THE HIGH COURT

[2020] IEHC 508

[Record No. 2019/367 COS]

IN THE MATTER OF JAMES ADAMS VINTNERS LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS, 1963-2003

JUDGMENT of Ms. Justice Pilkington delivered on the 21st day of July, 2020

1. By originating notice of motion, the joint liquidators in this matter seek an order fixing their remuneration for the period of the liquidation, 6th September, 2011 to 9th September, 2019. The application is grounded upon the affidavit of one of the joint liquidators, David Van Dessel, sworn on the 3rd October, 2019. There is a replying affidavit of Michael Nugent who acts on behalf of certain of the creditors (of whom I understand he is one) on the 18th November, 2019 and a second affidavit from Mr. Van Dessel sworn in reply on the 2nd December, 2019.

2. The company itself (James Adams Vintners) was incorporated on the 26th day of February, 1985 and its sole activity was the wholesale business of alcoholic beverages within Ireland and internationally.

3. Essentially, the grounding affidavit records that the company traded successfully for over 25 years, but it suffered a downturn and a significant decline in turnover following the financial crisis in 2008 and 2009.

4. It was initially thought, in or about 2010, that the business could be wound down, the company's premises sold, and all creditors satisfied in full. Unfortunately, that did not prove possible and the decision was made to place the company in liquidation.

5. No issue arose (and the liquidator has confirmed this in their report to the Director of Corporate Enforcement) in respect of proceedings pursuant to s. 150 of the Companies Act, 1990. No issue arises in respect of this company save that it could not trade its way out of a significant financial downturn within the economy.

6. In respect of the liquidators' fees two firms acted; this was due to the fact that each liquidator was employed by a different firm. The total sum sought by the liquidators is €128,874.89 plus VAT, together with outlay of €2,321.89. That does not include the costs associated with this application.

7. Essentially, the liquidators contend that they have calculated their rates pursuant to the High Court decisions of Kelly J. in *Re Missford Limited* [2010] 3 I.R. 756 ('*Missford*') in relation to an examiner and in *ESG Reinsurance Ireland* [2010] IEHC 365 *('ESG Reinsurance'*) in relation to the remuneration of an administrator. The sums sought break down to the sums of €81,913.25 and €46,964.64 for the respective joint liquidators, one of whom works for Moore Stephens Nathans and the other for Deloitte (Mr. Van Dessel).

8. If these payments were approved and considered, it is anticipated by Mr. Van Dessel that the sum of €61,039 would stand to the credit of the liquidation. As I understand it, this

would involve payments to the secured creditors of approximately 75% of debts due, but nothing to the unsecured creditors.

9. Before dealing with the other affidavits, it is noteworthy that by letter dated 31st August, 2019, the Revenue solicitors wrote to the solicitors having carriage of this application and they state: -

   (a) With regard to the joint liquidator's remuneration for the period of the 6th September, 2011 to the 9th September, 2019 measured at €75,000 plus VAT (€94,571.89) that Revenue considers that figure to be excessive and that the appropriate fee to be the sum of €52,000 plus VAT. In that letter they set out the rationalisation for the reduced figure.

   (b) With regard to the fees sought in this application, again, Revenue believed the figure sought of €19,928 (€9,928 for the liquidator and legal fees of €10,000 plus VAT) to be excessive and, in their view, believed that a figure of no more than €10,000 plus VAT is a reasonable figure for the combined liquidator/legal costs for this application.

10. Those figures would appear to be figures with which the joint liquidators do not raise any strenuous objection in all the circumstances.

11. Mr. Michael Nugent, solicitor, who swore his affidavit on 18th November, 2019, makes certain submissions as to the entitlements of the joint liquidators to the magnitude of their proposed costs.

12. Mr. Nugent, initially, applies to be appointed a *legitimus contradictor* to oppose the application of the joint liquidator. Mr. Nugent, solicitor, has been instructed by a number of creditors and is entitled to act on their behalf and to put forward such arguments as he may advance with regard to their interests. I accept, of course, that he is entitled to appear on behalf of the creditors he represents.

13. He also seeks to be indemnified as to costs and entitled to his costs as *legitimus contradictor* either by the liquidators or out of the assets of the company in such sum as this Honourable Court may deem fit. The entitlement to indemnification is not understood and no basis is advanced for this unusual application. For the avoidance of doubt any suggestion of an entitlement to indemnity costs is rejected and the overall entitlement to costs will be a matter for consideration in due course.

14. Mr. Nugent takes issue with a number of matters including: -

   (a) That the minutes of the creditors meeting are at variance with what transpired and he exhibits what he asserts to be the proper and correct minutes from meetings between December, 2013 to December, 2018. He further takes issue with the creditors' attendance list. These are not matters that I can resolve on affidavit and only one aspect appears to relate to his contentions within this application, with regard to s. 269 of the Companies Act, 1963 ('s. 269') below.

(b) With regard to the liquidator's fees, he claims that the figure is initially high for a company that had long since ceased trading, was left in good order and had a liquidation lasting in excess of eight years.

(c) Pursuant to s. 269 at the creditors' annual meeting of 17th December, 2013, Mr. Nugent avers that the remuneration of the liquidators was agreed to be fixed at €10,000 plus VAT. He further avers that at the annual meeting of creditors on 10th October, 2014, the liquidator sought approval for an increase in their fees and in relation to that increase, a further resolution was passed pursuant to s. 269, that the remuneration of the liquidators be fixed at €10,000 plus VAT together with an extra amount for outlays in the sum of €3,039. Mr. Nugent avers that the liquidators stated on more than one occasion that they would apply to the High Court to have their fees increased but did not do so. It appears to me that they do so now. They may be late in doing so but I cannot discern any time limits that preclude them from now making this application.

(d) Separate from the submission pursuant to s. 269, there is a suggestion that the company premises were sold at significant undervalue. Linked to this is the fact that the creditors (or those whom Mr. Nugent represents) further point to their dissatisfaction at the delays in dealing with this matter.

15. In my view, it is not for this Court to seek to examine the sale of the company's sole significant asset. This is an application solely in respect of liquidators' fees and there is no entitlement as a matter of law, as I construe it, for Mr. Nugent to seek that there be any setoff in respect of these fees or that the liquidators in some way be disallowed a certain portion of their fees represented by the sale costs. If there is any issue with regard to the disposal of property within any liquidation, then there are means of seeking legal redress and it does not appear that this course was taken.

16. Mr. Nugent further points out that the preferential creditors will get approximately 75% of what is due to them, the unsecured creditors will get nothing and it is only if his application in respect of the liquidators is successfully opposed, that the unsecured creditors will get any monies.

17. The final affidavit is sworn by Mr. Van Dessel in reply to that sworn by Mr. Nugent. He deals with the sale of the property and I have already set out my view in respect of that above. He does note that he had professional advisors with regard to the sale. He states that it was the best price achievable in the property market at that time.

18. With regard to the allegations raised by Mr. Nugent, the only allegation Mr. Van Dessel accepts is that there has been some delay in bringing he application before the court and proffers an apology in that regard. He also refers to the Revenue Commissioner's letter which I have set out in some detail above.

19. In my view the suggestion from the Revenue provides a practical and straightforward method of dealing with this matter.

20. There have been a series of cases which have considered the issues surrounding liquidators (or examiners or administrators) costs and *Missford* and *ESG* are referred to above.

21. In the case of In the Matter of *Mouldpro International Limited* (*In Liquidation)* [2012] IEHC 418, Finlay Geoghegan J., in respect of an issue arising in an application for the amount of remuneration sought by the liquidator, stated as follows: -

> "There are no statutory criteria according to which the court should determine what constitutes reasonable remuneration for the purposes of section 29. It does not appear to me that this can be determined by reference only to the total charge out costs computed from the hours spent and relevant hourly rates for the examiner and those working with him. This may, of course, comprise one element to be taken into account in determining what reasonable remuneration is. However, in my view, it should not be the only element, and in determining what is reasonable remuneration the court must also have regard to the nature of the work carried out, the complexity of the work and the importance or value of the work to the client. These would be common elements considered by professionals charging or seeking to agree fees with clients."

22. The court continued: -

> "The principles set out above have been cited with approval by Kelly J. in *Missford,* in relation to an examiner and in *ESG Reinsurance*, in relation to the remuneration of an administrator… and by Clarke J. in *Re Marino*, in relation to an examiner. In each of these three cases, Kelly J. and Clarke J. addressed the appropriateness of the specific hourly rates set out by the examiner or administrator in respect of himself and the staff of the relevant accountancy firm. The rates allowed have subsequently been applied by official liquidators and allowed by the Court without objection from the Revenue Commissioners in applications in winding ups by the Court……
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> Since the delivery of the judgment in *Re Sharmane Ltd*., it has been clear that the Court, in determining the remuneration of persons appointed as examiners, administrators or official liquidators, will not determine the reasonable remuneration by reference only to the total charge-out costs computed from the hours spent and relevant hourly rates, but will also have regard to:
>
> (i) the nature of the work carried out; and
> (ii) the complexity of the work; and
> (iii) the importance or value of the work 'to the client'."

23. An appeal from a notice party to the judgment of Finlay Geoghegan J. above fixing the remuneration of the official liquidator came before the Court of Appeal ([2018] IECA 88). In respect of a liquidator's remuneration, Whelan J. stated: -

> "I am satisfied on a review of the jurisprudence that the discretion of the Court in respect of the remuneration of a liquidator pursuant to s. 228 of the Companies Act 1963 constitutes a jurisdiction analogous to that which exists pursuant to s. 29 of the Companies (Amendment) Act 1990 in respect of the remuneration of an examiner… the court has an obligation to be vigilant in scrutinising any application for costs brought by an examiner pursuant to section 29. I am satisfied that the exercise of discretion is likewise informed by the obligation for vigilant scrutiny when an application for costs falls to be considered pursuant to section 228."

24. In The Matter of *Swift Structures Limited* [2017] IEHC 540, Haughton J. considered s. 228 of the 1963 Act and RSC Order 74 rr. 46 & 47 dealing with similar issues regarding the entitlement of the court to supervise the payment of liquidators' fees in light of pre-existing funding arrangement(s). In this case the court quoted from the Supreme Court in *Merchant Banking Limited (in liquidation)* [1987] I.L.R.M. 260 which in turn quoted with approval form Keane's Company Law as follows: -

> "the court directs what remuneration the liquidator is to receive. There is no scale of fees fixed for remuneration: the court considers the circumstances of the particular and determines what is fair…"

25. Whilst *Missford, ESG Reinsurance* and others have refined the criteria with regard to the calculation and assessment of fees; as those cases have themselves pointed out that is not to oust the Court's jurisdiction but to provide a degree of assistance and direction. The fundamental entitlement of the High Court to direct what remuneration a liquidator receives remains.

26. I think it is fair to say that this was not in, what one might describe as at the higher echelons of complex liquidations. It appears, and the liquidators agree, that this was a well run company with its books and records in order. In saying this I of course appreciate that there must be a thorough independent examination, by the liquidators, of this documentation to establish these matters. There was a recommendation that no proceedings be issued pursuant to section 150. It appears this company had only one significant asset, the property. That it sold at a lower price than was perhaps anticipated is not a matter that concerns the court directly in respect of this motion in the manner contended for by Mr. Nugent. In my view, creditors cannot use their disagreements with certain elements of this liquidation, in seeking to redirect that dissatisfaction by seeking a diminution in the liquidators' fees. The entitlement of the liquidators to the discharge of their fees is based upon the facts and principles set out above, not creditor dissatisfaction with the realisation of certain assets. That is not to say that such complaints are not without legal redress but that lies elsewhere.

27. It is of course for the creditors at their meeting to appoint the person(s) of their choice to act as liquidator(s). In this instance I note that their selection has occasioned the retention of two liquidators and two firms (each liquidator being employed by a separate firm). That is unlikely to result in a diminution of costs and is perhaps regrettable, but

that follows from their appointment by the creditors and so must now be dealt with on that basis.

28. Counsel for the liquidators relies upon s. 280 of the Companies Act 1963. Section (1) and (2) provides as follows: -

> "280.(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise in relation to the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just….."

29. It is contended that this section provides or grounds the entitlement of the liquidators to make this application and there is nothing within its parameters that precludes any such application being made. Section 280 is certainly broadly drafted with regard to the issues which can be adjudicated before the court. I am satisfied that it is sufficiently broadly drawn to embrace this application.

30. Mr. Nugent relies specifically upon s. 269 of the 1963 Act which is as follows: -

> "(1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators.
>
> (2) Within 28 days after the remuneration to be paid to the, liquidator or liquidators has been fixed by the committee of inspection or by the creditors, any creditor or contributory who alleges that such remuneration is excessive may apply to the court to fix the remuneration to be paid to the liquidator or liquidators.
>
> (3) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection or, if there is no such committee, the creditors, sanction the continuance thereof. "

31. Mr. Nugent avers that at a creditors meetings, referred to at paragraph 14 above, that the sums were fixed to be paid to the liquidator. There has been no subsequent court application by a creditor so, it is contended, the rate is fixed and binding upon the liquidators. I do not construe s. 269 in such terms; whilst it appears that no creditor has applied to court and Mr. Nugent relies heavily on the fact that at the creditors meeting the liquidators stated their intention to make a court application, they did not in fact do so.

32. In my view the liquidators are entitled to make this application pursuant to s. 280 which is, I accept, very broadly drawn. They are entitled to seek orders notwithstanding s. 269 to have the court adjudicate upon their fees.

Conclusion

33. Subject to the matters set out above and to the clear jurisdiction of the High Court to direct the remuneration a liquidator receives and the entitlement accorded pursuant to s. 280, I fix the remuneration of the joint liquidators in the terms set out within the letter from the Revenue to Messrs Kane Tuohy solicitors, as referred to above, and dated 31st October 2019 as to their costs within the liquidation and in respect of this application.

34. I will hear the parties as to what, if any, consequential or other orders are required.