

# THE HIGH COURT

[2023] IEHC 566

Record No. 2020/192COS

## IN THE MATTER OF DOONBEG INVESTMENT HOLDING COMPANY LIMITED (IN LIQUIDATION)

**BETWEEN**

**TOM KAVANAGH, AS LIQUIDATOR OF DOONBEG INVESTMENT  
HOLDING COMPANY LIMITED (IN LIQUIDATION)**

**APPLICANT**

**- AND -**

**ALFRED GIULIANO, AS TRUSTEE IN BANKRUPTCY OF KIAWAH  
DOONBEG LLC (IN BANKRUPTCY)**

**NOTICE PARTY**

### **Judgment of Ms. Justice Butler delivered on the 19<sup>th</sup> day of October 2023**

1. This is the third judgment which I have delivered in connection with this matter and deals with the question of the applicant's costs in respect of the application the subject of my two earlier judgments ([2021] IEHC 382 and [2022] IEHC 88). The applicant, as liquidator of the company (having been so appointed in a creditors voluntary winding up), made an application to the High Court under s.631 of the Companies Act 2014 ("2014 Act") for directions as to whether a claim made by the notice party should be admitted to proof. For reasons set out in my judgment [2022] IEHC 88 I determined that it should be.

2. The applicant now proposes that the court should make an order reflecting this direction and further stipulating that his costs should be costs in the liquidation. In written submissions the applicant has expanded on this to explain that, as costs properly incurred in the liquidation, his costs would fall to be paid out of the property of the company in priority to all other claims under s.617(1) of the 2014 Act. Within the list of priority costs under that sub-section "*costs payable to the solicitor for the liquidator*" rank fifth in order of priority under s.617(2)(e). The notice party is not seeking an order for its costs as against the applicant personally but contends that the court should exercise its discretion under Order 99 of the Rules of the Superior Courts to direct that the applicant's costs not be treated as costs in the liquidation.

3. Thus, the issue which the court must now decide is whether the applicant should be entitled to have his costs for this litigation paid out of the property of the company to the detriment of the notice party and other creditors whose claims have been provisionally admitted to proof. The effect of this may be quite stark in this case. The property of the company available to distribute to creditors at the commencement of the liquidation was €1,528,090 which, given the amount of the claims provisionally admitted by the applicant and the amount of the notice party's claim, allowed for a return of approximately 7% to each creditor. Obviously, certain costs of the liquidation will have to be paid from that sum before any distribution can be made. However, the addition of the applicant's legal costs, which can comfortably be expected to reach a five-figure sum, will necessarily reduce the fund available for distribution even further. The notice party, as the single largest creditor, will stand to lose most in real terms.

4. The notice party is the trustee in bankruptcy for a number of related companies in the USA. The claim which is now been admitted concerned loans made by one of those US based companies to the company and in turn passed by the company to three of its Irish

based subsidiaries. The situation was factually complex for various reasons. These included the relationships between the parent and subsidiary companies within their respective corporate structures on both sides of the Atlantic; the lack of assistance provided by those who were directors of the companies, again on both side of the Atlantic, at times material to the transfer of money between the two sets of companies and differences between accountancy and regulatory practises and requirements which meant that some of the US records did not conform with or have the same legal significance as their Irish equivalents. However, there was no particular legal issue raised on the facts. The question posed by the applicant simply asked the court to direct whether, on the evidence, the notice party's claim should be admitted.

5. It will be apparent from my two earlier judgments that I had reservations as to whether a query of the type posed by the applicant was a proper use of s.631, and further, I had serious concerns over the manner in which the section was invoked in this case. The observations made in the applicant's costs submissions which suggest that I was "*somewhat critical*" of his approach are an understatement. The submissions identified two issues in respect of which I was critical of the applicant but, in my view, they misdescribe and thereby underplay the breadth and the seriousness of my concerns.

6. To briefly recap, my concerns were threefold. Firstly, although the scope of s.631 is very broad in that it allows the applicant (and others) to apply to the court to determine "*any question*", it seemed to me that where the question raised was whether, on the evidence, a claim should be admitted to proof, the applicant was effectively asking the court to step into his shoes as liquidator and to make a decision of a type routinely made by liquidators in the course of liquidations. There was no apparent dispute between any of the parties involved in the liquidation on this issue and the decision was not such that it would have a knock-on

effect on how the applicant might decide a range of other applications arising in the course of the liquidation.

7. Indeed, the applicant made no secret of the fact that he had invoked s.631 in order to avoid the risk of personal liability should he make a positive decision on the notice party's claim which was successfully challenged before a court by the other creditors or, alternatively, should he face the prospect of the appeal which the notice party had stated it would take in the event of a negative decision. Apart from the fact that I believe the former risk to have been overstated by the applicant, none of the other creditors appeared in court to oppose the admission of the notice party's claim. Consequently, there is no real reason to believe that they would have challenged a decision of the applicant to admit that claim to proof without obtaining court sanction in advance. There is merit in the notice party's submission that by bringing this application the applicant has unnecessarily incurred significant legal costs by asking the court to make what was ultimately an uncontroversial decision that he should have made himself.

8. Secondly, when the application was opened to court it transpired that only half of the other creditors had been put on notice of it. The choice of whom to serve had apparently been made on the basis of identifying the largest creditors. However, with the exception of the notice party's claim, there was relatively little difference between the amounts owed to those served and to most of those who were not served such that it seemed the applicant had arbitrarily imposed a cut-off point for which there was little objective justification. Of course, creditors could have been put on notice of the fact of the application and advised that they could participate if they wished to do so without formal service of the application papers on all creditors being required to achieve this. Instead, what occurred was extremely comprehensive service on half of the creditors (including up-dates on changed court dates etc.) whilst the other half were left entirely unaware that the application was being brought.

9. The fact that half of the creditors were not on notice of the application was of concern to me for two reasons. Firstly, there was no *legitimus contradictor* before the court to contest the notice party's claim even though the admission of this debt would have a significant and detrimental effect on the amount of the fund available to deal with other claims. Whilst the lack of a *legitimus contradictor* might be acceptable in circumstances where those with a potential interest in the matter have chosen not to come forward, this cannot be said to be the case when those with a potential interest are not made aware of an application the outcome of which might affect them. In addition, the notice party, unaware that all creditors had not been notified of the application, relied on the fact that there was no objection from the other creditors to support the contention that his debt should be admitted to proof. In normal course, the court could properly give weight to this submission but in circumstances where half of the creditors had not been notified, it could not be inferred from their non-appearance that they were not objecting to the claim.

10. In his written submissions on costs, the applicant states that when the issue was raised by me, counsel immediately expressed the liquidator's readiness to serve all of the other creditors if required by the court. With respect, that is not an entirely accurate reflection of what occurred at the hearing of the application. The court was informed at the outset that there was a significant gap between the amounts owed to those who had been served and the amounts owed to those who had not and that this justified the difference in treatment between them. When the court resumed after lunch, I was informed that this was not in fact correct and that there was not a big difference in the amounts owed between those served and those not served. However, the applicant stood over what was characterised as an administrative decision not to serve some of the creditors on the basis that it was unlikely that those who had not been served could add materially to the evidence on the issue. In his reply at the conclusion of the hearing counsel introduced authorities purporting to justify the non-service

of some of the creditors and also relied on the fact that the relevant rule, O.74, r.57, does not specifically require service on all creditors. I have dealt with these arguments in my first judgment ([2021] IEHC 382). It was only at a very late stage after all these arguments had been made, that the applicant indicated his willingness to serve the unserved parties and to invite them to make submissions if they wished to do so before the court delivered its judgment.

**11.** The third matter of concern - and very much connected to the other two - is that the applicant studiously maintained a neutral position throughout the application. The applicant continues to stand over this in his costs submissions treating it as a virtuous stance which did not prejudice the notice party. I fully accept that there will be applications brought under s.631 where it is appropriate for the liquidator to adopt a neutral position thereby allowing other affected parties to contest the issue which the liquidator has raised. The problem in this case is that when no other creditors sought to intervene and the liquidator stood back and did not engage with the issue, the notice party was afforded an unopposed opportunity to make his claim. The concerns which may have led the applicant to make this application in the first place did not emerge in any meaningful way during the hearing and certainly were not urged on the court as reasons why the notice party's debt should not be admitted to proof. This left the court in the entirely unsatisfactory position of being asked to determine an issue of concern to the applicant, as liquidator, upon which the applicant declined to adopt a position or to offer any view which might have been of assistance to the court.

**12.** The practical effect of all of this was that, unsurprisingly, the notice party succeeded when, unopposed, it asked the High Court to determine that its claim should be admitted. To achieve that outcome, significant legal costs were incurred by both the notice party and the applicant. In light of the applicant's unwillingness to engage in the issue which he had before the court (when no other party had come forward to do so), thus making the outcome

almost inevitable, a question necessarily arises as to whether the applicant's costs were "*properly*" incurred in liquidation.

13. In his written submissions the applicant relies on s.617(1) and (2) of the 2014 Act which I have summarised above and on the recent decision of the Supreme Court, McKechnie J. in *Re Ballyrider Limited (In Voluntary Liquidation)* (Unreported, Supreme Court, 31 July 2019). McKechnie J. summarised the relevant principles as follows:

- “(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. If a costs order is made the liquidator incurs a personal liability in respect of same; as such the sufficiency or insufficiency of a company's assets is irrelevant.*
- (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 personal 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 a company in*

*respect of both the costs incurred by him as a party and also in respect of the costs 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 1963 Act and the relevant case law above mentioned. 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.”*

**14.** The argument made by the applicant is that although the application was not made on behalf of the company – indeed the company itself is not a person listed in s.631(1) as being entitled to make an application under the section - as liquidator he is ordinarily entitled to have recourse to the assets of the company in respect of legal costs incurred by him as a party. He has not been guilty of misconduct in the sense of misfeasance, bad faith,



negligence, personal unfitness for office or dishonesty. He characterises the matters of which I was critical as matters of “*procedural judgment*” and contends that an error of judgment of this nature, even if it were to be characterised as a mistake would be an honest mistake made *bona fide* and should not deprive him of the entitlement he would otherwise have to have recourse to the assets of the company in respect of his own legal costs.

**15.** The notice party relies on the provisions of Order 99 of the Rules of the Superior Courts and, in particular on O.99, r.9 which deals with costs which have been “*improperly or without any reasonable cause incurred*”. This rule allows a court to call on the legal practitioner acting for the party by whom the costs have been incurred to show cause as to why such costs should be disallowed as between the solicitor and client or to refer the matter to the Legal Costs Adjudicator. It does not seem to be suggested by the notice party that the court should embark upon a further procedure in this regard; rather the rules envisage that there will be circumstances where the court can direct that a party will not be liable to their lawyers for a portion of their own legal costs.

**16.** I agree that this is not a case in which the applicant could be characterised as having acted dishonestly or in bad faith and there is no question of misfeasance or misconduct. In my view there is nonetheless a serious issue as to whether the applicant’s costs can be said to have been properly incurred in the liquidation of the company in light of the various matters discussed above. It is a core function of a liquidator to adjudicate on claims made by creditors against the company which is being wound-up. The question posed by the applicant asked the court to make a decision of a type routinely made by a liquidator in the course of a liquidation. There was no dispute before the applicant as to the admissibility of the notice party’s claim. As the applicant did not offer any view on the matter and no other party appeared, there was no dispute as to the admissibility of the notice party’s claim before the court either. This resulted in a situation where the notice party’s undisputed claim was

admitted, but only after significant legal costs were incurred. It is hard to escape the conclusion that these legal costs were incurred solely because the applicant was not prepared to make a decision squarely within his functions as liquidator in order to avoid the risk of personal liability for having done so in the event of a subsequent challenge.

**17.** The applicant seeks to downplay the impact of his decisions by characterising them as procedural judgements which, in his submission, should at their height be treated as honest mistakes. I do not think this is an accurate reflection of the position. The applicant made a deliberate choice not to make a decision and instead to ask the court to make it in circumstances where this would necessarily give rise to significant legal costs. Had the applicant made the decision he was originally minded to (i.e., refuse the notice party's claim) and lost an appeal taken by the notice party, then that decision could readily be characterised as an honest mistake. The applicant would have erred in the exercise of his statutory functions which error was subject to correction *via* a statutory right of appeal. Had the applicant been persuaded by the notice party's additional arguments, allowed the claim and been faced with a challenge by the other creditors the same logic would apply. In either case the incurring of legal costs would depend on an appeal being taken against the applicant's decision – an event which might not occur at all, in which case no costs would arise. To decline to make any substantive decision and thereby necessarily incur the legal costs of this application regardless of its outcome, is not a mistake as such. Rather it is a tactic designed to protect the applicant as liquidator at the expense of the company's creditors.

**18.** A similar point can be made as regards the applicant's decision not to offer any view on the substantive merits of the application he had made to the court. The rationale offered for the making of the application (i.e., avoiding the risk of personal liability) does not provide any justification for why the applicant did not take a stance on it once the application had been made. Whilst the applicant raised some issues as to why the claim might be disallowed

- such as whether some or all of the notice party's claim was statute barred - he did not adduce evidence in support of those issues. Once that approach was taken by him, the notice party's claim was almost inevitably bound to succeed since the notice party was making a substantive evidence-based case which was not opposed. In effect, the application for directions was made to the court in a manner which hindered the court in engaging with the applicant's underlying concerns – which the applicant was not prepared to expand upon.

**19.** Express statutory provisions governing legal costs were introduced in the Legal Services Regulation Act 2015 (ss.168 and 169) and the Rules of the Superior Courts were subsequently amended to take account of these provisions. The general thrust of these provisions is that, subject to the court's discretion, the awarding of costs will depend on the outcome of legal proceedings. In particular, when considering the application of the principle that costs should follow the event under s.169(1), the court may have regard to "*whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings*" (s.169(1)(b)). In most instances this factor will arise when the unsuccessful party seeks a reduction in the costs to be awarded against it because of issues raised either unnecessarily or unsuccessfully by the successful party. However, it usefully focuses on the reasonableness of the parties' approach towards the litigation as a factor separate to the parties' conduct (s.169(1)(a)).

**20.** The notice party has not sought costs against the applicant so strictly speaking the court is not engaged in an exercise under s.169(1) but the application that the applicant's costs be treated as costs incurred in the liquidation is opposed by the notice party. I do not think that this application can be disposed of in favour of the applicant solely by virtue of the fact that he has not been guilty of misconduct or misfeasance. In my view this is very much a "*borderline*" case as referred to by McKechnie J. in paragraph 5(iv) of *Ballyrider* and, on

balance, I am of the view that there are sufficient grounds to deny the applicant recourse to the company's funds to meet his legal costs.

**21.** It seems to me that I should have regard by analogy to whether it was reasonable for the applicant to raise an issue by way of an application for directions under s.631 of the 2014 Act and then decline to pursue or contest the substance of that issue before the court. I do not think that this course of action can be characterised as reasonable – especially in circumstances where no-one else opposed the notice party's claim. The applicant says he was not aware that this would be the case until after the application was made (or, more accurately, after all the creditors had been notified of it) but he does not point to any steps taken by him to ascertain whether there was likely to be any opposition to the admittance of the claim before the litigation was commenced.

**22.** In the circumstances I am not satisfied that the legal costs incurred by the applicant in making this application were properly incurred in the winding up of the company. It follows from this that the applicant is not automatically entitled to have recourse to the company's funds to reimburse his own legal costs and I am not prepared to make the order proposed by the applicant that the applicant's costs should be costs in the liquidation.