

# THE HIGH COURT

[2024] IEHC 617

2011/219MCA

**IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)  
AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2012 AND IN THE  
MATTER OF THE EUROPEAN COMMUNITIES (MARKETS AND FINANCIAL  
INSTRUMENTS) REGULATIONS 2007**

**BETWEEN**

**ROGER DAY**

**APPLICANT**

**AND**

**KIERAN WALLACE, OFFICIAL LIQUIDATOR AND ADMINISTRATOR**

**RESPONDENT**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 1<sup>st</sup> day of November 2024**

1. This judgment relates to the costs of a motion brought by Roger Day. By Decision dated the 19<sup>th</sup> December, 2023, I refused an application for Mr. Day for the following reliefs:

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- “1. An order appointing Roger Day as Legitimus Contradictor, representing the interests of uncompensated investors: or in the alternative
2. An order appointing Roger Day as Notice Party representing the interests of uncompensated investors”

After my Decision was delivered, there was an exchange of legal submissions concluding with submissions made on behalf of the Investor Compensation Company DAC (“the ICCL”) on the 26<sup>th</sup> June, 2024.

2. I will summarise the various submissions, before giving my decision on the costs issue.
3. Mr. Day submitted that costs should be awarded in his favour against the ICCL and/or Kieran Wallace, the official liquidator of Custom House Capital. In the alternative, he sought that no order as to costs would be made.
4. In his initial written submission, Mr. Day emphasised the fact that he had been appointed as Legitimus Contradictor in 2014 and 2017 “*in opposition to the matter of cost applications by Mr. Wallace to access clients’ assets...*”. On Mr. Day’s account, no such applications ultimately proceeded or were successful.
5. Mr. Day goes on to state that on the 1<sup>st</sup> July, 2020 he was appointed as Legitimus Contradictor by Pilkington J. in respect of a range of issues which were ultimately the subject of a very extensive judgment by Heslin J. which (Mr. Day suggests) has resulted in some ongoing issues which remain to be resolved. On this submission, I should note that my Decision (at para. 2) recorded the following: -

“As has already happened in this administration, it may be desirable to appoint a Legitimus Contradictor to appear on specific applications to court. However, there are no such applications currently before the court and none appear to be imminent. The judgment of Mr. Justice Heslin, delivered on the 13<sup>th</sup> October, 2021, has provided comprehensive guidance to the Administrator on the issues which the court was at that time asked to address.”
6. As I have rejected Mr. Day’s contention that there are outstanding issues arising from the judgment of Heslin J., at least in as much as they seem likely to give rise to an

application to the court, I do not accept the proposition that a particular order for costs should be made in Mr. Day's favour on this basis.

7. Mr. Day goes on to say that it was his "*opinion*" that the judgment of Heslin J. indicated that "*the matter was continuing*" and that accordingly "*his role as Legitimus Contradictor continued...*". However, as is pointed out in the submissions made on behalf of Mr. Wallace, this position is difficult to reconcile with the plain terms of the motion brought by Mr. Day which, as already noted, seeks his appointment either as a Legitimus Contradictor or notice party. It does not seek confirmation that his position as Legitimus Contradictor is an ongoing one. Having said that, as Mr. Day points out there is correspondence referring to his "*continuance as Legitimus Contradictor*", which correspondence variously pre dates and post dates my Decision on Mr. Day's application.

8. Separately, Mr. Day submits: -

"It is brought to the attention of the court, in the applicant's work in protection of the interests of the investors' funds in Custom House Capital, such involvement as an unpaid court appointed member of the Client Committee and subsequently three times as Legitimus Contradictor, the applicant was involved (sic) numerous meetings with other members and the legal teams, video and telephone conferences, briefings, research, written submissions and attendance at court – giving up a large percentage of his available time to the benefit of defrauded investors. During the period he has had no financial interest in the outcome."

9. Under the heading "*Limitation of Costs*" Mr. Day makes an argument about the different roles occupied by Mr. Wallace – as liquidator and as administrator. Having considered this argument, I do not think that he gives any basis for departing from the normal rule that costs follow the event.

**10.** Mr. Day notes the observation by Pilkington J. in her judgment of the 30<sup>th</sup> April, 2020 to the effect that: -

*“There are no circumstances in which the Legitimi Contradictores would be obliged to discharge their own costs or indeed the costs of any other party”.*

While this is undoubtedly correct, it begs the question as to whether or not Mr. Day was acting as Legitimus Contradictor in bringing the motion which I have decided against him.

**11.** Towards the end of his written submission, Mr. Day refers to the fact that he obtained no benefit from the role of Legitimus Contradictor, that he *“sought in the public interest only to protect the 1,372 investors he represented...”*, that he raised a *“legitimate concern”* in connection with the affairs of Custom House Capital, and that: -

*“his involvement over a period of thirteen years in the interests of uncompensated investors and the losses incurred in Custom House Capital would make any award of costs against him unfair and unjust.”*

**12.** Mr. Day refers to two letters in support of his position. They are from two individuals who have, with Mr. Day, shared the role of Legitimus Contradictor in respect of the affairs of Custom House Capital. Both letters eloquently and persuasively set out the stresses involved in carrying out that role, the responsible way in which Mr. Day approached his position as Legitimus Contradictor, and the extensive work carried out by Mr. Day in this regard.

**13.** The submissions of Mr. Wallace begin, correctly, by pointing out that Mr. Day is not entitled to any costs and that the most that can be awarded in Mr. Day’s favour are his expenses of the motion. The submissions go on to point out, again accurately, that ultimately the four possibilities with regard to the costs of the motion will involve either that Mr. Day bears the costs, or that Mr. Wallace bears the costs with the possibility (though by no means the certainty) that these costs will not be recoverable at all (given the insolvent status of the

liquidation) or, if they are so recoverable, that this will be at the expense of clients of Custom House Capital.

**14.** The written submissions of counsel for Mr. Wallace emphasise the fact that Mr. Wallace's position was comprehensively set out in correspondence before the motion issued. This was done in the light of comments which I had made (reflected in the correspondence) to the effect that I did not want the liquidation to be "*weighed down by applications*". Mr. Wallace's submissions record, again accurately, that I had directed the parties to exchange correspondence before the motion was issued so that both sides were fully aware of the basis upon which the motion would be brought and the basis upon which it would be resisted. McCann Fitzgerald, the solicitors for Mr. Wallace, sent a comprehensive three page letter describing Mr. Wallace's position. At p. 2 of the letter, point (1) reads: -

“(1) As you may be aware, a *legitimus contradictor* is a party appointed to participate in court proceedings or applications as the natural and a proper opponent to the moving party. There is no application in the liquidation proceedings currently, or imminently intended to be issued, before the court requiring the appointment of a *legitimus contradictor*. For this reason, an application to the (sic) appointed as *legitimus contradictor* is fundamentally misconceived at this juncture.”

**15.** As is clear from my original Decision of December 2023, and from the earlier part of this judgment, this simple point was enough to decide the motion against Mr. Day.

**16.** It should also be noted that the letter from McCann Fitzgerald invited Mr. Day to contact two named solicitors in that firm to discuss the matter further, if he wished to do so.

**17.** In response to the written submissions of Mr. Wallace, Mr. Day delivered brief submissions confirming that he was not seeking costs in his favour, but rather sought an order which meant that he did not have to pay the costs of any other party. He reiterated that it was his "*clear understanding*" that his position as *Legitimus Contradictor* would continue until

such time as Mr. Wallace “*had discharged all of the obligations imposed on him by [the judgment of Heslin J.]*.” Mr. Day went on to emphasise that he has always sought to do what was right by the investors, and that “*resultant from my very considerable and constant exposure to harrowing tales of penury from uncompensated investors*” he was left with the option either to ignore the predicament of those individuals or “*to pursue what was the last realistic remaining access of the thousand plus investors I represented to what I saw as a just outcome in their claim for compensation.*”

**18.** Finally, a written submission was delivered by William Fry, solicitors for the ICCL. It is not necessary to go into these submissions in any great detail. The ICCL took no part in Mr. Day’s motion. I can see no reason why the ICCL should have to pay the costs of any other party in those circumstances, in particular given that no order was made in favour of Mr. Day as the moving party as against the ICCL. Helpfully, and sensibly, the submission of the ICCL concludes by stating that it is not seeking any order from the court for its own costs. Mr. Day has not provided any reason why the ICCL should pay his costs or expenses, and indeed these may no longer be sought given the contents of his written submissions in response to the submissions of Mr. Wallace. I will therefore make no orders as to costs as far as the ICCL is concerned.

**19.** With regard to the costs of Mr. Wallace, I agree with the written submissions of his counsel to the effect that none of the factors set out at s. 169(1)(a) to (g) of the Legal Services Regulation Act, 2015 are specifically engaged. Of course, these are simply defined instances which the court may take into account in ordering that an entirely successful party is not to be awarded its costs. The more general jurisdiction set out at s. 169(1) is that the court may decline to award costs in favour of the successful party “*having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties...*”.

**20.** Mr. Wallace has succeeded completely in this motion. On the face of it, therefore, he is entitled to his costs. As against that, Mr. Day has acted without any hope of personal benefit as Legitimus Contradictor on a number of different occasions over a period of years. I accept fully the position taken by Mr. Day (and supported by the two letters exhibited by him) that acting as Legitimus Contradictor has been distressing, time consuming and stressful. I also accept that Mr. Day has a very real concern for investors in Custom House Capital who have been very seriously affected by what went on in that company and its consequent collapse. In bringing this current application, Mr. Day has acted (genuinely but mistakenly) in the interests of disappointed investors in the company.

**21.** Mr. Day is not a busybody trying to interfere in Mr. Wallace's affairs. He is somebody whose position has been approved by a number of judges during the course of the administration and liquidation of this company. It is often extremely helpful for the court to have a Legitimus Contradictor in place to represent the interest of people like the investors in Custom House Capital. A full order for costs against a person seeking to act as a Legitimus Contradictor, even if on the face of it justified on the specific facts of this motion, could have a detrimental effect on the willingness of others to take up such a role.

**22.** I must balance all of these considerations against the fact that Mr. Wallace's solicitors carefully and comprehensively set out the reasons why the motion would not succeed, and did so before the motion was brought. I must also take into account the parlous nature of the finances of the company. Ultimately, the costs incurred by the liquidator may well fall to be paid by the investors in the company. Given the costs of the liquidation and administration of Custom House Capital, this will certainly be a very marginal further cost as far as each individual investor is concerned. Of equal concern is the possibility that the lack of funds the liquidation may lead to Mr. Wallace having to bear the costs of defending this motion, notwithstanding the fact that he has succeeded in resisting it. Again, however, the costs of

this motion will almost certainly be marginal in the overall context of the costs and expenses in conducting the administration or liquidation of Custom House Capital.

**23.** Were it not for the correspondence from McCann Fitzgerald before the motion was issued, for the reasons I have set out earlier in this judgment I would have given serious consideration to making no orders as to costs on the motion. However, Mr. Wallace's solicitors did exactly what I had directed them to do, which was to put their cards on the table in order to make sure that an unnecessary motion was not brought. Rather than relieve Mr. Day of any liability for Mr. Wallace's costs in defending the motion, and in particular given the contents of the letter from McCann Fitzgerald, I will award Mr. Wallace 30% of the costs of defending the motion. These are to be adjudicated in default of agreement. The discount which I have afforded Mr. Day of the reasons set out at paras. 20 and 21 of this ruling.