

**THE HIGH COURT
REVENUE**

[2021] IEHC 533
[Record No. 2020/89R]

BETWEEN

EXPRESS MOTOR ASSESSORS LIMITED (IN LIQUIDATION)

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Stack delivered on the 28th day of July 2021.

1. Subsequent to my written judgment delivered on 21 June 2021, the respondent (“Revenue”) has sought an order for the costs of the application to amend the case stated on the basis that the application to amend was refused.
2. However, they also seek an order for those costs as against the liquidator of the appellant, Mr Stephen Doran, personally, together with an order prohibiting him from having recourse to the assets of the appellant company to discharge either his own costs of the motion, or the costs of other parties for which he may be made liable.
3. I will deal first with the costs of the application to amend the case stated. The principles relevant to costs have been summarised by the Court of Appeal (*per* Murray J.) in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183. The general discretion of the court in connection with the ordering of costs is preserved, but the court must have regard to the provisions of s. 169 of the Legal Services Regulation Act, 2015, which provides that a party who has been “entirely successful” in the proceedings is entitled to an award of costs against the unsuccessful party, unless the court orders otherwise. In considering whether or not to order otherwise, the court must have regard, *inter alia*, to 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.
4. As the appellant points out in its replying submissions on the subject of costs, my principal judgment dealt not only with whether the case stated should be amended to include the two questions proposed by the appellant, but also dealt with two procedural matters which were obviously regarded by the respondent as being significant.
5. On the question of whether it was this Court rather than the Appeals Commissioner who should amend the case stated, the Revenue took a somewhat one size fits all approach, in reliance of the recent judgment of this Court in *O’Sullivan v. Revenue Commissioners* [2021] IEHC 118. However, that judgment was explicitly predicated on the fact that the case stated before the court contained sufficient findings of fact to permit the court to amend itself. By contrast, in this application, had I found that Question 1 was an appropriate question to be added to the case stated, I would have had to remit the matter to the Appeals Commissioner to make the necessary findings of fact. The respondent, in those circumstances, was not truly successful in its assertion that, as a matter of course, amendments should be done by this Court.

6. On the substantive issue before me, which was whether I should amend the case stated to include the Questions proposed by the appellant, Revenue was successful. The appellant did not press strongly for the inclusion of Question 2, but as regards Question 1, it should have been reasonably obvious that such a question was not appropriate for determination by this Court on case stated, as it related to matters outside the jurisdiction of the Appeals Commissioner.
7. On the second procedural issue before me, which is whether it was appropriate for the appellant to proceed by way of motion rather than making an application to amend at the outset of the hearing of the case stated, I found that the appellant had used the appropriate procedure.
8. In those circumstances, it cannot be said that the Revenue was "entirely successful" in these proceedings. However, I do not believe that the proceedings were such that it is appropriate to break down the judgment and look at the success or otherwise of each party on each point as if a modular trial had taken place.
9. In the exercise of my discretion, therefore, I will order that the Revenue is entitled to all of its costs of the application to amend.
10. As regards the application of Revenue to make the liquidator personally liable for those costs and to preclude him from having recourse to the appellant's assets for either his own costs or those of other parties for which he may be made liable, I do not believe the Revenue has met the threshold required for such a far-reaching order. In support of this submission, Revenue cited the *Ballyrider* principles as set out in the judgment of McKechnie J in *Revenue Commissioners v. Fitzpatrick*, which appears to be an unreported Supreme Court decision of 31 July, 2019 (no neutral citation provided). Revenue cite that judgment as quoted by MacMenamin J. in *Eteams International v. Bank of Ireland* [2020] IESC 23. I have been unable to find a copy of the judgment in *Fitzpatrick*, but the principles set out therein are clearly quoted by MacMenamin J. in *Eteams*.
11. *Eteams* concerned the institution of proceedings in the name of a company pursuant to the Companies Acts, when it was clear that they should have been issued in the name of the liquidator. It is notable that the Supreme Court was careful to say that costs should not be imposed personally against a liquidator other than on the basis of clear and cogent evidence of misconduct within the meaning of the *Ballyrider* principles.
12. In this case there is no evidence whatsoever of such misconduct and the application is made purely on the basis of an assertion in Revenue's submissions on costs that the liquidator was acutely aware that the bringing of the within motion in respect of Questions 1 and 2 would not be in the best interest of creditors or the Appellant company in liquidation. This really amounts to a submission that the application was unsuccessful and that this should have been clear from the outset. However, there is no evidence as to the circumstances in which the application came to be made and I cannot see how I can infer even negligence, let alone the more serious forms of misconduct referred to by McKechnie J. in the *Ballyrider* principles, without such evidence. I agree with the

appellant that to make the order sought would have a chilling effect on liquidators who must, from time to time, decide whether or not to bring appeals by way of case stated to this Court.

13. In my view, Revenue have not established any basis for an application for costs against the liquidator personally or the related order that he should not have recourse to the company's assets for his own costs or the costs of any party in respect of which he has become liable.
14. I will therefore order that Revenue should recover the costs of this application from the Appellant company.