the funds left in the company. Revenue proposed a figure of €36,000. Having considered the evidence, Allen J determined that the liquidator was entitled to retain the sum of €37,883.69, before concluding in material part (at para. 79):

‘The Revenue’s open offer of €36,000 plus VAT would have come to €44,280.00. The liquidator is short of that and must pay the costs of the proceedings.’

19. Mr Fitzpatrick submits that *Re Lucca* must be distinguished from the present case because the application there was made under a different statutory provision and concerned a voluntary liquidation in which fees could have been agreed without any requirement to apply to court. In my view, that is a distinction without a difference. The liquidator’s fees in that voluntary liquidation could not be agreed with the result that an application to court had to be made on a contested basis. In this case, while an application to court to fix the provisional liquidator’s remuneration would have been necessary either way, the position is directly comparable to that in *Re Lucca* because the provisional liquidator’s fees were not agreed and his application to have his remuneration fixed proceeded on a contested basis. Had those fees been agreed, the application would have been unopposed, and it is very likely that Mr Fitzpatrick would have been awarded his costs of the application as costs in the liquidation. But that is not what happened precisely because of the choice that Mr Fitzpatrick made. To that extent, there was no compulsion to proceed as Mr Fitzpatrick did. Thus, the approach of Allen J in *Re Lucca* seems to me to be the correct one and applying it to the facts of this case leads to the same result. Mr Fitzpatrick must pay the legal costs of Mr Murphy and Revenue.

iii. specific principles on seeking costs against a liquidator

20. In his judgment for the Supreme Court in *Eteams International v Bank of Ireland* [2020] IESC 23, (Unreported, Supreme Court, 8 May 2020), MacMenamin J cited the following passage from the judgment of McKechnie J in *Revenue Commissioners v Fitzpatrick in his capacity as liquidator of Ballyrider Ltd (in liquidation)* (Unreported, Supreme Court, 31 July 2019) on the principles governing an application for costs against a liquidator (‘the *Ballyrider* principles’) (at para. 88):

- ‘(1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.
- (2) Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules vis-à-vis an adverse litigant will apply.
- (3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter

situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.

- (4) In the proceedings first mentioned as the liquidator incurs no liability the question of seeking to have recourse to the company's assets does not arise.
- (5) In the proceedings second mentioned, the position will be as follows:
 - (i) Where acting for and on behalf of the company, the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.
 - (ii) Even when acting for and on behalf of the company, if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described, include misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.
 - (iii) On the other hand, where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.
 - (iv) Just as there will be cases which are clear-cut on one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the court will have regard to section 281 of the [Companies Act 1963] and the relevant case law [under it]. In doing so the Court will consider the representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine whether there are sufficient grounds on the balance of probability to deny him such a course.

These statements are of a generalised nature and may have to yield to individual but rather specialised circumstances where required.'

21. *Re Cherryfox Ltd* [2020] IECA 123, (Unreported, Court of Appeal, 30 April 2020), concerned the costs of an unsuccessful appeal by a liquidator (once again, Mr Fitzpatrick) against an order of the High Court on an application by Revenue challenging the level of fees and remuneration that he had claimed. In giving judgment for the court, Haughton J questioned the extent to which the *Ballyrider* principles apply where the liquidator is not acting in a representative capacity (at para. 10). In that instance, as in this one, Mr Fitzpatrick was acting in a personal capacity in seeking to have his remuneration as liquidator fixed in a substantial sum.
22. To the extent that the *Ballyrider* principles do apply, Mr Fitzpatrick's application falls within the second, as an application brought in his personal capacity, to which the normal rules vis-à-vis an adverse litigant will apply.

23. Hence, the first and fourth *Ballyrider* principles cannot apply, since Mr Fitzpatrick's application was not initiated in the name of and on behalf of the company.
24. The third *Ballyrider* principle is of limited application because, while Mr Fitzpatrick was obliged to bring an application under s. 645 to have his remuneration fixed (and, in that sense, could argue that the application was forced upon him), he was under no compulsion, statutory or otherwise, to seek the level of fees he did. There is no public policy requirement that a provisional liquidator should be entitled to have recourse to the company's funds to pay the costs of an unsuccessful claim to have his remuneration fixed at a substantially higher level than that found to be reasonable. This is not a case in which the court might exercise the discretion to refrain from awarding costs against an unsuccessful applicant, where there was a statutory obligation to bring the application and where to do so would damage the public interest by discouraging the fair and reasonable pursuit of applications of that kind. Thus, the various authorities relied upon by Mr Fitzpatrick on the costs of a liquidator's application to restrict a director of an insolvent company do not assist his submission on the costs of the present application, in which he was pursuing his own interests and not those of the company or the public. Indeed, I note that broadly the same point was made by Finlay Geoghegan J for the Court of Appeal in *Re Ballyrider Ltd* [2017] IECA 115, (Unreported, Court of Appeal, 7 April 2017) (at paras. 19-20).
25. The fifth *Ballyrider* principle does not apply because Mr Fitzpatrick was not acting in a representative capacity in bringing the application – that is, I think, the point that Haughton J was making in *Cherryfox*.
26. In summary, therefore, the application of the *Ballyrider* principles does not alter the result; the normal rules on costs apply. Mr Murphy and Revenue are entitled to their costs against Mr Fitzpatrick. Mr Fitzpatrick is not entitled to have recourse to the assets of the company in respect of the payment of those costs, both because his unsuccessful application to have his remuneration fixed at the level he sought was not one brought in a representative capacity and because it would be contrary to public policy (indeed, would fly in the face of justice) to make the company's creditors (including Revenue) bear the legal costs of those parties' successful opposition to that application. For the avoidance of doubt and for the same reasons, I must refuse Mr Fitzpatrick's application for an order that his costs of the application be made costs in the liquidation – it would be an affront to justice to require the creditors of the company to bear Mr Fitzpatrick's legal costs of his unsuccessful application to have his remuneration fixed at a level that was more than twice that found to be reasonable.

Setting-off the provisional liquidator's remuneration against the costs he is liable for

27. Revenue seeks the set off of the legal costs that it seeks from Mr Fitzpatrick against the remuneration to which he is entitled as provisional liquidator. In advancing that argument, it relies on the decision of Humphreys J in *Re Star Elm Frames Limited* [2016] IEHC 666, (Unreported, High Court, 3 October 2016). That was a case in which Revenue's petition for the winding up of the company was opposed by both the company and (once again) Mr Fitzpatrick, who had been nominated as liquidator in a creditors'

voluntary winding up. Humphreys J acceded to Revenue's application and made an order for Revenue's costs of that contested application against the company and Mr Fitzpatrick jointly. On the issue of a set-off between the fees due to Mr Fitzpatrick for work done prior to his replacement as liquidator and the legal costs of Revenue's petition for which he was liable, Humphreys J concluded (at para. 50):

'Mr Fitzpatrick and the company are jointly liable for the costs of this application. Insofar as the costs are recouped from Mr Fitzpatrick rather than the company, such payment generates additional funds from which the company's creditors can be paid. It is appropriate therefore for the company via the new liquidator to be entitled to set off the costs being paid by it to Revenue against any monies due by the company to Mr Fitzpatrick for his work done to date (in effect, paying the liquidator's fees to date directly to Revenue in satisfaction of costs due, rather than paying them to Mr Fitzpatrick), thereby increasing the pot available to other creditors.'

28. In this case, I have found Mr Fitzpatrick (and not the company) solely liable for the legal costs of Mr Murphy and Revenue. Thus, there is no question of his discharge of those costs relieving the company of any obligation to do so, thereby increasing the pot available to creditors generally. Rather, Mr Fitzpatrick has a personal liability to Mr Murphy and to Revenue for the legal costs of each, and the company has a separate liability to Mr Fitzpatrick for the fair and reasonable remuneration to which he is entitled as its provisional liquidator. In the circumstances, I do not think any right of set-off in the accepted sense arises here – what Revenue seeks in this case more closely resembles a garnishee order. I express no view on whether and, if so, in what circumstances it might be appropriate to make a company the garnishee of its liquidator's personal creditors – in this case by ordering the company to pay Revenue as much as is necessary or available to defray Mr Fitzpatrick's liability for Revenue's legal costs from the remuneration otherwise due from the company to Mr Fitzpatrick. Suffice it to say that, in the absence of fuller argument on the point, I do not propose to make such an order in this case.

Conclusion

29. In summary, I will make the following final orders:

- (1) An order pursuant to s. 645 of the 2014 Act, fixing the remuneration of Mr Fitzpatrick as provisional liquidator of the company in the sum of €48,804.12.
- (2) An order directing Mr Fitzpatrick to pay Mr Murphy and Revenue their reasonable costs of the application, to include all reserved costs and the costs of submissions, which costs are to be adjudicated upon in default of agreement.
- (3) An order prohibiting Mr Fitzpatrick from having recourse to the assets of the company to discharge his own costs of the proceedings or those of Mr Murphy and Revenue for which he is liable.