COURT OF APPEAL

CIVIL

[approved]

Neutral Citation No. [2025] IECA 37

[2024 No. 239]

The President
Noonan J
Meenan J

IN THE MATTER OF TOWER TRADE FINANCE (IRELAND) FORMERLY IN EXAMINERSHIP UNDER PART TEN OF THE COMPANIES ACT 2014
AND
IN THE MATTER OF DEAL PARTNERS LOGISTICS LTD FORMERLY IN EXAMINERSHIP UNDER PART TEN OF THE COMPANIES ACT 2014

JUDGMENT (*Ex tempore*) of Ms Justice Costello delivered on the 17th day of February 2025

1. On the 17 February 2023, Mr Declan McDonald ("the Examiner") was appointed examiner to two related companies, Tower Trade Finance (Ireland) Ltd and Deal Partner Logistics Ltd ("the companies"). He acted as Examiner for the two companies between February and May 2023. Proposed schemes of arrangement were not approved by the creditors and the companies entered into liquidation. The Examiner was appointed Liquidator.

2. The Examiner applied for orders approving the remuneration and costs of the examinership and approving payment out of the assets of the companies. The members of the Committee of Inspection of the companies were put on notice of the application. Three

members of the committee consented to the application and one member did not respond. They did not attend the application in the High Court.

3. One member of the Committee of Inspection (Mr Shanley) asked that the court's attention be drawn to his recollection that the court sanctioned the examinership subject to a commitment by the directors to contribute €150,000 to specifically be used to offset examinership costs. The Examiner's solicitor responded, setting out his own recollection, which was that the €150,000 was to be used to provide working capital as and when required and not to defray examinership costs. The court asked for a transcript of the DAR of the hearing of the petition.

4. After reviewing the transcript, while the court did not take issue with the amount of costs sought or the work done in the examinership, the court, nevertheless, refused to sanction any examinership costs on the grounds that:

(i) The directors had represented to the court at the hearing of the petition that funds would be provided to cover the costs of the examinership.

(ii) The Examiner and his solicitor had not accurately described this to the High Court on their application for costs.

(iii) Sanctioning the Examiner's costs would be prejudicial to the creditors of the companies.

The High Court judge was expressly informed that if he declined to make the order sought, the Examiner would have to bear the costs himself, and that, counsel submitted, would require impropriety or some exceptional feature for the court to take that course of action.

5. The matter which caused the High Court concern and led to it refusing the application in its entirety arose as follows. The Examiner swore the affidavit grounding the application for payment of fees on 8th May 2024. He made no reference to the hearing of the petition before the High Court. The application was sent to the four members of the Committee of

Inspection of Tower Trade Finance Ireland Ltd for their approval. One member, Mr Kieran Shanley, emailed the Examiner's solicitor on 13th June 2024, stating that he agreed to the order being made in relation to the examinership costs. He then continued:

> *"However, as discussed, I would like it mentioned before the court on the 24th of June next that I was in attendance at the hearing on the 17th of Feb 2023 and have a very clear recollection that Justice Brian O'Moore sanctioned the examinership process subject to a commitment from Mr Diggins and Buckley [the directors of the two companies] of a combined contribution of personal funds amounting to €150k to be specifically used to offset examinership costs..*
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> *Although this may not have been reflected in the courts (sic) written judgement (sic), I would like it brought to the court's attention on the day.."*

6. The Examiner's solicitor, Mr Gavin Simons, swore an affidavit on 21st June 2024. He averred that three members of the Committee of Inspection, including Mr Shanley, confirmed their agreement to the orders sought being made. He drew the court's attention to Mr Shanley's email, and he replied as follows:

> *"5. The sum of €150,000 was mentioned in Court at the hearing of the Petition but neither I nor the former Examiner believe there to have been a binding commitment from the directors to provide this sum unconditionally or that the Court relied on this sum being paid by them when appointing the Examiner. Indeed, the Court Order made on 17 February 2023, makes no mention of any such commitment or of the sum of €150,000.*
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> *6. In the former Examiner's first report to the Court, he noted as follows,*
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> *'The directors have committed €150,000 to fund the costs and ongoing operation of the business and this would provide the entities with sufficient resources to operate during the examinership period'.*

7. Therefore, I believe that it is clear that the suggestion of funding up to an amount of €150,000 was not to defray the costs of the examinership process but to provide working capital as and when required. As matters transpired, the only working capital requirement during the examinership was in the sum of €35,000, which was provided by the directors personally."

7. A perusal of the transcript showed that this averment was incorrect. At the hearing of the petition counsel for the petitioner said:

"The next question to ask is, well, what prejudice would be wrought by the Court in appointing an Examiner? And in that regard, Judge, Mr Diggins and Mr Buckley are committed to the investment into the company of €150,000 if the examiner is appointed on day one. That is intended to cover cashflow for the year. The Court will have seen, ... in the report, the cash flows... That €150,000 on the cashflows isn't used in the trading. It's available. And if it were the case that an examiner were to come in, be appointed, that €150,000 wouldn't (sic) be available in the first instance to pay or contribute towards the payment of its fees. It is a significant amount of money, showing the face [faith] of Mr Diggins and Mr Buckley in the enterprise, and one which either eliminates or considerably reduces and alleviates the financial prejudice that might be brought by an examinership. One of, yes, a failed examinership. The principal way in which the creditors in this case would be damnified would be by the imposition of a layer of legal and administrative costs which would come from them. But €150,000 would go some considerable way to the defraying of those costs, particularly as is envisaged – although it is ultimately a matter for the examiner himself – that this will be a comparatively short examinership. And we do appreciate that the examiner has duties to the Court which are well established and thoroughly to investigate matters, and it may take

longer than we had envisaged, but nonetheless, there is a token of goodwill, earnest and I think practical assistance to the creditors who will through an examinership, we hope, be offered a choice, a scheme deal which gives a certain return, or failing that, a liquidation on which they will have, dare I say, more of an advanced knowledge.

. . .

I should say, Judge, that it is within the power of the Court, were it to appoint an Examiner, to impose a short time period in order to ensure that the costs of the process don't operate in any way to prejudice the creditors, other than as I said there is a considerable cushion of costs which are being provided for by Mr Diggins and Mr Buckley."

8. This submission of counsel was at odds with both the Independent Expert's Report and the examinership petition. The Independent Expert stated, at para. 11.3, "*I have been advised that two of the directors, Joe Diggins and Niall Buckley will source funding to meet cashflow requirements during the protection period".* At para. 8.1, the petition provided:

"At Appendix D of the Report of the Independent Expert has, on the basis of a projected cash flow statement prepared by management covering the period for which the protection period is expected to run, expressed the view that the Companies will be able to continue trading during the protection period and will have sufficient resources to meet all obligations during the protection period. The key assumption supporting the cash flow forecast is the injection of €150,000 into TTFI in respect of the Companies' working capital requirements for the next year (which would obviously include the protection period)." (emphasis added).

9. While the Examiner and Mr Simons were present in court at the hearing of the petition, they obviously took no part and Mr Simons has averred that he took no note of the

submissions of counsel to the court when moving the petition. The transcript of the hearing reveals that despite opposition from some of the investors in the companies, the trial judge was swayed by the report of the Independent Expert that the only alternative to the appointment of an Examiner would be a liquidation, which would be far less advantageous to the investors than the possible scheme of arrangement which an examiner might be able to put in place. He made no reference to the funding to be provided by the directors and the order of the court made no such reference either.

10. In the Examiner's report, submitted to the court on 7th March 2023, at para. 4.1, he stated, "*the directors have committed €150,000 to fund the costs and ongoing operation of the business and this will provide the entities with sufficient resources to operate during the examinership period*". In a further report, on 21st March 2023, he referred to the directors providing €35,000 in "*working capital support*". (emphasis added).

11. At the application to sanction the fees and expenses of the Examiner, the High Court took the view that the Examiner, by his silence, and the solicitor, in his affidavit, had misled him as to the basis upon which the High Court had been induced to place the companies under the protection of the court in the first instance. Oisín Quinn J pointed out that what was averred in Mr Simons' affidavit was untrue in light of the submissions of counsel for the petitioner to O'Moore J on 17th February 2023. Quinn J took the view that in the absence of Mr Shanley's email and the belated provision of the DAR of the hearing from February 2023, *"the Court would have been misled on 24th June and a further burden would have been imposed on these creditors".* He was of the view that the premise of the application to appoint the Examiner was that the directors of the company, on day one, would lodge €150,000 to the company which would be available, in the first instance, to pay the fees of the examinership. He was highly critical of the fact that neither the Examiner nor the solicitor had sworn an affidavit *"correcting the record"* that had been put before the court. He

expressed the view that the Examiner could recover his fees from the directors. Accordingly, he was satisfied, in the exceptional circumstances of the case, that it would be wrong for the court's discretion to be *"deployed to place a burden on creditors, where the position as described is what has emerged"*. Accordingly, while he had no concern about the reasonableness of the sums claimed or of the nature of the work provided, he declined to make any order on the application.

12. The appellant appealed and no respondent opposes the appeal though the members of the Committee of Inspection were notified of the appeal.

13. Prior to the hearing of the appeal, Mr Simons sought and was granted leave to file a further affidavit dealing with the situation.

14. He set out in detail what I have outlined above and quoted from the relevant documents and transcripts. He accepted that it would have been preferable if he had filed a further affidavit correcting his first affidavit in advance of the hearing, and he also accepted that his account of the hearing before O'Moore J on 17th February 2023 was incorrect. At para. 23 of his affidavit of 28th November 2024, he stated:

> *"Myself and the Examiner had been present at the petition hearing on 17 February 2023, 16 months earlier, although no transcript of that hearing was available and I had not kept a note of the oral submissions made on behalf of the Petitioner. I reviewed the Order made by the Court on the Petition hearing, and I also reviewed the update reports made by the Examiner to the Court. I consulted with Mr McDonald before swearing my First Affidavit. Our recollection was that the Companies' counsel referred to €150,000 being provided by the directors to the Companies for working capital purposes rather than to fund the examiner's costs, and that the judge had not referred to this funding in his ruling."*

15. At para. 44 of his affidavit, he acknowledged, in light of the transcript, that his affidavit was inaccurate in not referring to the submissions made by counsel for the petitioner, and reiterated that neither he nor the Examiner had any recollection of the oral submission being made at the hearing of the petition. He also pointed out that the directors' commitment to fund the companies was not recorded in any written document and was described, variously, as working capital and cashflow.

16. Mr Simons points out that it was never suggested at the petition hearing that the Examiner's entitlement to recover costs from the companies would be confined to any funds contributed to the companies by the directors. The court appointing the Examiner did not make any direction to that effect and there was no agreement to that effect.

17. Regarding his failure to swear a corrective affidavit, he accepts that with hindsight, that would have been preferable. However, he says that since the full transcript was provided to the court in advance and his counsel opened the relevant passages to the court, at the time, he did not consider that it was necessary for him to correct his description of his recollection of that hearing. He also pointed out that Quinn J did not express any concern or dissatisfaction regarding the absence of a corrective affidavit at the time and made no issue about it at all in advance of his ruling. Had the court indicated its dissatisfaction, he says he would have applied for an adjournment to permit him to file a further affidavit.

The Appeal

18. The Examiner accepts that on an appeal against a costs order, he must show that the High Court's order was *"outside the range of judgment calls which were open"* to it (see *Ryan v Dengrove* [2022] IECA 155 and *O v Minister for Justice & Equality* [2021] IECA 293). He asserts eight ways in which he says the High Court erred, such that the order satisfies this test:

(i) The High Court adopted a clearly incorrect view of the legal principles relevant to the refusal of costs to an examiner, without giving any reasons.

(ii) The High Court assigned decisive weight to representations made on behalf of other parties, without reference to the Examiner, before his appointment, which had no real relevance to the Examiner's costs application.

(iii) The High Court assigned excessive weight to errors in the Examiner's solicitor's affidavit which, though regrettable, were honest and understandable mistakes.

(iv) The High Court reached conclusions and made strong adverse findings about the Examiner and his solicitor on grounds that were not raised during the course of the hearing and which neither had any proper opportunity to address.

(v) The High Court erroneously believed it would have been possible for the Examiner to try to recover costs from the directors.

(vi) The High Court refused the application because allowing the Examiner to recover costs would impose a burden on creditors when that is an inherent feature of the statutory scheme that arises in every unsuccessful examinership.

(vii) The High Court disregarded the fact that the Committee of Inspection members, who have statutory oversight of liquidation costs, were consenting, or not objecting, to the application.

(viii) The High Court acted disproportionately by refusing to allow the Examiner to recover any costs and the most extreme sanction possible, which has been applied in only one previous reported case.

Discussion

The power to award remuneration and costs

19. Section 551(4) of the Companies Act 2014, confers on the court the power to *"from time to time make such orders as it thinks proper for payment of the remuneration and costs*

of, and reasonable expenses properly incurred by, an Examiner". Subsection (2) provides a default rule:

> "*Unless the court otherwise orders, the remuneration, costs and expenses of an examiner shall be paid and the examiner shall be entitled to be indemnified in respect thereof out of the revenue of the business of the company to which he or she has been appointed, or the proceeds of realisation of the assets (including investments).*"

20. In *Re Sharmane* [2009] 4 IR 285, in relation to s. 29(2) (now s. 554(2)), Finlay Geoghegan J. held:

> "*. . . as appears from the terms of s. 29(2), as set out above, the normal rule, unless a court otherwise orders, is that the remuneration of an examiner is to be paid out of the revenue of the business of the company to which he has been appointed, or the proceeds of realisation of the assets [of that company].*
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> *. . .*
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> *Construed in the context of the scheme of the Act, it does not appear to me that the opening phrase of s. 29(2) – '[u]nless the court otherwise orders' - permits the court to make an order of the type sought now by the examiner. Rather, its purpose is to give the court jurisdiction to make an order that the remuneration, costs and expenses of an examiner are not to be paid out of the assets of the company to which he is appointed or that he is not entitled to be indemnified in respect thereof out of the revenue of the business of the company. Such an order will, of course, only be made in exceptional circumstances and normally where there is wrongdoing by an examiner. The decision of Costello J. in In re Wogan's (Drogheda) Limited … is one such example. No such circumstances arise in these proceedings. The examiner is entitled, pursuant to s. 29 to approval of*

such amount as may be determined by the court for his reasonable remuneration, costs and expenses in respect of the work done by him as examiner to each of the companies and it will then follow, as the court will not be otherwise ordering, that he will be entitled to recover those fees out of the assets of each of the relevant companies in accordance with s. 29(2) in accordance with the priorities granted in ss.3 and 3B."[Emphasis added]

21. Commenting on s. 554(2), Courtney says that an examiner will ordinarily be entitled to payment by the company *"unless he acts in breach of his duties or acts outside of his statutory remit"* ('The Law of Companies' (2016 4th Ed.) p. 1736). He continues that, ordinarily, an examiner's full costs will be borne by the company under protection in priority to all other creditors' claims but that where *"the examiner acts in breach of his duties, he may be disentitled to his costs: Re Wogan's of Drogheda (No. 3)".* Conroy (the Companies Act 2014 (2018 Ed.), p. 770) says that where an examiner has conducted himself improperly, either no amount or a reduced amount may be allowed in respect of his remuneration, citing *Re Wogan's of Drogheda (No. 3)* and *Re Camden Street Investments Ltd* [2014] IEHC 86.

22. I am satisfied that *Re Sharmane* and In *Re Wogan's of Drogheda* (No 3) correctly state the law on this issue. It has been established for some time and is correctly summarised by Courtney and Conroy.

23. An Examiner and any solicitor acting on his behalf is required to act with propriety and to keep the court fully informed of all matters relevant to the examinership. It goes without saying that an examiner should never mislead the court and if, through inadvertence or mistake, he has presented inaccurate or incomplete or misleading information to the court he ought to correct this at the earliest possible opportunity. Failure to do so would constitute a breach of his duty to the court; the more seriously inaccurate the information originally presented to the court, the more serious the failure promptly to correct the position.

24. Quinn J. was concerned that the failure of the Examiner and his solicitor initially accurately to set out what had occurred at the hearing of the petition was not corrected by either the Examiner or his solicitor swearing a corrective affidavit such as was sworn for the purposes of this appeal. He was also concerned at the apparent failure of the Examiner to follow up with the directors of the companies on the representation of their counsel to the court to the effect that they would invest €150,000 from day one and that this would be available to defray some at least of the costs of the examinership if it did not result in a restructuring of the companies. The directors paid €35,000 of the promised €150,000 towards the cashflow of the companies. They do not appear to have contributed to the costs of the examinership in any way.

25. The issue is therefore the degree of culpability to be attributed to the Examiner for each of these omissions.

26. As regards the latter, the Examiner was present during the hearing of the petition and presumably heard the petitioner's counsel's submissions. While this was at odds with the Independent Expert's Report and the petition itself and the directors funded the examinership with an injection of €35,000, there is no indication that the Examiner considered the representations of counsel or made any inquiry of the directors in relation to the balance of the promised funds. Given that there was a conflict between the written and oral basis upon which the petition was moved, it would have been reasonable for the Examiner to at least attempt to clarify the discrepancy. The issue could then have been brought to the attention of the court in one of his subsequent reports.

27. The question for this Court is the weight to be attributed to this omission. It is possible that his failure to act resulted in the directors withholding €115,000 from the examinership which would otherwise have been available to defray a large portion of his claimed costs and remuneration. However, it is by no means certain that this is the case. It is

possible that the directors might have disavowed the representations of their counsel, or, given the outcome of the examinership, the court might not have held them to his representation. We do not know. What is significant is that three of the four members of the Committee of Inspection of Tower Trade Finance (Ireland) Ltd. either supported or did not object to the Examiner's application for remuneration and costs, including Mr Shanley, even though they represented the creditors who were prejudicially affected by the application. Furthermore, none has opposed this appeal. Clearly, *they* do not believe that the Examiner should be denied his costs and remuneration in all the circumstances. While not decisive, this is a matter to which the court should attribute considerable weight in assessing the degree of any impropriety and culpability of the Examiner in all the circumstances.

28. In my judgement the failure to recognise the discrepancy between the oral submissions and basis for the application as set out in the petition and the Independent Expert's Report was, at the very least, unfortunate, and ought to have been followed up. However, it was not deliberate nor so grave a breach of duty or impropriety as would justify refusing to award *any* remuneration or costs. In my opinion while it was an error it is not an error of such nature or magnitude which could justify or warrant withholding all remuneration and costs, which, it must be recalled, the High Court accepted were reasonable and properly incurred. It might have been appropriate to deduct a sum to reflect the Court's disapproval of the failure of the Examiner in this regard, but this was not considered. This Court is assessing the refusal to award *any* costs and remuneration, not the level of deduction from otherwise reasonably incurred expenses and remuneration.

29. The issues which arose on the application for the payment of costs and remuneration were not such as in my judgement warranted any sanction by the court. The Examiner swore his affidavit. Mr Simons' affidavit shows that it was based upon the documentary record and upon his recollection of a hearing which occurred nearly 18 months previously. There was no

note of counsel's submissions nor any transcript of the hearing of the petition to correct his recollection. I accept that the incorrect recall was understandable, a simple failure of recollection, and in no way deliberate or designed to deceive or mislead the court. His solicitor brought Mr Shanley's email to the attention of the court and set out his *bona fide* recollection. Once the transcript was obtained it was furnished to the court and the Examiner and his solicitor accepted that their recollections were in error and his counsel drew the court's attention to the passages where counsel for the petitioner made the representations to the court regarding the availability of funds to meet the costs of the examinership should it be unsuccessful.

30. The High Court appeared to accept that there had not been any intention to mislead the court but was clearly dissatisfied by the failure of either the Examiner or his solicitor to swear a corrective affidavit. However, the court did not voice these concerns in terms nor require either of them to swear a further affidavit explaining the position. In my judgement had the court intended to place any weight on this failure- as it clearly did- it was incumbent upon it to do so. If the court was seriously concerned about the matter, it was incumbent on the judge to raise the issue during the course of the hearing. As was said by Irvine J. in *Dublin Waterworld v National Sports Stadium Campus* [2019] IECA 214, paras. 141-142:

> "*141. The potential for injustice to one or other party should a judge decide a case on a point not advanced in the course of the hearing is obvious. There may be a perfect answer to the point that the trial judge considers unanswerable and had it been raised at the hearing, the error in the trial judge's thinking would have been corrected. A similar injustice would arise if, after the conclusion of a hearing, the trial judge was to come across a legal authority not referred to in the course of the hearing and, believing it provided the answer to the claim,*

decided the case on that basis. However, had that authority been brought to the attention of the parties it might have been distinguished successfully.

142. It follows that if, when a trial judge comes to write his or her judgment, a point comes to mind, or a legal authority is unearthed which was not canvassed in the course of the hearing and is one which they consider crucial to the determination of the claim, in order to do justice between the parties a further hearing will normally be required so that the parties may be afforded an opportunity to address the said issue or authority."

31. I do not believe that the failure of the Examiner or his solicitor to swear corrective affidavits amounted to misconduct: they knew that the full transcript was before the court, their counsel was to draw the court's attention to the relevant passages and the mistaken position set out in their affidavits was to be corrected, albeit through submissions of counsel rather than sworn testimony. There was no question of any attempt to mislead the court or to stand over their mistaken recollection of the hearing of the petition. Certainly, in my view it did not amount to conduct which should lead the court to refuse to award any costs in respect of the entire examinership.

32. In my judgement neither the failure of the Examiner to pursue the directors in relation to the representations of their counsel to the court at the hearing of the petition nor the conduct of the application for the costs and remuneration of the examinership warranted the refusal to award any sum for the costs and remuneration. The conduct giving rise to concern fell considerably below that in *Wogans of Drogheda* and was in my view *"outside the range of judgment calls which were open"* to the High Court to make on the application.

Other grounds of appeal

33. Furthermore, in the interests of fair procedures, had the High Court been perturbed that the conduct in advancing the application for costs and fees without referring to the

submissions for counsel for the petitioners, on the one hand, and thereafter, the failure to file a corrective affidavit, on the other hand, was of such concern, the High Court ought to have notified the Examiner of his concerns and invited him to address those concerns. The failure to do so, and in effect, the failure to afford the solicitor and the Examiner an opportunity to address the concerns of the High Court, in my view, resulted unfortunately in an unfair hearing and would itself justify allowing the appeal in the circumstances of this case.

34. In my judgement, the High Court erred in holding that the Examiner could seek to recover the costs of the examinership from the companies' directors based upon the submission of their counsel to the court at the hearing of the petition. There is simply no possible legal basis for the Examiner to personally bring a claim against the directors to secure the payment of his fees. Furthermore, the ruling disregards the fact that €35,000 of the €150,000 was paid into the company and that the total sums claimed (which the High Court accepted were reasonable) was approximately €171,000, and accordingly, recovery of €115,000 from the directors – even if legally possible – would not have covered the reasonable costs and expenses of the appellant.

35. The trial judge was concerned that approving the Examiner's costs would impose a financial burden, or would be unfair to, the creditors of the companies. This is what the Oireachtas has provided in the Companies Act 2014. As O'Donnell ('Examinership' (2016, 2nd Ed) (para.9.2)) says "*if the examinership is unsuccessful . . . there will inevitably be creditors whose entitlements will be adversely affected by the priority granted [by s. 554(3)] to the examiner".* This reflects the statutory priority of examinership costs over all other creditors' claims. Thus, while it is true that paying examinership costs out of the companies' assets will reduce the assets available for distribution to other creditors, this potential prejudice arises in all unsuccessful examinerships and is inherent in the statutory provisions. Accordingly, it cannot form a basis for withholding an examiner's reasonable costs. It would

be otherwise had O'Moore J. expressly ordered that the Examiner was confined in his remuneration to the level of investment promised by the directors at the hearing of the petition, but he did not.

36. For all of these reasons, I believe it is appropriate for this Court to intervene and to set aside the order of the High Court and to make the order sought in the notice of motion sanctioning the Examiner's remuneration costs and expenses and directing payment out of the companies' assets in the proportion indicated.

Noonan J: I agree

Meenan J: I too agree with the judgment of the President.