THE HIGH COURT

[2023] IEHC 261

2022 No. 48 COS

In the Matter of Ballylea Developments Limited (In Creditors' Voluntary Liquidation)

In the Matter of Dexbury Limited (In Creditors' Voluntary Liquidation)

And in the Matter of the Companies Act 2014

Between:

Michael Fitzpatrick as Liquidator of Ballylea Developments Limited and Dexbury Limited (In Voluntary Liquidation)

Applicant

-and-

Brian Conroy, Killian Conroy, Brian Madden, CPSL Limited, Haverbrook Limited, Lennglen Limited, Magheravon Limited, Marine House Trustees Limited and Pinemeadow Limited

Respondents

Judgment of Mr Justice Dignam delivered on the 16th day of May 2023.

1. The first, second, fourth, sixth, seventh, eighth and ninth-respondents seek, by Notice of Motion, an "*Order, whether pursuant to Section 631 of the Companies Act 2014 or otherwise, declaring that the Applicant, as liquidator of the companies named in the title to the proceedings, shall be personally liable in respect of any and all costs orders made against him in the proceedings."* For the purpose of this judgment I propose to adopt the approach of the applicant's written submissions and will refer to these respondents as "the moving parties".

2. The "proceedings" referred to were issued by the applicant (who is the respondent to this motion) by Originating Notice of Motion dated the 8th March 2022. The applicant is the liquidator of Ballylea Developments Limited and Dexbury Limited, both of which are in creditors' voluntary liquidation, and for the purpose of this judgment I will refer to him as "the liquidator". In that Originating Notice of Motion he seeks various reliefs under sections 608 and 612 of the Companies Act 2014 arising from the sale of certain property and payments made to the moving parties. It is not necessary to refer to these proceedings in any detail. The liquidator's claim is summarised in paragraphs 4-9 of his affidavit grounding that Originating Notice of Motion and in particular in paragraphs 5-7 where he says:

> *"5. Since my appointment as liquidator to Ballylea and Dexbury, I have carried out extensive inquiries into the way the net sale proceeds arising from the sale of the property known as Marine House, Clanwilliam Court, Clanwilliam Place, Dublin 2…were dealt with by Ballylea and Dexbury. It appears to me that certain payments from the net sale proceeds were made to the Respondents for which Ballylea and Dexbury did not receive any consideration. Consequently, I believe that there has been an improper transfer of the assets of Ballylea and Dexbury in favour of the Respondents. Additionally, I believe there has been misfeasance, breach of duty and breach of trust on the part of the First and Third Named*

Respondents whereby they have misapplied and or retained property of Ballylea and Dexbury.

6. On or about 3 March 2016, Dexbury sold the property to Hibernia REIT Plc ("Hibernia") for the sum of €26,525,000.00 pursuant to a written contract of sale ("the Contract for Sale")…

7. Before dealing with how the sale proceeds of the Property were dealt with by Ballylea and Dexbury, it was necessary for me to examine the complex way the Property came to be sold and to detail the various agreements which Ballylea and Dexbury purportedly entered into. Having done so, I became extremely concerned that Ballylea and Dexbury entered into a fictitious joint venture whereby Ballylea took the profits of the sale of the Property to Hibernia even though it did not own the Property. The purpose of this joint venture was to prevent Dexbury paying capital gains tax…on the proceeds of same. The joint venture only came into being after Hibernia – quite properly – refused to take a sub-sale of the Property from Ballylea in circumstances where Ballylea was heavily indebted to the National Asset Management Agency ("NAMA"). The joint venture was, therefore, a sham transaction that was designed to avoid payments to Revenue and NAMA. From my investigations to date, it appears the mechanism put in place to deal with the net proceeds of sale of the Property, including the purported joint venture was designed by Brian Conroy, and it was put in place by him. Rather than pay CGT to Revenue or repay NAMA, Brian Conroy directed that the proceeds of sale of the Property be paid to the Respondents. For the reasons that will be explained in this affidavit, I believe that these payments were fraudulent."

3. There followed an extensive exchange of affidavits. It is stated in the moving parties' written submissions that there are eleven affidavits in respect of that substantive application.

4. While this exchange of affidavits was going on, the moving parties' solicitors wrote to the liquidator's solicitors by letter dated the 18th May 2022 raising a number of matters. These included the question of security for costs and the

funding of the litigation. The liquidator's solicitor replied by letter dated the 1st June 2022 and there then followed an exchange of correspondence. As this correspondence provides much of the context for the current application and, indeed, canvassed many of the issues that were raised at the hearing, it may be helpful to refer to some of the contents of these letters.

5. In the letter of the 18th May 2022 the moving parties' solicitors asserted that the moving parties had a prima facie defence and expressed concern that the liquidator would be unable to meet any costs order. They went on to say "*In view of the fact that the Applicant in these proceedings is the Liquidator personally, and that in the ordinary course any costs orders which might be made in the Respondents' favour would be enforceable directly against the Liquidator and his assets, we would ask your client to confirm that he unequivocally accepts personal liability in respect of any costs orders which are adverse to him. If the Liquidator refuses to provide that confirmation, then we must necessarily reserve our clients' entitlement to seek security for costs."* They also sought information as to how the liquidator would discharge the moving parties' costs. The letter also raised the possibility that the liquidator may have entered some form of arrangement to fund the litigation, possibly with a commercial litigation funder and sought information in relation to this. The letter requested the liquidator's solicitor to "*confirm within 14 days from the date of this letter: (1) that your client accepts that he will be personally responsible for discharging any costs order which might be made in our clients' favour, and (2) how the Applicant is funding the litigation and whether, in particular, the litigation is being funded (or part-funded) by third parties…*". It concluded by reserving the moving parties' entitlement to make an application for security for costs (which, of course, could only be made against the companies).

6. Ultimately, the liquidator's solicitor confirmed that no third party was funding the litigation and so I will not refer further to that particular issue.

7. In their response of the 1st June 2022, the liquidator's solicitor described the assertion that the moving parties had a prima facie defence as "*without foundation and preposterous*" and set out the reasons for this. They also stated that the legal authorities do not support an application for security for costs and referred to *Re Ballyrider Limited (Unreported, Supreme Court, McKechnie J 31st*

July 2019) (a case to which I return), *Re Eteams International [2020] IESC 23* and *Re Cherryfox Limited [2020] IECA 123* in support of this position. They described the moving parties' solicitor's letter as containing a "*threat to bring an application for security for costs"* and that such threat was a "*deliberate intimidatory tactic which attempts to 'gag'* [the liquidator] *and prevent a case with public interest elements from being prosecuted…that is indicative of* [the moving parties'] *attempts to delay and obfuscate* [the liquidator's] *attempts to conclude the winding up of the Companies*". They also expressed the view that such an application would be bound to fail. The letter did not address the moving parties' request for confirmation that the liquidator would be personally liable for any costs order made in the liquidator's underlying motion in favour of the moving parties (the respondents to the liquidator's motion) though it did refer to paragraph 88(5)(i) of *Re Ballyrider* and stated that the liquidator would be entitled to have recourse to the assets of the Companies in respect of the costs incurred by him. This seemed to implicitly acknowledge that he would be personally liable if an order for costs were made against him but he could in turn have recourse to the assets of the companies.

8. By letter dated the 21st June 2022 the moving parties' solicitor stated that, contrary to what was said in the liquidator's solicitor's letter, they had not sought security for costs and reserved their right to do so. They also referred to the *Ballyrider* decision, noting that in his judgment McKechnie J addressed various scenarios and the costs implications of those scenarios depending on whether the company in liquidation or the liquidator is the party. They referred to the liquidator's solicitor's reliance on sub-paragraph 88(5)(i) of McKechnie J's judgment to the effect that where a liquidator brings or defends proceedings in his own name he is usually entitled to have recourse to the company's assets to meet any adverse costs order made against him and described this as being *"undoubtedly correct, but is of cold comfort to our clients (and to your client presumably), as the Companies have no assets from which to discharge any liability for costs. Given that obvious fact, it is surprising that your client has, for reasons which are not clear to us, failed to expressly confirm that if a costs order is made in our clients' favour, your client will bear personal liability for those costs, and that his assets would be liable to execution. We repeat our request: please unequivocally confirm that your client accepts his personal liability in respect of*

costs." The letter concluded with the moving parties reserving their rights to make an application for security for costs.

9. The applicant's solicitor replied by letter of the 28th June 2022. The letter proceeded on the basis that the previous correspondence concerned a request for security for costs and stated, inter alia*, "you state that this principle is "of cold comfort" to your clients as the Companies have no assets. This brings us to the crux of the issue in respect of security for costs. As you are well-aware, our client's proceedings seek to recover the improper transfer of the Companies' assets to and from several parties, including your clients. It is your clients' actions that have left the Companies in the parlous financial position. Our client will not, therefore, accept personal liability in respect of costs."* The letter concluded by saying "*We trust the content of this letter addresses your client's concerns. If it does not, we await receipt of an application for security for costs…".*

10. By letter of the 13th July 2022 the moving parties' solicitor replied, stating, inter alia: *"Turning to the substance of your letter under reply, it is regrettable that your client continues to avoid answering a straightforward questions: does he accept that if an order for costs is made in our clients' favour, your client will be personally liable to discharge that order for costs?...Your client cannot have it both ways. He cannot, on the one hand, seek to insulate himself from an application for security by saying that any order for costs will be made against him, and on the other hand refuse to confirm that he will bear personal liability for the costs if he loses the proceedings and the Companies have no assets from which to pay the costs…We therefore, for the third time, ask your client to expressly confirm that if an award of costs is made against your client in the Proceedings, and he loses the Proceedings, or if alternatively any realisations are insufficient to discharge those costs, your client will be personally liable to pay those costs…If you fail to provide that confirmation, we will infer that your client's position is that he does not bear personal responsibility for those costs, and that he will argue at the conclusion of the proceedings that any costs order should be made against the Companies…*". It concluded with a reservation of the moving parties' rights, including to bring an application for security for costs.

11. This exchange culminated with the liquidator's solicitors writing on the 7th September 2022 to state that the liquidator's position in relation to the proposed security for costs application remained as set out in their letter of the 28th June and "*in particular our client reiterates that he is not accepting personal liability for the costs of these proceedings".*

12. The exchange of affidavits in the substantive motion continued in October, November and December and the moving parties issued this motion in respect of liability for costs on the 2nd November 2022.

13. There is no doubt that this is an unusual application. However, the novelty of the application, in itself, can not, of course, be determinative. There is no direct authority on the point. The moving parties rely on *Persona Digital Telephony v Minister for Public Enterprise [2016] IEHC 187* but that was dealing with a different interlocutory declaration (the applicant describes it as '*radically different*').

14. The primary basis of the liquidator's opposition to the application is that it interferes with the trial judge's discretion. This is put in various ways in the written submissions filed on behalf of the liquidator. At paragraph 1.1 it is submitted that "*This Costs Application is extraordinary, not because of the legal principles it raises, but because of its timing. In this regard, it is utterly premature. In bringing this Costs Application, the Moving Parties are asking this Honourable Court – at an interlocutory stage – to usurp the function of the trial judge by deciding on costs before any evidence is heard*." At paragraphs 4.1 – 4.8 the submissions address the law on the trial judge's discretion in respect of costs and in paragraph 6.3 it is submitted that the *"Moving Parties' request that this Honourable Court determine a costs' liability at this juncture is premature for two reasons. Firstly, because costs should not be considered until the proceedings have been determined as there is no visibility as to which party will ultimately be successful, and secondly, because a determination at this time would usurp the trial judge's discretion that can only be properly exercised after the conclusion of the hearing."* At paragraph 5 of his replying affidavit, Mr. Conroy says, inter alia "[*T]he effect of the Respondents' application is to ask this Honourable Court to determine whether I have correctly brought this litigation before the substance of the proceedings is even adjudicated upon."*

15. That the question of costs is a matter for the discretion of the trial judge is beyond question. It is a long-established principle and is expressly provided for in section 168(1) of the Legal Services Regulation Act 2015 and in Order 99 Rule 1 of the Rules of the Superior Courts. Section 168(1)(a) of the 2015 Act provides that *"[A] court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings … order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings*." Order 99 Rule 1 provides that *"[T]he costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively*." Section 169(1) of the 2015 Act provides that costs should follow the event but nonetheless confers a broad discretion on the court to depart from that rule having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including a number of matters set out in the section. It is also well-established that the appellate courts will be reluctant to interfere with the trial judge's decision in relation to costs precisely because such a decision is a matter for the discretion of the trial judge (*Spencer v Kinsella [1999] IESC 16* and *Ryanair Ltd v Aer Rianta cpt [2001] 10 JIC 2604*)

16. Thus, if the relief sought in this motion did constitute an interference with the trial judge's discretion it would not be open to this Court to grant the relief sought. However, it seems to me that any interference with the discretion in relation to costs is more apparent than real. The starting point of any analysis of whether the relief in fact usurps or fetters the trial judge's discretion are the precise terms of that relief. The relief sought is a declaration that the "*the Applicant, as liquidator of the companies named in the title to the proceedings, shall be personally liable in respect of any and all costs orders made against him in the proceedings.*" It does not ask this Court to determine the question of costs and, in particular, whether a costs order should be made. Even were this Court to make the Order sought, and the moving parties were to succeed in defeating the liquidator's motion, it would still be entirely a matter for the trial judge to decide whether or not to make a costs order at all or, for example, whether to make a partial costs order or, indeed, whether to make a costs order in favour of some of the moving parties but not others, or, indeed, whether an order for costs should

be made in favour of some of the moving parties against one or more of the other moving parties. The trial judge's discretion would remain intact and unfettered. If, for example, the trial judge was to hold in favour of the moving parties he or she may still refuse to make an order for their costs having regard to the matters set out in section 169(1) of the 2015 Act.

17. The effect of the declaration sought would simply be that if the trial judge were to decide to make an order for costs against the liquidator, is the liquidator who shall be personally liable on foot of that order.

18. The effect of the declaration could possibly be seen as compelling the trial judge to make whatever order for costs he decides to make against the liquidator, if any, against the liquidator personally rather than against the companies, and therefore could possibly be seen as interfering with his discretion in respect of costs as between the liquidator and the companies. However, even this is more an apparent than real interference with the trial judge's discretion because on the basis of the authorities referred to below, such an order could only in fact be made against the liquidator personally. This seems to me to be a central factor in determining this application, if the Court is to determine it.

19. The underlying application is one that has to be brought by the liquidator personally rather than by or in the companies' names. In *Tucon Process Installations Limited (In Voluntary Liquidation) v Bank of Ireland [2016] IECA 211* Costello J had to consider the locus standi of Tucon Installations Limited to bring an application under section 139 of the Companies Act 1990 (the predecessor to section 608 of the Companies Act 2014). Hunt J had held in the High Court that Tucon did not have locus standi on the basis of the decision of the Supreme Court in *Southern Mineral Oil Ltd (In Liquidation) v Cooney [1997] 3 IR 549*. In that case, Lynch J was considering whether a company in liquidation had locus standi to bring an application under section 297A and section 298 of the Companies Act 1963 and section 138 of the Companies Act 1990. Section 297A provided that *"[T]he court, on the application of the receiver, examiner, liquidator or any creditor or contributory of the company, may, if it thinks it proper to do so…*" and section 138 provided that *"[T]he court may, on the application of the liquidator, or any creditor or contributory, examine the conduct of…*". Lynch J held that "*None*

of these statutes provide that the application may be brought by the company in receivership or examinership or liquidation. They provide that the application shall be brought by the receiver or examiner or liquidator, as the case may be, and in all cases the application may also be brought by any creditor or contributory of the company in question…." Hunt J held at page 3 of his judgment:

> "*In the case of an application brought pursuant to a statutory provision, regard must be had to the plain and ordinary meaning of the words of the statute in determining questions such as standing. The nomination of specific parties as potential applicants expressly precludes such statutory applications being brought by a party other than those specified by the legislature, otherwise the precise words used to legislate for classes of applicant would be deprived of ordinary meaning. As the company is not specified by either statutory provision as being an appropriate applicant, it has no standing to seek relief under either of the statutory provisions invoked in this application.*"

20. He relied on the passage above from *Southern Mineral Oil (In liquidation)* and held at page 5:

> "*As they represent a correct and precise statement of the law on legal issue arising in this case, the application herein should be dismissed on the basis that neither of the sections invoked by the applicant is available to it in circumstances where it is not within the category of applicant specified by either of the statutory provisions in question.*"

21. At paragraph 18 of her judgment on behalf of the Court of Appeal, Costello J upheld Hunt J's judgment. She stated:

> "*I am of the opinion that the learned trial judge was correct in his application of the law. I find the judgment of Lynch J in Southern Mineral Oil Ltd to be compelling and, while it is not strictly binding upon this Court, I believe it should be followed in construing s.139 of the Act of 1990….It follows that where the legislature has taken the trouble to specify the parties who may*

bring an application under s.139 it is not open to this Court to extend locus standi to a party upon whom it has not been conferred by the express words of the stature."

22. Both sections under which relief is sought by the liquidator (sections 608 and 612) specify the parties who may bring an application under those sections. Section 608 (the successor to section 139) provides that the Court has certain powers where an application is made by "*a liquidator, creditor or contributory of company which is being wound up…*". Section 612 is structured differently but also provides that the Court may make certain orders *"…on the application of the Director [*of Corporate Enforcement*] or the liquidator or any creditor of the company…*". Thus, on the basis of *Southern Mineral Oil* and *Tucon Process Installations* an application under either section 608 or section 612 can not be brought by the company (or in this case companies), in liquidation.

23. In any event, it is clear from the terms of the liquidator's affidavit in the underlying application and from his submissions in this motion that the application is one brought by him personally. In the original grounding affidavit, he states that he is the applicant and that he is making the affidavit in connection with **his** application [my emphasis] for various reliefs.

24. The parties referred to McKechnie J's decision in *Re Ballyrider (Unreported, 31st July 2019)* in the exchange of correspondence referred to above. The issue in that case was different, i.e. it related to the circumstances in which a liquidator may incur personal liability for costs upon being removed for cause, but McKechnie J's general discussion of when a liquidator, rather than the company, may be liable for costs is very helpful. At paragraph 88 of his judgment McKechnie J summarised the position discussed in detail earlier in his judgment in relation to the position of a liquidator vis-à-vis costs (see, for example, paragraphs 72-78) and said:

"(1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.

(2) ***Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules vis-à-vis an adverse litigant will apply. If a cost order is made the liquidator incurs a personal liability in respect of same: as such the sufficiency or insufficiency of the company's assets is irrelevant****.*

(3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.

(4) In the proceedings first mentioned as the liquidator incurs no personal liability the question of seeking to have recourse over the company's assets does not arise.

(5) In the proceedings second mentioned, the position will be as follows:

(i) Where acting for and on behalf of the company, the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.

(ii) Even when acting, if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described include this misfeasance, bad faith, negligence, unfitness for office and dishonesty.

(iii) On the other hand where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.

(iv) Just as there will be cases which are clear-cut on one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the Court will have regard to section 281 of the 1963 Act and the relevant case law above mentioned. In doing so the Court will consider the representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine

whether there are sufficient grounds of the balance of probability to deny him such a course." [emphasis added]

25. Paragraph (2) makes it clear that where proceedings are brought by the liquidator in his own name the normal rules in relation to costs apply and if a costs order is made the liquidator will be personally liable (subject to his right to have recourse to the assets of the company).

26. In Forde, Simms and Kennedy, *The Law of Company Insolvency* (2015, Round Hall) at paragraph 10-54 it is stated:

> *"Where the liquidator is the plaintiff or applicant and loses, the order for costs is against him personally. It was held in Re Wilson Lovatt & Sons, where the authorities in this area were analysed, that the court will not direct that this liability be limited to such sums as he (i.e. the liquidator) may recover from the company."*

27. The liquidator accepts that it is a well-recognised principle that where a liquidator initiates or defends proceedings in the name of the company in liquidation he or she has no personal liability and that where proceedings are brought in the liquidator's own name, he or she will typically be personally liable for an adverse costs order. In *Eteams International v Bank of Ireland [2020] IESC* 23 MacMenamin J said at paragraphs 17-18:

> *"It is, of course, generally true that when proceedings are being taken or defended by a liquidator in the name of the company rather than in his or her own name, he or she will have no personal liability for any award of costs that may be made in favour of the other party to the litigation, provided there has been no personal impropriety on his or her own part. The costs will, however, be classed as a cost or expense of the winding-up and will rank ahead of the liquidator's own remuneration.*
>
> *The 1963 Act provided that certain statutory causes of action had to be taken by liquidators in their own names. These included: fraudulent or reckless trading proceedings under S.297A; and misfeasance proceedings*

under s.298. Additionally, proceedings under s.204 of the Companies Act, 1990 ("the 1990 Act") to impose personal liability for failure to keep proper books of account came into that category. The policy behind this proviso is obvious. These are instances where the application is anything but pro forma. Rather, it comes within a category of cases where a liquidator will have to arrive at a conclusion that the initiation of such proceedings, effectively imputing unlawful conduct, is warranted. In such situations, an adverse litigant may, if successful, be entitled to look to the liquidator personally to meet any award of costs, albeit that it is the case generally that the liquidator will have a right to be indemnified out of the assets of the winding up (see, Lyndon MacCann and Thomas B. Courtney, Companies Act 1963-2012 (Bloomsbury Professional 2012), at p. 490: notes on s.231 of the 1963 Act)".

28. Of course, the underlying application by the liquidator in this case is one which "*comes within a category of cases where a liquidator will have to arrive at a conclusion that the initiation of such proceedings…is warranted."*

29. The applicant relies on the use by MacMenamin J of the word "*may*" in the passage "*an adverse litigant may, if successful, be entitled to look to the liquidator personally to meet any award of costs…"* to submit that notwithstanding the well-recognised principle in respect of personal liability, i.e. that a liquidator will be personally liable for any adverse costs order in proceedings brought in his name, costs orders in liquidations remain at the discretion of the trial judge and notes that a similar position pertains in England and Wales. *Loose & Griffiths on Liquidators* (9th Ed. Loose et al, LexisNexis, 2019, London) state at paragraph 7.11 that *"[O]ne issue which frequently arises in litigation involving liquidators is the question of costs. If the liquidator acts in the name of the company, he is not personally liable for costs but the position is otherwise where he acts as liquidator and institutes the proceedings in his own name. He will, in any case, be entitled to an indemnity out of the assets unless he acted improperly."*

30. In my view, that passage from MacMenamin J's judgment simply reflects the general discretion which I discuss below and reflects the fact that even if the

respondent to a motion brought by the liquidator is successful the Court has a discretion not to award costs against the liquidator to the respondent. It does not refer, in my view, to any discretion on the part of the Court to decide, having determined to make an order for costs, to make it against the company rather than against the liquidator. It could not do so where the authorities are clear that the liquidator is personally liable where the application is one which must be brought in the liquidator's own name or where the liquidator has to assess whether to bring the application and has chosen to do so. Of course, in such a case, the company is not a party to the proceedings.

31. Thus, while it may appear that the Court would have a discretion to order costs against either the liquidator or the companies, that is not in fact the case, and if and to the extent that the trial judge decides to make a costs order against the liquidator in favour of the moving parties, such an order could only be made against the liquidator personally. Therefore, a declaration in the terms sought would not interfere with the discretion of the trial judge. In summary, the relief sought would not fetter or usurp the trial judge's discretion as to whether or not to make a costs order as between the liquidator and the moving parties or, indeed, the substance of that order and, because the trial judge could not make an order against the companies, the relief sought does not interfere with any discretion which might have existed in respect of whether such order for costs should be against the liquidator or the companies.

32. However, that does not determine the application. The question remains whether the Court should grant the relief. Interlocutory declaratory relief (as the relief is characterised by both parties) is an unusual relief and involves a jurisdiction which must be "*circumspectly exercised and in accordance with the circumstances of the case."* (Clarke J in *Omega Leisure v Superintendent Charles Barry [2012] IEHC 23*).

33. While *Omega Leisure* was not concerned with a declaration at an interlocutory stage, the principles set down in *Omega Leisure* were applied by Donnelly J to an application for interlocutory declaratory relief in *Persona Digital Telephony v Minister for Public Enterprise [2016] IEHC 187*. In any event, the

parties are agreed that the principles set down in *Omega Leisure* are the applicable principles. They are:

> *"In approaching claims for declaratory relief, the court must first be satisfied that there is a good reason for so doing. Second, there must be a real and substantial, and not merely a theoretical, question to be tried. Third, the party with carriage of the proceedings must have sufficient interest to raise that question and finally, that party must be opposed by a proper contradictor. It should, of course, be borne in mind that, by its very nature a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case."*

34. The liquidator in his written submissions accepts that the moving parties have sufficient interest to raise the question, within the meaning of the court's general jurisdiction, and that the applicant is a proper contradictor. In my view, the liquidator was correct to do so. In those circumstances, it is not necessary to determine the question of locus standi. It was pointed out on behalf of the liquidator that the only party who could bring an application under section 631 is CPSL Limited. That is correct. I do not need to consider the effect of that in circumstances where it is not disputed that the moving parties have locus standi outside of section 631.

35. Thus, the real issues of dispute as to whether the *Omega Leisure* principles are met are whether there is a "*good reason for so doing*" and whether there is a *"real and substantial, and not merely a theoretical question to be tried."*

36. I am satisfied that these two criteria can, in the circumstances of this case, be treated together. I am of the view that there is a real and substantial question to be tried and that there is good reason for determining the point. There is a clear disagreement between the parties as to whether or not a liquidator must be personally liable in respect of an order for costs in respect of an unsuccessful application brought by the liquidator, if, indeed, an order is to be made in favour of the opposing party at all. That disagreement is clear from the exchange of

correspondence set out above, in which the liquidator's final position was to simply state "*our client reiterates that he is not accepting personal liability for the costs of these proceedings*", and from the submissions made on behalf of the liquidator where the case is made that notwithstanding that this is the normal rule, there remains a discretion in the trial judge, which seems to encompass a discretion to order costs against the company. The moving parties' position is that if an order for costs is made against the liquidator, it can only be made against him personally.

37. Certainty in respect of the potential liability as to costs, if an order for costs in favour of the moving parties is ultimately made, is in itself a good reason for determining the application for a declaration. Such certainty must stand to the benefit of all parties because it permits them to make strategic and tactical decisions as to the proper running of the litigation. I was directed to a number of authorities on the role of costs in litigation and the legal system but I do not believe that it is necessary to deal with them in detail. The making of a declaration would not mean that the parties can be certain that an order for costs would be made against the liquidator in favour of the moving parties (if successful) because, as discussed above, that is a matter for the trial judge, but merely that if the trial judge decides to make an order for costs in favour of the moving parties against the liquidator he will be personally liable, i.e. the order will be made against him. The liquidator will be free to argue that an order for costs should not be made having regard to the court's discretion and the matters set out in section 169(1) of the 2015 Act. Essentially the liquidator would be in the position that any plaintiff/applicant will be in.

38. Notionally the possibility of the moving parties applying for security for costs against the companies if the potential liability for costs remains unclear is a good reason to determine this application. In their letter of the 1st June 2022 the liquidator's solicitor relied on the passage from McKechnie J's judgment in *Re Ballyrider* in contesting the moving parties' entitlement to security for costs. This seems to be on the basis that as the liquidator rather than the company is the applicant, the moving parties could not obtain security for costs from the companies. However, the foundation of that argument must be that the liquidator must be personally liable for the costs (the companies and the liquidator being the

only possible parties to an order for costs) but the liquidator has not accepted that he will be personally liable for the costs if an order is made in favour of the moving parties. If I decline to grant the relief or if I had found that the companies could be liable then the moving parties would then be entitled to apply for security for costs. Thus, it seems to me that I have to have some regard to the fact that the moving parties may wish to apply for security for costs against the companies. There would be a fundamental unfairness to leaving over the question of the liability for the costs as between the liquidator and the companies until after the determination of the substantive hearing because at that stage the moving parties will not have the opportunity to apply for security for costs against the companies. However, it seems to me that this must be of limited significance as a reason on the facts of this case, in circumstances where an application for security for costs has not previously been made, where significant costs have been incurred through an extensive exchange of affidavits, and where the matter is on for hearing in a matter of weeks. It would not be appropriate for me to express any sort of concluded view as to the merits of an application for security for costs but it must be acknowledged that any such application must face very considerable difficulty. There is an obligation on an applicant for security to move the application at an early stage. In this case there has been a very extensive exchange of affidavits, the majority of which were exchanged long after the possibility of an application for security for costs was first raised by the moving parties. The applicant's solicitor was incorrect in describing the moving parties as having sought security for costs in the correspondence but, nonetheless, the possibility of doing so was raised as early as 18th May 2022 but no such application was made. Nor was an application made even after the applicant's solicitor confirmed by letter of the 28th June 2022 that the applicant would not be confirming that he was personally liable for the costs. The exchange of affidavits proceeded even during and after this exchange of correspondence. Furthermore, the trial date is now only a matter of weeks away. It seems to me that on the level of principle the possibility of an application for security for costs is a good reason to make a declaration but its significance as a reason in this case is reduced considerably by the real difficulties which such an application would be likely to face.

39. Thus, it seems to me that the certainty which would be achieved by the declaration is a good reason for granting the relief and, while the possibility that

the moving parties may wish to apply for security for costs is also a reason, it is of far less significance for the reasons set out above.

40. Finally, as is clear from the principles set down by Clarke J in *Omega Leisure*, declaratory relief is discretionary in nature and "*involves a jurisdiction which must…be circumspectly exercised and in accordance with the circumstances of the case.*"

41. It seems to me that there are a number of factors which I must consider in the exercise of my discretion.

42. Firstly, and of very great concern to the Court, is any possible chilling effect which such an Order might have on liquidators in the performance of their functions. The Court must be concerned about any impediment to liquidators carrying out their role, particularly in pursuing any asset which might have been improperly transferred from the company. However, I do not believe that a declaration in the terms sought would constitute an impediment or, indeed, would have a chilling effect. Such effect or impediment as comes from liquidators being made personally liable for the costs of applications brought in his or her name already exist and a declaration in the terms sought would simply reflect the existing position. Indeed, in this case the liquidator has already identified and acknowledged that the likelihood is that he would be fixed with liability if he is unsuccessful in the application and that has not dissuaded him from bringing the application.

43. The second factor is the possibility that what is being sought is security for costs by stealth, as it is put by the liquidator, and is an attempt to delay or stymie the prosecution of the proceedings. If this were an attempt to obtain security for costs or if the effect of the relief were to be to grant security by stealth the Court could not countenance making the order sought as to do so would be to permit the moving parties to obtain a relief or benefit without having to satisfy the elements of a very well-established test for the relief. However, the relief sought is fundamentally different from an order for security for costs which has the effect of staying the proceedings until security is provided by the applicant. An Order in the terms sought would have no such effect. Nor could it be said to stymie the

prosecution of the proceedings in the way that security might do. The applicant has acknowledged that "*it is likely that he will be liable for the costs…*" (if unsuccessful) and thus he has clearly taken account of that risk in deciding to institute and maintain these proceedings. For the reasons set out above, relief in the terms sought does not change the nature of that risk and therefore can not properly be said to stymie the proceedings any more than the risk that an order for costs might be made already does. It bears repeating that the effect of the relief sought is not to determine costs against the liquidator.

44. The third factor to be considered is the availability of an indemnity for the liquidator from the assets of the company. It was noted in *Eteams International* and *Re Ballyrider* (see also *Re Pacific Coast Syndicate [1913] 2 Ch 26* and *Comhlucht Páipéar v Údarás na Gaeltachta [1990] ILRM 266* and *Loose & Griffiths on Liquidators*, para. 7.11) that a liquidator who is personally liable for an order for costs will generally have a right to be indemnified out of the assets of the company. I do not believe that this is relevant to the question of whether or not the Court should make the declaration sought. The liquidator's right to have recourse to the assets of the company does not affect the principle that in an application brought in his name he will have personal liability if the court makes an order for costs in favour of the other party. The question of an indemnity or of recourse is a matter between the liquidator and the company.

45. The fourth factor is the question of delay. The liquidator makes the point that the moving parties have delayed in bringing this application. The proceedings were commenced on the 8th March 2022 and this application did not issue until the 2nd November 2022. In the meantime, there was both an exchange of correspondence about the costs of the substantive application (set out in detail above) and an exchange of affidavits in respect of the substantive application. There was a delay of two months from the end of the correspondence to the issuing of this motion. In fact, the liquidator's solicitors stated clearly in a letter of the 28th June 2022 that the liquidator "*will not…accept personal liability in respect of costs.*" Thus, it could be said that there was a period of four months between the date upon which the liquidator made clear that he would not confirm that he would accept personal liability and the issuing of the motion. I think the Court can have regard to any delay but it seems to me that it is of far less significance in

the context of this application than in respect of an application for security for costs. An Order for security for costs always has the potential to impede the prosecution of the proceedings. That risk is inherent in the test for security for costs – in order to obtain security the moving party must establish that it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant and it must follow if the defendant has satisfied that test that there will be a real possibility that the plaintiff will not be able to provide the security ordered. Thus, it is essential that the application for security is made at the earliest possible stage and certainly before any significant costs are incurred. However, in this case, the relief sought would simply clarify that if the Court makes an order for the moving parties' costs it will be against the liquidator and not the companies. The liquidator knew all along that there was a real risk (and indeed a likelihood) that if he was unsuccessful and the court was making an order for costs in favour of the moving parties that order would be against him. He decided to institute the proceedings and incur the costs in the knowledge of that likelihood. Thus, the delay in bringing this motion can not be said to have caused the liquidator to have incurred costs which he would otherwise not have incurred.

46. There are also a number of factors set out in paragraph 6.1 of the submissions filed on behalf of the liquidator. These include the nature of the issues to date uncovered by the liquidator, who it is said (and I accept) has no personal interest in the proceedings and is acting with the sole motivation of properly exercising the functions of his office, the fact that he engaged in lengthy correspondence with the moving parties in an attempt to obtain information before having to issue a motion for directions in 2019, that he obtained the opinion of Senior Counsel, that the question of costs would not have arisen if the first-named respondent/moving party had not caused the companies to be denuded of their property in the first place, and that there is a public interest in liquidators being able to perform their role correctly. It seems to me that these are all proper matters for the trial judge to consider when determining whether or not to make an adverse costs order if the liquidator is unsuccessful but they do not go the question of whether this particular declaration should be made.

47. Thus, in the circumstances it sems to me to be appropriate to make the declaration sought, that is "a declaration that the Applicant, as liquidator of the companies named in the title to the proceedings, shall be personally liable in respect of any and all costs orders made against him in the proceedings."