Case No: HC-2017-002846

NEUTRAL CITATION NUMBER : [2019] EWHC 2194 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building,
7 Rolls Building, Fetter Lane, London,
EC4A 1NL

Thursday, 9 May 2019

BEFORE:

SARAH WORTHINGTON, QC(Hon) sitting as a Deputy High Court Judge of the Chancery Division

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BETWEEN:

Ms FARHEEN QURESHI
(in her capacity as Liquidator of Edgware Constitutional Club Limited)

Claimant

- and -

ASSOCIATION OF CONSERVATIVE CLUBS LIMITED

Defendant

MR M BOWMER (instructed by Kennedys Law LLP) appeared on behalf of the Claimant
MR M HUBBARD (instructed by Thomson Snell & Passmore LLP) appeared on behalf of the Defendant

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APPROVED JUDGMENT
(ON COSTS)

Sarah Worthington QC(Hon) sitting as a Deputy High Court Judge:

1. On 9 May 2019, at the end of oral hearings to deal with the consequential matters raised by my judgment in the substantive case, I ordered that the Defendant pay the Claimant her costs of the claim on the standard basis, such costs to be the subject to a detailed assessment if not agreed, and further that the Defendant pay the Claimant by 4.00pm on 30 May 2019 the sum of £60,000 on account of those costs.

2. I reached that conclusion after reading written submissions from both the Claimant and the Defendant, and considering their elaboration in extended argument before me. Given the lateness of the hour, I asked the parties if they wished me simply to state my conclusions on costs or if they wished to have a written judgment setting out the reasons for those conclusions. They indicated their preference for the former, and that is what I did. By implication, it is clear I had been persuaded for the most part by the arguments of counsel for the Claimant and his responses to my questions in court, and less by counsel for the Defendant.

3. Some time later I was sent a transcript of my brief oral statement of my conclusions on costs by way of draft judgment for approval. In the circumstances, it seems more useful and appropriate to set out in summary form the key reasons underpinning my conclusion, rather than simply restate the order I made as to costs, the details of which already appear clearly in the sealed copy of the Order of 10 May 2019.

4. The context is straightforward, and I repeat it here by way of essential background. The Claimant Liquidator had sought declarations as to the legality of certain past and proposed distributions of the assets of the Edgware Constitutional Club Limited (the Club) on a members' voluntary winding up, and in particular sought confirmation that those assets should be paid to the members subject to payment of the liquidator's proper expenses.

5. This was contested by the Defendant Association of Conservative Clubs Limited (the Defendant) on the basis that the Club was not properly in liquidation, so no assets could lawfully have been paid to the Club's members under the Club's own Rules, or, alternatively, that even if the Club was in liquidation, its surplus assets should have been paid to the Association under the Club's Rules.

6. In a judgment handed down on 9 May 2019 I rejected both limbs of the Defendant's arguments and granted the orders sought by the Claimant on the basis that:

   (i) the Insolvency Act 1986 s 107 was applicable on this winding up, so any surplus should be distributed to members "unless the articles otherwise provide". The Club's Rules did not "otherwise provide", since in this respect Rule 74 only provided that "*except* on the dissolution or winding up" (emphasis added), no surplus should be distributed to members: see in particular *Re Merchant Navy Supply Assoc* [1947] 1 All ER 894.

   (ii) The Club was in liquidation, despite any procedural irregularities in entering into that process, applying *Browne v La Trinidad* (1887) 37 ChD 1.

7. The general rule is that costs follow the event. If that rule is to apply in this context, it is plain that the Claimant has won and should be entitled to her costs from the Defendant. This is what I ordered.

8. By contrast, the Defendant argued that the costs of both parties (i.e. including the costs of the Defendant as losing party) should be regarded as proper costs in the liquidation, and so paid out of the Club's funds as an expense of the liquidation. This I declined to do.

9. In support of this argument, counsel for the Defendant relied especially on the decision of Hildyard J in *Lehman Bros International (in Administration)* [2018] EWHC 924 (Ch) (the *Waterfall IIC* costs judgment). That judgment, however, would seem to support the Claimant's position, that costs should follow the event in this case, not the Defendant's contrary position.

10. Hildyard J identified the guiding principles on costs in this context: see especially paras [6]-[11]. Paraphrasing, first, courts should exercise real caution before departing from the general discretionary rule that costs follow the event. Secondly, and regardless of the form of the proceedings before the court, departure may be justified where the losing party's involvement is in substance one sponsored by the estate administrator in order to facilitate a necessary judicial inquiry into the general distribution of the estate, since in that case fairness would dictate that the estate should bear the costs of the inquiry, including the costs of the losing party. Thirdly, the losing party seeking its costs on this basis will need to justify departure from the general rule by reference to the facts dictating that party's involvement, not by reference to any supposed general principle, nor by reference to the form of the proceedings before the court. Otherwise the general rule as to costs in adversarial proceedings will apply.

11. Counsel for the Defendant first suggested that the form of the substantive proceedings may be material in itself to the Defendant's argument on costs. The *Waterfall IIC* costs judgment goes against that, further supported by the Insolvency Rules r. 12.41 and CPR Part 44.

12. As to the discretionary element, and by analogy with Hildyard J's analysis of the position of the Senior General Creditors in the *Waterfall IIC* case (see especially paras [30] and [47]-[50]), the facts here indicate that the Defendant's manner in pursuing its position against the Claimant was adversarial (see the correspondence between the parties); the issues raised in the substantive proceedings were ones whose genesis, inclusion and development was driven by the Defendant, notwithstanding the form of the application by the Claimant; moreover, these issues were not raised by the Defendant acting for some identified benefit beyond its own so as to represent an argument of interest and material significance to others in a like position in the Club's liquidation; on the contrary, the Defendant's case was in pursuit of its own private objective; finally, and though not of material significance to my conclusion, aspects of the Defendant's argument were – to use the words of Hildyard J at para [49] – "stretched" (e.g. the possible effect of the 2011 unregistered Rules). I therefore find that the Defendant's role in the substantive proceedings was not a role with an objective that affected all or such a substantial body of creditors that the Club's estate

should, in fairness, bear the cost of its resolution. I therefore decline to depart from the general rule as to costs.

13. In reaching this conclusion I have not ignored the argument put on behalf of the Defendant suggesting the issues raised were indeed of wider concern, in that the Defendant was keen to know whether it had an entitlement in the winding up of other similar clubs, being sister associations of the Edgware Constitutional Club Limited. That is no doubt true. But that is an issue of general importance to the Defendant, not to the Claimant, and may in a different context have justified the successful Defendant in such proceedings having to bear a losing party's costs if the proceedings had been run as a sponsored test case on that particular issue.

14. Counsel for the Defendant further argued that if the Claimant had lost before me she would nevertheless have been entitled to have all her costs recouped out of the Club's assets, including the costs needing to be paid to the successful Defendant. That is true, provided the costs were properly incurred by the Claimant, but this is the result of the indemnities given to liquidators to shield them from personal liability for the expenses of winding up an estate, so long as they carry out that task properly. Similarly, the Defendant's costs will be borne by the Defendant, and the Defendant's officers will carry no secondary personal liability for the loss these costs impose on the Defendant provided they have behaved properly in their own roles. But all this is to do with each organisation protecting its officers; it has nothing to do with whether the Defendant's costs, including the Defendant's liability to pay the Claimant's costs, should be paid from the Club's estate.

15. Finally, counsel for the Defendant argued that even I adopted the general rule as to costs, I should reduce the Defendant's liability to pay the Claimant's costs by one third because the total costs of these proceedings had been increased by the Club's actions from 2012 to 2018 in respect of the 2011 unregistered Rules and in respect of procedural irregularities in the Club's management and winding up; by the sparse evidence put forward by the Claimant; and by the failure to engage in mediation. I do not accept these suggestions. If the facts in this case had been different, the costs of proceedings would have been different, but the facts themselves were not manufactured to drive an unwarranted increase in costs. Further, my comment on the evidence before the court being "sparse" was directed equally at the Claimant and the Defendant. Even in the costs hearing, further factual details emerged that neither side had seemed able or willing to advance in the main hearing, for example the existence of what appeared to be a settlement agreed on both sides but not pursued, and an obvious explanation for the until then unexplained return of significant sums paid out by the Claimant in her initial distribution of assets. On the admittedly still sparse facts I was presented with by both sides, I heard nothing to persuade me that mediation would have altered the costs position given that these proceeding took place despite what emerged in the costs hearing as an agreed settlement.

16. I therefore conclude that the Defendant, as the losing party, is liable to pay the costs of the Claimant on the basis now set out in the sealed Order of 10 May 2019, and is not entitled to have that general rule displaced in favour of having the costs of both parties met out of the assets of the liquidation estate.

17. For completeness, I should add that in my substantive judgment I had found that the expenses properly incurred by the Claimant in the liquidation of the Club, including in particular for these purposes the Claimant's costs of the substantive claim to the extent that such costs were not paid by the Defendant, were properly payable out of the Cub's assets. My declaration to that effect is recorded in the sealed Order of 10 May 2019.