Neutral Citation Number: [2022] EWHC 1419 (Ch)

Case No: BR-2017-001014

IN THE HIGH COURT OF JUSTICE

IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (Ch D)

9 June 2022

IN THE MATTER OF RORY MCCARTHY

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN

MARCO MAXIMILIAN ELSER

Applicant

And

(1) MARK SANDS
(as chairman of the meeting of creditors / joint nominee/ former joint supervisor of the voluntary arrangement in respect of Rory McCarthy)
(2) SEAN BUCKNELL
(as joint nominee/ joint supervisor of the voluntary arrangement in respect of Rory McCarthy)
(3) RORY MCCARTHY
(4) JAMIE BOND
(5) CHRIS JONNS
(6) OBN INVESTMENTS LTD
(7) MAXINE REID-ROBERTS
(as current joint supervisor of the voluntary arrangement in respect of Rory McCarthy)

Respondents

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JOHN BRIGGS (instructed by **IRWIN MITCHELL LLP**) for the **First Respondent**
RORY McCARTHY In Person
CHRIS JONNS (not appearing)

Hearing dates: 7 June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely with circulation to the parties' representatives by email. It will also be released to the National Archives for publication. The date and time for hand-down is deemed to be 14:00 hrs on 9 June 2022.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

Chief ICC Judge Briggs:

1. At a hearing of consequential matters relating to a judgment handed down on 21 December 2021 I found that the Third and Fifth Respondents were the unsuccessful parties for the purpose of a costs application made by the Applicant. The Second Respondent appeared in person without legal representation and the Fifth Respondent did not appear at all. I found that these Respondents were also liable to pay the costs of the First Respondent. Mr McCarthy was unable to advance any arguments to counter the submissions made by counsel. Following the hearing I communicated with counsel to raise a concern in these terms:

> "Before the order is sealed in respect of the hearing yesterday, the 7 June 2022, I wish to raise a concern. On reflection I made an error awarding the costs of the [First Respondent] against Mr McCarthy and Mr Jonns. The [First Respondent] was neutral in respect of the outcome of the challenge to the IVA and was not in any respect an applicant. The [First Respondent] attended and defended the claims made by [the Applicant]. The [Frist Respondent] did not third-party Mr Jonns or Mr McCarthy and cannot therefore be said to be a successful party. I regret this change of mind but unfortunately no submissions were made to the above effect. Mr Briggs [counsel for the First Respondent] has an opportunity to respond before the order is drawn, however if he agrees then the order will only relate to the costs of the Applicant, Mr Elser."

2. Mr Briggs duly responded today with a written submission to the effect that the decision to award costs in favour of the First Respondent at the hearing was correct and should not be reversed.

3. This short judgment deals with the submission and decides if the First Respondent should be awarded costs against the Second and Fifth Respondents.

Costs- legal analysis

4. CPR 44.2 sets out the court's discretion as to costs:

> "44.2 (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order…

> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

5. CPR 44.2 provides the court with a discretion as to costs, namely whether costs are payable by one party to another, but the general rule is that the unsuccessful party should pay the successful party's costs. As regards principle I gratefully adopt the useful passage in *HLB Kidsons (A Firm) v Lloyds Underwriters* [2007] EWHC 2699 (Comm) at [10][11]:

> "The principles applicable as to costs were not in contention. The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (Travellers' Casualty v Sun Life [2006] EWHC 2885 (Comm) at para 11 per Clarke J. As Mr Kealey submitted, the general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2) . In Kastor Navigation v Axa Global Risks [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see para 143, per Rix LJ. The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party: Scholes Windows v Magnet (No. 2) [2000] ECDR 266 at 268. As Longmore LJ said in Barnes v Time Talk [2003] BLR 331at para 28, it is

> important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": BCCI v Ali (No. 4) 149 NLJ 1222 , per Lightman J. Success, for the purposes of the CPR , is "not a technical term but a result in real life" (BCCI v Ali (No. 4) (supra)). The matter must be looked at "in a realistic … and … commercially sensible way": Fulham Leisure Holdings v Nicholson Graham & Jones[2006] EWHC 2428 (Ch) at para 3 per Mann J. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at para 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues".

6. CPR 42(2)(2)(b) provides the court with the power to depart from the general order where the unsuccessful party pays the costs of the successful party and in making that decision the court is to have regard to the factors in CPR 42(4) and CPR 42(5). Once the court has found that factors exist to make a different order CPR 44.2(6) provides a list of those "different orders": "this rule include an order that a party must pay…another party's costs…".

7. I accept that the discretion provided to the court by CPR 42(2)(2)(b) is wide. It is wide so as to allow the court to fulfil the aim to "make an order that reflects the overall justice of the case."

8. The paragraphs I have cited in *HLB Kidsons (A Firm) v Lloyds Underwriters* [2007] EWHC 2699 (Comm) demonstrate well how the court is to approach the question of costs. The analysis to be undertaken is aimed at establishing the successful party. Once the successful party is identified the court may proceed to ask whether the general rule should be departed from on the facts of the case.

9. No authority has been cited to the effect that CPR 42 provides the court with a power to make an order between Respondents where one Respondent or Defendant has made no allegations against another, and no Part 20 claim exists. As between the Respondents none of the factors in CPR 42(4) and CPR 42(5) apply.

10. Further, the 2022 edition of the White Book does not contemplate such an order in its notes. The authors of the text do comment on what would be a highly unusual order:

> "The most strikingly different order would be an order which was completely the reverse to an order in accordance with the general rule, that is to say, an order requiring the successful party to bear its own costs and in addition pay the unsuccessful party's costs. Less so would be an order (as r.44.2(6) provides) that the unsuccessful party pay only "a proportion of" the successful party's costs (r.44.2(6)(a)) (sometimes colloquially

> known as "percentage orders"), or only "a stated amount in respect of" those costs (r.44.2(6)(b)), or only those costs "from or until a certain date" (r.44.2(6)(c)), or costs relating only "to a distinct part of the proceedings" (r.44.2(6)(f)), or any combination of such different orders."

11. If the authors consider a reversal of the general rule between the parties "strikingly different" an order between Respondents would be even more striking, yet no commentary contemplates such an order.

12. In my judgment the term "parties" is more likely than not to refer, when reading CPR 44 as a whole, to the parties between whom there is a dispute. There was no dispute between the First, Second and Fifth Respondents in this case.

Submission

13. Mr Briggs submits that insolvency proceedings and in particular an application challenging a decision of a chairman at a meeting of creditors seeking approval of a voluntary arrangement is significantly different litigation. First, he argues the position of the chairman on voting rights and on an appeal from his decision on entitlement to vote is special. The Insolvency Rules 2016 r. 15.35(6) disapplies the general rule that the unsuccessful party will be ordered to pay the costs of the successful party as that the chairman cannot be expected to resolve disputes between the person seeking to enter the arrangement and the creditors. I agree. However that the rule is focused on the relationship between an applicant and the chairman (the respondent), and not between respondents.

14. Mr Briggs submits that the chairman has a role to assist the court on an appeal whether he or she needs to defend his or her own conduct or not. I agree.

15. Mr Briggs says that it follows that in a case where the chairman's conduct is not being impugned but the debt(s) are being disputed on an appeal it is right and necessary that the chairman should file evidence, disclose to the court the documents and information disclosed to him and generally assist the court from a position of neutrality. For this purpose, he needs to be represented at court and it is understood that chairmen are generally represented on such appeals.

16. This submission is a little more challenging. In my view a chairman need not always be represented. A chairman can decide whether to attend court for the purpose of being neutral as to the outcome of a challenge. The Insolvency Rules 2016 do not mandate attendance. It depends on the facts.

17. In this case the chairman had been heavily criticised by the Applicant. It was entirely proper for the chairman (the First Respondent) to provide evidence to contradict the criticisms and be prepared to be cross examined on his evidence. Neither the Second nor the Fifth Respondent criticised the First Respondent or sought to cross examine him. As a party who was successful in that he robustly and successfully defended the allegations made against him by the Applicant, he was able to recover his costs from the Applicant.

18. Two further arguments are advanced. First, it is said that it is "irrelevant that the supervisor is not a "successful party" as against the Second and Fifth Respondents". As I have explained in my legal analysis above, I do not accept that it is "irrelevant". The court must identify the successful and unsuccessful parties as a starting point when determining costs. I do accept that the First Respondent is unable to demonstrate that he was successful as against the Second and Fifth Respondents. Mr Briggs submits that *Re Rochay Productions Limited (in liquidation)* [2020] EWHC 1737 Ch at para 46 is authority for the proposition that the court need not establish the successful party where there is a challenge against a chairman's decision. That case concerned a challenge by an applicant against the admission of the third respondent's proof of debt for voting purposes at a meeting of creditors. The complaint addressed in paragraph 46 of the judgement was that costs were not sought on the face of the application. ICC Judge Barber correctly, in my view, explained that the pleading point did not prevent her making an order for costs in favour of the successful Applicant against the unsuccessful third respondent. *Re Rochay Productions Limited (in liquidation)* does not assist.

19. Lastly Mr Briggs relies on a letter warning the Fifth Respondent that costs would be awarded against him. The letter does not provide either jurisdiction to make an adverse costs order between the First and Fifth Respondent in this case nor persuade me that any discretion, if discretion is at large, should be exercised in favour of the First Respondent.

Conclusion

20. It is correctly conceded that the First Respondent is unable to demonstrate in any meaningful way that it is the successful party vis-à-vis the Second and Fifth Respondents. The CPR provides a wide discretion to permit the court to do justice between the parties in respect of costs. It does not contemplate an award of costs such that the First Respondent be entitled to a "different order" from the "general order" as against the Second and Fifth Respondents. These parties were all respondents to the application made by the Applicant. There was no dispute between them.

21. As regards discretion, if there is a discretion to exercise, contrary to my finding above, the First Respondent claims it would be "grossly" unfair not to be able to recover the costs of preparing and attending court where the First Respondent was neutral as to the outcome. It is true that the First Respondent was neutral. There was no dispute between him and the other Respondents. In these circumstances, my judgment, it would be unfair to visit the First Respondent's costs of attending court on these Respondents.

22. To award costs in favour of the First Respondent would be contrary to the underlying principle to: "make an order that reflects the overall justice of the case." For this reason, if I have discretion, I exercise it against making an order as an injustice would be visited upon the Second and Fifth Respondent if an order was made in favour of the First Respondent.

23. A nominee/chairman knows well that a dissatisfied creditor may challenge a decision made at a meeting of creditors. He or she is likely to have regard, when negotiating a fee with the debtor, to the possibility of providing evidence to the court and

complying with any legal obligations resulting from his or her position as chairperson if a challenge is initiated.