

THE HIGH COURT

COMMERCIAL

[2022] IEHC 643

Record No. 2012/432 COS

IN THE MATTER OF TREASURY HOLDINGS (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

JUDGMENT OF Mr. Justice Twomey delivered on the 23rd day of November, 2022

INTRODUCTION

1. This case deals with an official liquidator’s application for approval of his remuneration which was rejected by this Court. The proposed amount of remuneration was rejected because of this Court’s concerns that it included payment for the time and costs which were incurred by the liquidator in rectifying his own mistake during the liquidation.

2. This Court refused to approve the remuneration, even though the primary creditor in the liquidation had agreed the proposed sum. This Court did so, in this instance, because the primary creditor is NAMA, which is taxpayer funded and so if the Court had approved the proposed remuneration, it is the taxpayer who would have been out of pocket.

BACKGROUND

3. An official liquidator is an officer of the court. In the discharge of her – although in practice it is invariably ‘his’ - duties, a liquidator owes fiduciary duties to the company in liquidation (see *Re Dr Developments (Youghal) Ltd* [2011] IEHC 307 at para. 20 per Finlay Geoghegan J.).

4. One of these fiduciary duties is not to profit from the office of liquidator. However, a liquidator and his lawyers have to be paid for their time in winding up the insolvent company. This means that for every euro that is paid to the liquidator and his lawyers, one less euro is available for the creditors of the company.

5. All of this means that a liquidator, who is occupying this position of trust, is placed in an unavoidable position of conflict between his interests in receiving reasonable remuneration for his work and the interests of the company in liquidation (and so the interests of creditors, who are hoping to receive as much as possible of the debt owed to them from the company).

6. For this reason, a court plays an important role in approving a liquidator's remuneration.

7. This important role of the Court is accentuated where the main creditor is a State agency, since, as noted below, the Court must also bear in mind the interests of the taxpayers who are funding that State agency.

8. This is the background to the application by a liquidator in this case to approve his fees for the period 1st July, 2021 to 30th September, 2022, as well as an application to file amended Forms E4 in the Companies Office.

Error by Liquidators in filing Forms E4

9. At the initial hearing on 25th October, 2022, the liquidators in this case, by which is meant Mr. Michael McAteer and Mr. Paul McCann who were appointed joint official liquidators of Treasury Holdings (the "Liquidators"), made an application to this Court to file 14 amended Forms E4 in the Companies Office. The application was to substitute the 14 Forms E4 which had been filed by the Liquidators over the previous seven years, for the years 2016 to 2022 inclusive.

10. The need to file the amended Form E4s arose because of an error that had been made by the Liquidators, by the incorrect inclusion of information in those forms relating to *solvent*

subsidiaries of Treasury Holdings. No criticism is made of the Liquidators in relation to this error, since errors occur all the time and in all walks of life.

11. The Liquidators are also applying to this Court for their fees to be approved for the period 1st July, 2021 to 30th September, 2022 and for their lawyers' fees to be approved for the same period.

Were the Liquidators paying themselves for rectifying their own error?

12. This Court was concerned that creditors should not be at a loss financially because of an error made by the Liquidators. To put the matter another way, this Court did not think that it should be approving fees payable to the Liquidators, or costs incurred by the Liquidators, for correcting errors that had been made by the Liquidators.

13. With this in mind, on reviewing the affidavits in respect of these two applications, it became clear to this Court that costs were likely to have been incurred by the Liquidators in discovering and then correcting the error in the 14 incorrect Form E4s (as well as legal costs).

14. This Court noted that in his affidavit supporting the application to file the amended Forms E4, Mr. McAteer stated, in respect of these errors, that:

“creditors of the Company have not been impacted, and there is no change to the expected return for creditors.”

15. However, when this Court sought to satisfy itself that the creditors had not been impacted by the error, it could find no reference, in the affidavit seeking approval for the Liquidators' remuneration and legal costs, to the costs which were incurred by the Liquidators in discovering and resolving the Form E4 filing errors. In particular, it was not clear to this Court, from that affidavit, that the costs incurred in correcting the Form E4 errors were *not* included in the amounts sought to be paid to the Liquidators and their lawyers.

16. For this Court, this raised, at the initial hearing, *at least the possibility*, that the Liquidators were proposing to pay themselves for the costs incurred in resolving the Forms E4 issue, in which case the creditors would be impacted by the errors.

17. However, at the initial hearing, the largest creditor in this liquidation, NAMA, indicated, through its lawyer, that it had already agreed to the amount of the Liquidators' remuneration and legal costs. The sums involved were €290,395.92 to the Liquidator and €38,670.62 for solicitors and counsel.

Adjournment of the application to approve the Liquidators' fees

18. In all these circumstances, this Court adjourned the approval of the fees and asked for clarity from the Liquidators on the amount of the proposed remuneration and legal costs which was attributable to rectifying the Liquidators' own error.

19. At the subsequent hearing on 10th November, 2022, the Liquidators, to their credit, confirmed in a frank affidavit that the original fees and legal costs for the period ending 30th September, 2022 included the sum of €8,536.20 (including VAT), which was attributable to their own mistake.

20. Clearly, this sum, which had now been identified as being attributable to the Liquidators' own error, should be retained by Treasury Holdings for the benefit of the creditors and it should not be paid to the Liquidators and their lawyers.

21. On this basis, the Liquidators reduced, by this amount, the sums for which they were seeking court approval, in respect of their remuneration and their lawyers' fees. This led to the Liquidators' remuneration being reduced by €4,747.80 to €285,648.12. In relation to the proposed legal costs, these were reduced by €3,788.40 to €34,882.22.

Additional fees which have been incurred but not charged in relation to the error

22. In addition, the Liquidators made clear that the sum of €8,536.20 relates only to the remuneration and legal costs which have been invoiced in the period up to 30th September, 2022. In this regard, Mr. McAteer stated that it would be necessary to revisit the remuneration and legal costs incurred after 30th September, 2022, in relation to the Liquidators' error, in order to ensure that they are not included in any remuneration or legal costs sought to be approved by this Court in the future.

The mistake by the Liquidators and the approval of the mistake by NAMA

23. Ideally the Liquidators would not have made the mistake of charging for rectifying their own error. Similarly, it would have been preferable if NAMA had been alive to the possibility that the proposed remuneration included payment for rectifying the Liquidators' own error and it had made the Liquidators check and then rectify this matter.

24. However, errors occur all the time and the sums involved are relatively small - relative, that is, to the overall level of remuneration and legal costs in this liquidation. In addition, there is no suggestion that the Liquidators consciously decided to charge for time which they knew was spent in rectifying their own mistake. Nor is there any suggestion that NAMA approved the remuneration while knowing that it included, or might have included, sums for rectifying the Liquidator's own errors.

25. Rather the oversight on the part of the Liquidators and the failure by NAMA to pick it up, appears to this Court to be a reflection of human nature in two ways. First, it illustrates that a person who is *charging* a fee (in this case the Liquidators) is unlikely to be as careful about checking the accuracy of that fee, as if he were the person *paying* a fee, i.e. if it was coming out of his own pocket.

26. Secondly, it illustrates that a person who is *paying* a fee out of his own pocket is more likely to be concerned about its accuracy, than if a State agency (in this case NAMA) is paying it – where it is the taxpayer who will ultimately be footing the bill.

27. This is the same point which was made by Murphy J. in *National Museum of Ireland v. Minister for Social Protection* [2017] IEHC 198 at para. 4, in the context of a State agency incurring litigation costs. She noted that a private citizen who is paying legal fees out of his own pocket has a '*potent incentive*' to be reasonable in his attempts to resolve the dispute, in order to avoid unnecessary legal costs. However, she observed that this incentive is absent where a State agency is litigating, since the costs will '*be met from the public purse*' and so no individual suffers the financial consequences if a State agency is not reasonable in its decision to proceed with incurring legal costs.

28. Another example of the courts being alert to the interests of the taxpayer is provided by the Supreme Court case of *Lett & Company Ltd v. Wexford Borough Council* [2012] 2 I.R. 198 at para. 14 in which O'Donnell J. was critical of the use of '*expensive litigation*' by State agencies to resolve disputes.

Obligation on court to bear in mind the interests of the taxpayer

29. What these cases illustrate is the importance of the courts being always alert to the interests of the taxpayer. This is because, while State agencies are represented in court, the taxpayer is never represented, yet it is the taxpayer who is often footing the bill in litigation, or, as in this case, it is the taxpayer who ends up being out of pocket if a mistake is made (in this case by the Liquidators).

30. It is also clear that the courts should have regard to the interests of the taxpayer in reaching their decisions– see for example *Reardon v. Government of Ireland* [2009] 3 I.R. 745 at p. 765 (per Murray C.J.) in which the Supreme Court noted that the interests of the taxpayer

had to be *'borne in mind'* by the court in reaching its decision (in that case it was a decision to bring groundless litigation to an end):

“It must also be borne in mind that all litigation, even groundless litigation, causes expense to the individuals or entities impleaded in it and that **this expense will often fall on the taxpayer”**. (Emphasis added)

31. Bearing the taxpayer’s interests in mind, in this instance, means a court being aware of the significant gap between the likely attitude of an individual creditor (e.g. an individual tradesman who is owed money by a company in liquidation) and the likely attitude of a State creditor, such as NAMA, when it comes to a liquidator’s remuneration.

32. The tradesman has a *'potent incentive'* to ensure that a liquidator’s remuneration only includes sums which are properly due and that those fees are as low as reasonably possible. This is because these sums reduce the amount which he will recover from the liquidated company and so effectively these sums come out of the tradesman’s pocket.

33. There is no individual’s pocket in NAMA which will be similarly affected, since it is the taxpayer, who will be out of pocket and thus there is not the same *'potent incentive'* for NAMA to ensure that the fees are as low as reasonably possible and that only fees, which are properly due, are charged.

34. It seems to this Court that a court should step into this gap (between how an individual and a State agency approach, in this case, the issue of a liquidator’s remuneration), in order to protect the taxpayer’s funds to the same degree, as if they were the funds of an individual.

35. All of this means that even if NAMA (the party primarily out of pocket if there is an overpayment of Liquidators’ remuneration) agrees the sum in question, nonetheless this Court can, and should, have regard to the impact on the taxpayer and act accordingly before approving that remuneration. On this basis, this Court decided to refuse to approve the Liquidators’ initial

proposed remuneration (which included fees for remedying the Liquidators' own mistake), despite the agreement of the primary creditor, NAMA.

36. While this Court's discharge of its obligation to '*bear in mind*' the interests of taxpayers has led to a relatively small saving in this case, the principle is of general application and therefore may lead to significant savings in other cases.

37. Finally, it is to be noted that at the second hearing in this case, NAMA indicated that it was agreeable to the payment of the reduced Liquidators' remuneration and reduced legal costs.

CONCLUSION

38. In light of the reduction of the Liquidators' remuneration and the legal costs, as set out above, this Court approves the payment of that remuneration and legal costs.

39. It is to be noted that no criticism is being made of the Liquidators or their lawyers, since errors happen all the time and it is simply human nature not to be as careful with other people's money, as one's own.

40. However, it is important for liquidators to know that the courts play an important role in overseeing any fees which they claim are reasonable and properly charged. This is because of the fiduciary position occupied by liquidators, combined with the unavoidable conflict between the interests of liquidators in deciding which work to do in the liquidation and calculating their remuneration for that work, on the one hand, and the interests of creditors whose return from the liquidation will be reduced by that remuneration, on the other hand. This calls for particular care to be exercised by liquidators when calculating their remuneration and this case simply illustrates an oversight on the part of the Liquidators in this regard, *albeit* in respect of a relatively small amount of money.

41. It is also important for State agencies to know that, if they are party to litigation (or, as in this case, just financially affected by it), there is an obligation on the courts to bear in mind the interest of the taxpayer. State agencies can do likewise by ensuring that money coming out

of taxpayers' funds is subject to the same scrutiny, as it would be, if it was coming out of an individual's pocket.