

THE HIGH COURT

[2021] IEHC 94

[Record No. 2019/235 COS]

IN THE MATTER OF LATZUR LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 11th day of February, 2021

1. On 20th November, 2020, I delivered a judgment in relation to an application by Mr. Ken Fennell ('the receiver') for an order pursuant to s.438 of the Companies Act 2014 ('the Act') giving directions in relation to certain matters arising in the course of the receivership of Latzur Limited ('the company'). In essence, the issue in respect of which directions were required was whether or not the receiver was appointed as such on foot of a fixed charge or a floating charge. That judgment ('the substantive judgment'), which is cited at [2020] IEHC 592, should be read in conjunction with the present judgment, which concerns the costs of the application and the form of order to be made.
2. The parties who would be affected by any directions given by the court at the receiver's request were Chelsey Investissements SA ('Chelsey'), which appointed the receiver as receiver and manager of the company's assets by a deed of appointment of 28th November, 2013, and the Revenue Commissioners ('Revenue'). If the court directed that the receiver was appointed on foot of a fixed charge, the position under the law governing the application – that is, prior to the coming into force of the Act – would be that the amount available to the receiver for distribution before deduction of receiver's costs and expenses of approximately €1.4m would be payable to Chelsey as the fixed charge holder. If the court directed that the receiver was appointed on foot of a floating charge, the preferential creditors would take precedence, and virtually all of the available sums would be payable to Revenue. Accordingly, having brought the application before the court, the receiver adopted a neutral position and indicated that he would abide by the court's order. The issue was thereafter contested by Chelsey and Revenue.
3. The findings of the court are set out at para. 145 of the substantive judgment. I held that the receiver was appointed under a fixed charge rather than a floating charge, and that the funds available to the receiver would be distributed to Chelsey. I invited written submissions within 14 days as to the terms of the orders to be made, and both parties duly made detailed submissions in this regard.
4. There is no dispute between the parties as to the legal regime which governs the award of costs. The applicable statutory provisions are ss. 168 and 169 of the Legal Services Regulation Act 2015 ('the 2015 Act') and the recast O.99 of the Rules of the Superior Courts as introduced by the Rules of the Superior Courts (Costs Order) 2019 SI 584/2019.
5. Revenue draws attention to the summary by Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 of the relevant principles which now apply as a result of the introduction of these provisions:

"...it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

- (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.9 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))."*

6. Revenue submits that the new regime provides the court with greater jurisdiction to reduce the costs awarded to the party who prevailed on the "event". As Murray J. commented at para. 20 of Chubb:

"Insofar as there might be said to be any difference potentially relevant to this application between the new and old regimes, they appear to me to lie in two features of the 2015 Act. First, Clarke J. in Veolia – at least on one view – limited his explanation of the power of the Court to reduce the costs of the party who prevailed on the 'event' by reference to the costs incurred by the other party in addressing issues on which the former did not succeed to cases that were 'complex'. No such express limitation appears on the face of the legislation. Second,

whereas under the pre-existing law, costs presumptively followed the event the prima facie entitlement to costs is now limited to the party who is 'entirely successful'. Given that the law was that the term 'event' fell to be construed distributively so that there could be a number of events in a single case (Kennedy v. Healy), winning the 'event' and being 'entirely successful' may well not mean the same thing..."

7. It might be said that Chelsey, given the result, 'won the day' in relation to the application. However, there is a number of factors which will be apparent from the substantive judgment which in my view engage the principles in the statutory provisions. They may be summarised as follows: -
 - (1) The originating notice of motion issued by the receiver did not address the issue on which Chelsey ultimately prevailed, i.e. the automatic crystallisation of the charge. As regards crystallisation of the charge, the only issue raised by the receiver was that of whether a notice of crystallisation of 23rd November, 2013 served by Chelsey was sufficient to convert the floating charge into a fixed charge;
 - (2) the issue of automatic crystallisation arose for the first time after service of the affidavits in the written submissions delivered by Chelsey on 9th March, 2020, just over two months prior to the assigned hearing date;
 - (3) affidavits in relation to service of the notice of crystallisation were sworn on 14th and 17th April, 2020, only after the written submissions of Revenue delivered on 6th April, 2020 made it clear that Revenue would contend at the hearing that Chelsey had not proved service of the notice of crystallisation;
 - (4) Chelsey was required to make application to this Court on the new hearing date of the application – 17th September, 2020 – for liberty to file the affidavits relating to service in court. This application was opposed unsuccessfully by Revenue, and the affidavits were an essential element in establishing the service of the notice of crystallisation;
 - (5) four grounds for establishing that the receiver was appointed on foot of a fixed charge were advanced by Chelsey. On two of these issues – the contentions that the floating charge automatically crystallised into a fixed charge on the presentation of the petition to appoint an examiner, and that the service of the notice of crystallisation, in the absence of automatic crystallisation, served to convert the floating charge into a fixed charge – Chelsey was successful. On the other two issues – whether automatic crystallisation occurred automatically on the appointment of the receiver, and whether the passing of a resolution by the company had the effect of crystallising the floating charge – Revenue was successful.
8. I agree with Murray J. that "...winning the 'event' and being 'entirely successful' may well not mean the same thing...". In the present case, Chelsey achieved the end result it set

out to achieve, but was unsuccessful on a number of issues. Primarily, it was successful in its assertion that the floating charge automatically crystallised on presentation of the petition to appoint an examiner. However, this issue did not materialise until Chelsey served its written submissions, at which point a hearing date had already been assigned.

9. Also, although Chelsey prevailed on the notice of crystallisation issue, it would not have done so if it had not been in a position to prove service of the notice, which it was only able to do by reason of my acceding to its application on the hearing date for liberty to file two affidavits relating to service. That application might well have been more contentious and less likely to succeed if it had required to be made on the date originally assigned for the hearing, 20th May 2020.
10. Section 169(1)(b) requires the court to have regard to the conduct of the parties, including whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. This requires the court to assess, in relation to Revenue's conduct of the application, whether it should have contested the proceedings at all, given that success on any one of the four grounds on which Chelsey maintains that the receiver was appointed pursuant to a fixed charge would have been sufficient to achieve Chelsey's desired result.
11. As we have seen, Revenue successfully contested two of the four grounds. In relation to a third, a refusal by me to allow Chelsey to file the affidavits relating to service on the day of the hearing would almost certainly have doomed the "notice of crystallisation" argument to failure. In relation to the argument that the fixed charge arose by automatic crystallisation on the presentation of the petition, I think it is important to note, as I remarked at para. 84 of the substantive judgment, that no decision was cited to me which deals directly with the issue of the validity or otherwise of a contractual automatic crystallisation clause. While considerable assistance was derived from the decisions of the Supreme Court in *Re Holidair* [1991] 1 IR 416 and *Re J.D. Brian* [2016] 1 IR 131, both of these cases dealt with significantly different situations and issues. The validity or otherwise of a contractual automatic crystallisation clause in the given circumstances was a novel and complicated issue, and required to be closely argued from first principles rather than binding precedent.
12. The question, as far as s.169(1)(b) is concerned, is in my view whether it would have been more reasonable, in view of the result, for Revenue to have 'folded its tent' prior to the hearing rather than cause Chelsey to incur cost in fighting issues on which it ultimately prevailed. In all the circumstances, I am of the view that it was reasonable for Revenue to contest all of the issues in the application, notwithstanding that the result went against it.
13. I am also conscious that it was the receiver who initiated the application, and invited the parties to contest it. Chelsey and the Revenue were notice parties making submissions to the court as to the appropriate directions to be made on foot of the receiver's application, although in reality Chelsey and the Revenue each sought to persuade the court that the

other's position was incorrect. I find it of some small significance that the application was not a *lis inter partes* as such.

14. I have considered all of the above factors, and in particular the matters set out at s.169(1)(a) to (c) of the 2015 Act. I cannot ignore the fact that Chelsey has prevailed in what was in effect an adversarial contest with Revenue. However, Revenue urges that I follow the approach outlined by Finlay Geoghegan J. in *Sony Music Entertainment (Ireland) Limited v. UPC Communications Ireland Limited* [2017] IECA 96 at para. 23:

*"I would respectfully say that where a trial judge reaches a decision that the party losing the case succeeded on a number of issues which contributed to the overall complexity, length and cost of the proceedings and proposes only making a partial order in favour of the winning party that he should indicate his decision as to the percentage which the issues won by the losing party contributed to the overall cost of the proceedings and then expressly make the net order. This permits the parties and an appellate court to know and assess more clearly the trial judge's decision. I followed this approach in the High Court in *McAleenan v. AIG (Europe) Limited* [2010] IEHC 279, [2013] 2 IR 202 where I determined, as a matter of probability, that the issues on which the losing plaintiff had succeeded, contributed to 40% of the overall costs of the proceedings. I decided and stated that it then followed that the plaintiff was entitled in substance to recover 40% of her costs against the defendant; the defendant was only entitled to recover 60% of its costs against the plaintiff (i.e. no part of the costs of the issues on which it lost) and that the net order should be an order for costs in favour of the defendant for 20% of the overall costs".*

15. Applying this approach, I take the view, that on a rough estimate, the issues on which Chelsey succeeded accounted for 70% of the costs of the proceedings, and the issues on which Revenue succeeded accounted for 30%. However, in the exercise of my discretion I am entitled and indeed obliged to take into account the conduct of the proceedings by the parties. Of the two issues on which Chelsey succeeded, one issue was raised for the first time only in written submissions before the hearing, and the other was entirely dependent for its success on the decision of this Court to allow Chelsey to file further affidavits relating to service. While I do not for a moment suggest that Chelsey's conduct was improper or underhand in any way, it is fair to assume that the late introduction of these elements had an adverse and disruptive effect on Revenue's ability to conduct its case and make an early and reasoned assessment of its prospects of success.
16. As a mark of disapproval of such conduct, I am of the view that Chelsey's percentage in relation to costs should be reduced from 70% to 50%. As I am of the view that Revenue should be entitled to 30% of its costs, there will be – in accordance with the approach set out in *Sony* and *McAleenan* – a net order in favour of Chelsey of 20% of its costs.
17. The court will make the following orders: -
- (1) A declaration pursuant to s.438 of the Companies Act 2014 that

- the applicant was appointed receiver over the assets and undertaking of Latur Limited on foot of fixed security;
- automatic conversion of non-fixed charges under the debenture of 24th May, 2012 between Chelsey Investissements SA and Latur Limited into fixed charges was effected in accordance with Clause 3.4.2(4) of the said debenture;
- such charges were valid and operative at the time of the appointment of the applicant as receiver.

(2) A declaration pursuant to s.438 of the Companies Act 2014 that

- if the automatic conversion referred to in para. (1) above were not effective, the notice of crystallisation served by Chelsey Investissements SA on Latur Limited on 23rd November, 2013 was effective to convert non-fixed charges under the said debenture into fixed security.

(3) An order that Chelsey Investissements SA is entitled to recover 20% of its costs of the application herein from the Revenue Commissioners, to be adjudicated in default of agreement.

18. Finally, Revenue has sought a stay on these orders pending an appeal. Given the novelty and complexity of the issues, I will grant a stay on the foregoing orders coming into effect until the expiry of the period for appeal, and if such an appeal is lodged, the stay will continue until the determination of the appeal.