

**THE HIGH COURT**

[2022] IEHC 656

**Record No. 2012/433 COS**

**IN THE MATTER OF SPENCER DOCK DEVELOPMENT COMPANY LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012**

**JUDGMENT OF Mr. Justice Twomey delivered on the 28<sup>th</sup> day of November, 2022**

**SUMMARY**

1. This case considers whether fees incurred as part of a liquidation should be approved by a court, where they are payable, not just to the official liquidator but also, to a company in which the official liquidator has an interest.

2. This Court has concluded that such an approach to fees in a liquidation is not best practice since it suffers from a lack of transparency, particularly when one bears in mind the position of unavoidable conflict of interest occupied by a liquidator in seeking payment for his fees, which payment will inevitably reduce the amount due to the creditors. Accordingly, this Court refused to approve the payment of the fees to such a company in this case.

**BACKGROUND**

3. In considering the approach of a court to the approval of fees to be paid to liquidators, it is important to bear in mind that a liquidator occupies a fiduciary position (see *Re Dr Developments (Youghal) Ltd* [ 2011] IEHC 307 at para. 20 per Finlay Geoghegan J.). This is reflected in part by the fact that liquidators are personally appointed, rather than the company or partnership through which the liquidator practices. The corollary of their appointment being

personal is that fees which are due to a liquidator are paid personally to that liquidator and not to his firm or a company associated with his firm.

4. The role of liquidator is one of considerable trust because liquidators are expected to recover, in as cost-efficient a manner as possible, as much money as possible for the creditors of an insolvent company, who are inevitably going to be out of pocket.

5. In addition, there will be a tension in every liquidation regarding liquidators' fees, because every euro that is paid to the liquidator in remuneration (and to his lawyers in legal costs) will lead to one euro less being paid to the creditors.

6. In all of this, a liquidator is placed in an unavoidable conflict of interest position since he is deciding on the work that he should undertake in the liquidation (and thus generating income for himself) and then deciding on the amount he should be paid for that work, without any oversight from directors, as the company is in liquidation.

7. For this reason, in cases such as this one, where the High Court is required to approve a liquidator's remuneration, this Court has an important role in approving what is in effect a payment by a liquidator of money out of the liquidation to himself. In essence, this Court is being asked to approve payment to the liquidator of a sum of money (which the liquidator says is reasonable) for work (which the liquidator says was justified).

8. The important role of the High Court is accentuated by the fact that there is no independent specialist (equivalent to the Office of Legal Costs Adjudicator) who verifies that the sums due to the liquidator are reasonable.

9. In these circumstances, it seems to this Court that the manner in which fees are paid to a liquidator, or for the benefit of a liquidator, should be as transparent as possible. This is the background to the present application by a liquidator for this Court to approve his fees.

### **Hearing on 25<sup>th</sup> October, 2022**

**10.** In this case, there was a hearing on 25<sup>th</sup> October, 2022 and one of the two official liquidators (the “Liquidators”) of Spencer Dock Development Company Limited (in liquidation) (“Spencer Dock”), Mr. Michael McAteer (“Mr. McAteer”), sought court approval permitting the payment on account of liquidator’s remuneration and also legal costs due to his solicitors and barristers.

**11.** The legal costs, for which approval is sought, are for the period 1<sup>st</sup> July, 2021 to 30<sup>th</sup> September, 2022 and amount to €245,278.31, including VAT.

**12.** It is to be noted that the order, for the approval of the payment of legal costs by this Court, was sought *‘pending taxation or measurement’* of those legal costs. In addition, the solicitors are providing an undertaking to reimburse the Liquidators in the event that the amount certified on taxation of those costs by the Legal Costs Adjudicator are less than the amount paid.

**13.** As previously noted, there is no equivalent to the Legal Costs Adjudicator for a liquidator’s remuneration. In this regard, Mr. McAteer seeks the approval of this Court for the payment of €174,479.86 (including VAT) for the same 15-month period in respect of *‘professional fees and expenses due to’* the Liquidators.

**14.** It is important to note that these fees are payable to the Liquidators personally and not to the firm in which they are partners (Grant Thornton). This is consistent with the fact that appointment by a court of a liquidator is a personal appointment and so the fees are paid to the liquidator personally.

**15.** However, in this case, the Liquidators also sought the Court’s approval for the payment of fees for the same 15-month period in the sum of €201,752.44 (including VAT) to a forensics accounting company called Grant Thornton Corporate Finance Ltd.

16. These fees relate to forensic work which was done by that company in relation to litigation conducted on behalf of Spencer Dock. The forensic accounting services provided by that company related to accessing large and historic data on Spencer Dock's server.

**Payments to a company in which the Liquidators have a financial interest**

17. At the hearing before this Court, this Court assumed (which assumption was not contradicted by counsel for the Liquidators) that Grant Thornton Corporate Finance Limited was associated with, or part of, the Grant Thornton firm in which the Liquidators are partners, although the nature of any such association was not set out in Mr. McAteer's affidavit.

18. This Court also assumed (which was not contradicted by counsel for the Liquidators) that Mr. McAteer and Mr. McCann would financially benefit from any payments made to Grant Thornton Corporate Finance Limited, even though in the application for the court approval, it was presented, not as payment of fees to the Liquidators, but rather as a payment of fees to what is legally a third party, *albeit* that it uses a similar name as the firm in which the Liquidators are partners.

19. This application for the approval of those fees to this company raised some concerns for this Court for the following reasons.

**Lack of transparency in payments sought by the Liquidators**

20. First, the appointment of a liquidator is personal, yet Mr. McAteer was seeking approval for the payment of fees arising from the liquidation, but not to the Liquidators personally.

21. Secondly, the proposed payment is to a company (which appears to be connected with the Liquidators), yet the extent, if any, of the Liquidators' interest therein, and whether it is a controlling or minority interest, in that company, is not clear. In essence, this Court is being asked to approve a payment to what appears to be a connected company of the Liquidators, yet the extent of that connection is not clear.

22. Thirdly, this lack of transparency is exacerbated by the fact that the Liquidators occupy a fiduciary position which involves an unavoidable conflict between the interests of the creditors (in obtaining as much as reasonably possible from the insolvent company) and the financial interests of the liquidators (in being paid reasonable remuneration for their work). For this reason, it seems to this Court that, as a general principle, it should be clear to creditors precisely, and in as transparent a fashion as possible, how much is being claimed by the Liquidators in remuneration (whether directly or indirectly through corporate vehicles).

23. Thus, instead of creditors being given an impression that the Liquidators were seeking only €174,479.86 in remuneration, it seems to this Court that a more transparent and accurate picture of the position of the Liquidators, who occupy fiduciary positions, should be given. This is particularly so, where the Liquidators occupy a position of unavoidable conflict of interest. In all these circumstances, absolute transparency is particularly important, in this Court's view.

#### **Attitude of primary creditor to absence of transparency on fees**

24. At the hearing on the 25<sup>th</sup> October, 2022, the main creditor in the liquidation, NAMA (which is funded by the taxpayer), had no objection to the payment of €174,479.86 to the Liquidators and a separate payment of €201,752.44 to a company apparently associated with the firm in which the Liquidators were partners. Since NAMA is the primary creditor, it is the party which is primarily affected by this issue, and so it is relevant for this Court to know its position regarding the proposed payment to Grant Thornton Corporate Finance Ltd.

25. However, the position of the primary creditor is not determinative. This is because this Court must have regard to the interests of all creditors when deciding to approve liquidators' fees.

26. In addition, as noted in *Reardon v. Government of Ireland* [2009] 3 I.R. 745 at p. 765, the courts are obliged to bear in mind the interests of the taxpayer when deciding cases (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)

27. In this case, the taxpayer funds NAMA and so, notwithstanding the fact that NAMA agreed the payment to Grant Thornton Corporate Finance Ltd, this Court refused to approve that payment. This was because of this Court’s obligation to have regard to the interests of the taxpayer. In particular, as noted *In the matter of Treasury Holdings (In Liquidation)* [2022] IEHC 643 at para. 41, there is an onus on the courts to ensure that money which is coming out of taxpayers’ funds is subject to the same scrutiny, as it would be if it were coming out of an individual’s pocket. In this Court’s opinion, this scrutiny demands that any payments made by a liquidator, which will impact upon the return to the taxpayer, is as transparent as possible.

28. On this basis, and in light of the foregoing concerns, this Court refused to approve the fees payable to Grant Thornton Corporate Finance Ltd.

### **Replacement of fee to corporate entity with a fee to the Liquidators**

29. On Thursday 10<sup>th</sup> November, 2022, the Liquidators returned to court and instead of seeking the approval of this Court for the payment of €174,479.86 to the Liquidators and the sum of €201,752.44 to Gant Thornton Corporate Finance Limited, the Liquidators sought this Court’s approval for the payment of one sum, €376,232.30, to the Liquidators.

### **Attitude of primary creditor to amount of fees**

**30.** At the second hearing, this Court sought the views of the primary creditor, NAMA, since it is the party best positioned to consider whether the work behind the proposed fees of €376,232.30 was justified and whether the resulting fee was reasonable.

**31.** As NAMA is a State agency, when it is considering whether to approve a liquidator's remuneration, it is in a different position to that of an individual creditor, such as a tradesman, whose pocket will be directly affected by the level of that remuneration. In contrast, there is no individual's pocket which will be affected by NAMA's decision on whether or not to approve the Liquidators' remuneration. This is because for an individual, the '*potent incentive*' (of the fact that the money is coming out of his pocket), causes that individual to act prudently. However, this incentive for a State agency to act prudently is absent, since money never comes out an individual's pocket as it is '*met from the public purse*' (See *Museum of Ireland v. Minister for Social Protection* [2017] IEHC 198, per Murphy J. where this point is made in context of a State agency incurring unnecessary legal costs).

**32.** In order to take account of this missing incentive, it seems to this Court that, in deciding whether or not to approve the fees being proposed by a liquidator, a State agency, such as NAMA, should be conscious of the fact that there is no individual's pocket in NAMA which will be affected by its decision. Accordingly, such a State agency should seek to take the same approach to agreeing a liquidator's remuneration as an individual creditor might take.

**33.** In this case NAMA indicated that it has no issue with the proposed fees in the sum of €376,232.30 payable to the Liquidators and the legal costs of €245,278.31, for the 15-month period in question.

**34.** While this Court is obliged to bear in mind the interests of taxpayers, it has no reason to believe that NAMA has not approached the approval of these fees in a similar manner to that

which would apply if the money was coming out of an individual's pocket, rather than from taxpayers as a whole.

**35.** This will not always be the case. See for example the decision *In the matter of Treasury Holdings (In Liquidation)*, where the amount payable to liquidators had been approved by a State agency creditor, but this Court nonetheless refused to approve the payment until that part of the proposed remuneration, which was not properly due to the liquidators, was removed from the invoice.

**36.** However, in all these circumstances, the revised fees in this case are approved by this Court.