[2020] IEHC 510

THE HIGH COURT

[Record No. 2011/219 M.C.A.]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 1963-2012

BETWEEN

THE INVESTOR COMPENSATION COMPANY DAC

APPLICANT

AND

KIERAN WALLACE, OFFICIAL LIQUIDATOR

RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 30th day of April, 2020.

1. Pursuant to a notice of motion issued on 10th December, 2019, the applicant ("ICCL") seeks certain reliefs as to the nature and extent of its entitlement to be subrogated, pursuant to the Investor Compensation Act 1998 ('the 1998 Act'), to certain client assets within Custom House Capital (in liquidation) ('CHC'), ('the subrogation application').

2. The genesis of the present application arises from the judgment of Finlay Geoghegan J. of 31st January, 2019 ([2019] IEHC 43), ('the 2019 judgment'). That in turn arose from an application by ICCL requesting that the Court direct the official liquidator to make an application for directions, on the subrogation issue, pursuant to s. 231 of the Companies Act, 1963 or alternatively, as the judgment states, 'to permit it to bring an application for directions in relation to a dispute concerning its claim to be entitled to be subrogated to the right (or certain of the rights) of clients of Custom House Capital (in liquidation) … to whom it has paid compensation … in relation to client assets still under the control of CHC or the liquidator'.

3. Pursuant to terms of the 2019 judgment, the Court stated that, on the basis of the submissions advanced, it was not clear what rights of a compensated client ICCL contended gave rise to its claim of subrogation. Accordingly, the Court envisaged that ICCL would advance actual facts relating to identified assets and clients (or at least a representative sample) in order to properly identify the client assets that might potentially give rise to ICCL's claim.

4. The Court expressly stated that, if ICCL did present its application in the manner envisaged, then the issue as to whether any such disputes should be determined in an application by ICCL within the liquidation proceedings, was a decision for a future application.

5. In any event following the 2019 judgment, ICCL thereafter issued its notice of motion in respect of the subrogation application.

6. The official liquidator has made it clear that he does not wish, and nor does he consider it appropriate, that he be a party to the subrogation application.

7. This, in turn, has necessitated ICCL seeking reliefs, within this notice of motion, for the appointment of two *legitimi contradictores*; Mr. Michael Nugent and Mr. Roger Day.

8. Whilst there is no objection to the joinder of these parties and each had consented, an issue has arisen as to who should discharge their respective costs. ICCL contend that those costs should be costs in the liquidation. Those acting on behalf of the liquidator take a different view, arguing that those costs should be borne by ICCL.

9. Accordingly, before the substance of the subrogation application can be dealt with, this specific issue has come before this Court. In short, who is to discharge the costs of the *legitimi contradictores*, in circumstances where both applicant and respondent agree they ought to be discharged.

10. I stress that this discrete application is not the hearing of the subrogation application itself. That is for another day.

11. As pointed out within the 2019 judgment, the nub of the subrogation application concerns the interpretation of s. 35(5) and (5A) of the 1998 Act; it is in the following terms:-

> "5. Where the company or the operator of an investor compensation scheme approved under section 25 has made a payment under section 34 to an eligible investor, the Company or operator shall be subrogated to the rights of that eligible investor in liquidation proceedings against the investment firm for an amount equal to the amount paid by the company or operator under section 34 to that eligible investor.
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> 5A. If–
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> (a) an eligible investor proves a claim in the liquidation proceedings referred to in subsection (5), and
> (b) The amount proved exceeds the amount of compensation paid by the company or by the operator of a compensation scheme approved under section 25,
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> the claim of the eligible investor and the subrogated claim of the company, or operator of the compensation scheme, for the amount of the excess rank equally in those proceedings and are to be paid proportionately. If the assets are insufficient to meet those claims, they are to abate in equal proportions."

12. Part III of the 1998 Act sets out the system for the payment of compensation to investors and in essence, provides for the payment of "compensatable loss" which means 90% of the amount of an eligible investor's net loss or €20,000, whichever is the lesser. Within the subrogation application itself, this is likely, in turn, to give rise to an argument as to how the term 'net loss' is to be correctly defined.

13. CHC's own assets are, in relative terms, minimal, but it has significant client assets under management. In respect of that aspect of the matter, within the 2019 judgment, Finlay Geoghegan J. summarised the position as follows:-

> "For the reasons already set out, the right of subrogation which ICCL may have by reason of payment of compensation pursuant to s. 35(5) is only of practical benefit if the right extends to client assets. There will be no dividend paid by CHC to any creditor. The liquidator in the correspondence from February 2018 disputes that any right of subrogation ICCL may have extends to client assets. Whilst that is potentially a headline dispute, it is immediately obvious from a reading of subss. 35(5) and (5A) and the knowledge the Court has of this liquidation and in particular the many types of client assets, that there are a considerable number of other questions which would fall to be determined before it could be decided that ICCL is now entitled to be subrogated to an identified right or claim of any compensated client in relation to a specified client asset. The questions identified by ICCL…"

The Court continued:-

> "Hence, the ICCL appears correct in its contention that the resolution of any disputed claim to be entitled to be subrogated to some or all of the rights of a compensated client of CHC to the return of his own assets, whether by payment, transfer of assets at the client's direction, or otherwise, will as a matter of probability require the determination by the Court of a number of issues including but not limited to those identified…
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> It is not my intention to express any view in this judgment on the substance of ICCL's claim to be entitled to be subrogated to certain rights of compensated clients. I only wish to draw attention to the potential complexity of issues which will be raised by any claim which ICCL may now make pursuant to subss. 33(5) and (5A) of the 1998 Act to be entitled to be subrogated to rights of compensated clients to client assets not yet returned to them in this liquidation. I use the term 'compensated clients' as it is at least clear that the right of subrogation only arises where ICCL 'has made a payment under section 34 to an eligible investor'."

14. Within the 2019 judgment, the Court set out the parameters of the argument as follows:-

> *"If ICCL were to make claims to be subrogated to the rights of identified compensated clients in relation to his assets still remaining under the control of CHC and those claims are (as is probable) disputed, then it may be that such disputes should be determined by an application in the liquidation proceedings. I would add that whilst the subject matter of the potential dispute may relate to the work which the official liquidator is required to do as part of the winding up, it does not necessarily follow that he would be obliged to bring an application for directions under s. 231 where the essential dispute is between ICCL as claimant and clients who opposes the ICCL's right to be subrogated."*

15. ICCL invokes the first sentence of the quotation in the preceding paragraph in support of its contention that this is an issue required to be determined within the liquidation proceedings and therefore that the costs at issue are to be borne within the same proceedings. The official liquidator invokes the second sentence of the same quotation in

support of its contention that this is a dispute between ICCL and the clients and therefore not a matter within the liquidation.

16. ICCL contends that the matters it seeks to raise are properly matters that arise within this liquidation. In the function and duties of the official liquidator identified by the Court in its judgment in *Re Custom House Capital Limited (In Liquidation)* [2012] IEHC 382, Finlay Geoghegan J. held that part of the official liquidator's role in winding up the affairs of CHC was in the orderly distribution of client assets. That in turn involves determining questions in relation to the nature and distribution of those assets. It follows therefore, contend ICCL, that the proper mode of realisation and distribution of those client assets is within the liquidation, which in turn will, in part, be determined by the outcome of the subrogation application. It follows, ICCL contend, that the costs of the *legitimi contradictores* should be borne within the liquidation.

17. Throughout this application, ICCL has made it clear it considers that the official liquidator should properly be a party to the subrogation application. It contends that its unwillingness to bring an application for directions or be a party to the subrogation application, is the only reason necessitating the joinder of any *legitimus contradictor*. ICCL stress this dispute had originally arisen (as the correspondence between the respective firms of solicitors confirms) as it, and the official liquidator, take a different view as to their interpretation of s. 35(5) and (5A) of the 1998 Act. They also point to the liquidator's solicitor's initial suggestion (in a letter of March, 2018) that a directions application to court may well be necessary to determine the matter.

18. ICCL points to RSC O. 99, r. 1(3) and r. (4) and the overriding requirement that costs should follow the event, which of course is correct. The difficulty here is in identifying what constitutes 'the event'. For ICCL the event, constitutes the issues which it raises pursuant to s. 35(5) and (5A) of the 1998 Act, which require to be determined as matters within the liquidation. They further contend that if ICCL is substantially successful in its interpretation of the 1998 Act, it would be invidious, in such circumstances, for it to have been required to discharge the costs of the *legitimi contradictores*. That of course excludes any costs application that ICCL might advance at the conclusion of the subrogation application. For the official liquidator, the event is the issue of the quantification of ICCL's subrogation claim between it and certain client assets within CHC.

19. Cases such as the judgment of Cooke J. in *Bupa Ireland Limited v. Health Insurance Authority* [2013] IEHC 177 and Cork County Council v. Shackleton [2007] IEHC 334 ('*Shackelton'*) after confirming the usual rule that a successful party should bear costs, emphasise that it would only be "in rare and exceptional circumstances" that this rule would only likely be departed from, usually where considerations of public interest were involved.

20. In *Shackleton*, Clarke J. stated in respect of any departure from the ordinary rule as to costs in "test cases" as follows:-

> "Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case."

21. The official liquidator points to the fact that there is a public interest dimension within ICCL's operation and function. It contends that ICCL seeks clarification of this issue for the ongoing exercise of its statutory function in this and other liquidations. In short, if ICCL seeks adjudication upon the subrogation issue, then it should discharge the costs associated with it.

22. More specifically, ICCL argues that the application in this instance is more akin to a pre-emptive or protective costs order and quotes Laffoy J. in *Village Residence Association Limited v. An Bord Pleanála (No. 2)* [2000] 4 IR 321 to the effect that a protective costs order would only be granted in this jurisdiction in an exceptional case. In that case, the Court approved the principles from *R v. Lord Chancellor, Ex Parte Child Poverty Action Group* [1998] 2 All E.R. 755 where Dyson J. concluded that if the Court had jurisdiction to make a protective costs order, there would be difficulties in exercising such a jurisdiction, because it would often not become clear whether the issue was of public importance until well into the substantive hearing and, accordingly, it would rarely be possible to make a sufficient assessment of the merits at an interlocutory stage. It follows that the making of any pre-emptive costs order should only be made in the most exceptional circumstances.

23. In *Rosborough v. Cork County Council* [2008] 4 IR 572 ('Rosborough'), Clarke J. stated as follows:-

> "The height of any possible jurisdiction of the courts to deal with cost matters in cases such as this, in advance of a hearing, arises under the so called "protective cost order" jurisdiction… However, it is clear that the jurisdiction of the court to make a "protective costs order" relates only to insulating a plaintiff or claimant who brings public interest proceedings, and who meets the other criteria set out in the jurisprudence, from the risk of having to pay the relevant defendant or respondent's costs… I know of no suggestion that a jurisdiction could possibly exist on the part of a court to require not merely that a claimant be insulated from the costs that might be awarded against it should it lose, but also become entitled to an order, in advance, in its favour, to the grant of costs."

24. In my view, the facts and circumstances of this unusual application can be distinguished from the cases quoted above, in respect of the 'usual order' as to costs within RSC Order 99 and a pre-emptive costs order.

25. In any of the cases discussing the criteria for a protective costs order, such orders are sought between parties to the litigation, in advance of a hearing, who might otherwise be

at potential risk of a costs order being made against them. In the quotation from Rosborough above, the Court refers to insulating a plaintiff or claimant from costs. Here no insulation is required as, from the outset, it is clear that the costs of the *legitimi contradictores* will be borne by others. 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. Understandably, they only agreed to be joined upon that basis. Both, through their respective counsel, have also contended that their costs should be borne by ICCL and not further burden CHC's financial situation within this liquidation. In correspondence opened to the Court, solicitors for Mr. Day have asserted that, if the Court directed that his costs be costs in the liquidation, he might re-assess his agreement to act as a *legitimus contradictor*. Counsel for Mr. Nugent expressly pointed out that he did not advance the same reservation.

26. Within the correspondence passing between solicitors and in written and oral submissions before this Court, the respective positions of the parties have been clearly set out. ICCL is adamant that the issues they advance are relevant and require adjudication within the context of this liquidation. The official liquidator on the other hand contends that this is essentially an issue between ICCL and the clients, to whom it is obliged to pay compensation, as to the nature and extent of its subrogated claim. The official liquidator does not accept that ICCL was obliged to bring this application within the liquidation proceedings, but merely chose to do so and in such circumstances should discharge the costs.

27. Counsel for the official liquidator contends that the real issue is the conflict between the view advanced by ICCL and the financial interests of the client assets. It follows, therefore, in the submissions on behalf of the liquidator that, as the subrogation application solely advances the claims and interests of ICCL as against clients of CHC in respect of their compensation, this has no relevance to the assets within the liquidation, or any other creditor of CHC.

28. The official liquidator further contends that there is no good reason for imposing the costs of any *legitimus contradictor* within this liquidation in circumstances where he must have regard to the interests of all creditors. Counsel for the official liquidator points, on the other hand, to the financial standing of ICCL and that it has already made significant provision in respect of the CHC clients entitled to compensation. They further point that the modest financial benefit to any individual client in resisting ICCL's motion, would be a fraction of the total legal costs involved in such an application, which could potentially have a substantial financial benefit to the ICCL if successful. In short, as the party charged in dealing with its investor compensation scheme, it is therefore the party best equipped to argue its entitlement as to the nature of the assets to which it may ultimately be subrogated and to bear the costs of that application. Whilst this application cannot be adjudicated solely upon who has a healthier financial standing, nevertheless I do accept that the liquidator is entitled to take into account and have regard to the position of all creditors within this liquidation.

29. Finlay Geoghegan J. in the 2019 judgment, under the heading "Additional Observations" set out certain matters (all *obiter*), in particular relating to the possible subrogation application by ICCL, all based upon her extensive and unique experience in dealing with varied and complex issues within this liquidation since 2011. In such circumstances, I believe the court should have regard to these observations and for ease of reference I reproduce them in full below where she states:-

> "19. Counsel for ICCL emphasised in the course of this application the importance to ICCL of obtaining clarification in relation to its rights of subrogation under the 1998 Act, not only for the purposes of potential claims in this liquidation, but also in relation to future insolvencies of other investment firms. I fully understand that desire. However, whether such clarification may be achievable by making claims to be entitled to be subrogated to certain rights of compensated clients in this liquidation and pursuing applications in relation to inevitable disputes should, I suggest, receive careful consideration by ICCL prior to being made.
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> 20. Subrogation is not defined in either the Directive or the 1998 Act. Whilst a well-established principle or doctrine in law and equity, it does not have a single meaning and how it operates depends on the particular facts and circumstances. It is not easy to envisage that a court in this jurisdiction, or the Court of Justice of the European Union on a reference under Article 267, will be able to give the type of clarification desired by ICCL even in relation to the questions identified in this application, having regard to the broad terms of subss. 35(5) and (5A) of the 1998 Act and Article 12 of the Directive. It may be inevitable that the type of clarification desired quite reasonably by ICCL necessitates further legislation and possibly the making of detailed regulations. I have noted in the course of considering this application, the different approach taken in the UK for the purpose…
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> 21. The second reason for which I make these observations is the timing of this application and of any future claims by ICCL to be subrogated to rights of compensated clients and the very difficult question of the potential prejudice to clients who receive compensation from ICCL in advance of the return of their client assets, as compared with those clients who may await the payment of compensation until after the return of their client assets. One issue that does not appear to be in dispute is that any subrogation right of ICCL only arises when compensation is paid. This potential prejudice and how it might be approached…
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> 22. This application is made approximately 7 years after the commencement of the liquidation, at a time when the liquidator is (hopefully) nearing completion of distribution of client assets, in accordance with directions given by the Court in 2017, see: *Re Custom House Capital Limited (In Liquidation)* [2017] IEHC 484. ICCL was on notice of that application but did not assert subrogation rights to client assets. The Court was informed on this application that 574 out of approximately 1,900 applicants have been paid compensation by ICCL. In addition to the potential prejudice to those to whom compensation has been paid if ICCL now assert a right

to be subrogated to certain of their rights, as compared with those whose claims for compensation are still pending and who may seek (if permitted) to await payment of compensation until after return of client assets, there is the inevitable probability of further significant delay in the completion of this liquidation to the prejudice of many who have already suffered losses if ICCL pursue subrogation claims."

30. The official liquidator asserts that all issues which arise for determination within this motion, are solely to the benefit of ICCL. Certainly, in previous applications, as is recorded in the 2019 judgment of Finlay Geoghegan J., it does appear that ICCL has suggested that this issue had a broader significance beyond this application, in respect of all future payments of compensation, in the context of its entitlement to subrogation, pursuant to the 1998 Act. ICCL now, in part, contends that the determination of this issue would be of assistance to the official liquidator and indeed of importance to this liquidation, in the ultimate distribution of funds. The official liquidator on the contrary states that it may well affect the amount and nature of ICCL's subrogation in respect of the relevant client assets but does not affect any role or duty of the liquidator as has been defined within the judgments of Finlay Geoghegan J. and, indeed, his broader statutory obligations within this liquidation.

31. ICCL has decided (as is its prerogative) to institute and pursue the subrogation application. It does so on notice of the position adopted by the official liquidator and has issued the present application against this background.

32. In such circumstances, I would find it difficult to determine that the costs of the *legitimus contradictor* would be borne by a non-party to these proceedings or to direct in such circumstances that the costs of this application would be, in respect of those *legitimus contradictor*, be costs within the liquidation. Ultimately, it is ICCL who have decided to pursue the subrogation application in this fashion.

33. I accept that the outcome may well have a relevance to this liquidation; it may determine how certain sums are to be distributed. Nevertheless, in my view, the initial determination of that issue is between ICCL and those clients and their assets within this liquidation, against whom it makes a claim of subrogation.

34. Having carefully considered this matter and, in particular, the 2019 judgment of Finlay Geoghegan J., in my view, the cost of the *legitimi contradictores* should be borne by ICCL. It is they and not the liquidator who have sought the determination of the subrogation application and, in my view, in such circumstances, it is they who should bear their costs.

35. I will hear the parties as to what, if any, consequential or other orders now arise.