THE HIGH COURT
CHANCERY

[2021] IEHC 565
[2020 No. 155 COS]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 631(1) OR SECTION 684(1) OF THE COMPANIES ACT 2014
AND IN THE MATTER OF SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND THE THIRD FORESTRY GROWTH PLAN PLC (IN LIQUIDATION)

BETWEEN

LAR SHEERAN, AISLING MURPHY AND RICHARD MULCAHY

APPLICANTS

AND

ALAN FITZPATRICK, AS LIQUIDATOR OF THE SIXTH IRISH FORESTRY FUND PLC (IN LIQUIDATION) AND THE THIRD FORESTRY GROWTH PLAN PLC (IN LIQUIDATION)

RESPONDENT

RULING of Mr. Justice David Keane delivered on the 16th August 2021

Introduction

1. On 16 July 2021, I gave judgment refusing the application of Mr Sheeran, Ms Murphy and Mr Mulcahy ('the applicants') for an order under s. 631(1) or s. 684(1), or both, of the Companies Act 2014 ('the 2014 Act'), directing Mr Fitzpatrick ('the respondent'), as liquidator of Sixth Irish Forestry Fund plc and Third Forestry Growth Plan plc ('the companies'), to furnish them with copies of certain documents or provide them with certain information, or both, relating to the trade, dealings or business of the companies.

2. This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2021] IEHC 488.

3. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to electronically file concise written submissions, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.

4. The parties could not reach agreement and, consequently, each electronically filed written legal submissions on 30 July 2021.

The costs of the application

i. *applicable rules and principles*

5. Order 99, rule 2(1) of the Rules of the Superior Courts ('RSC'), as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), confirms that, subject to the provisions of statute, the costs of and incidental to every proceeding in the Superior Courts shall be at the discretion of the court concerned.

6. Order 99, rule 3(1) of the RSC provides in material part:

> 'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the

matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

7. Section 169(1) of the 2015 Act states:

> 'A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
>
> (a) conduct before and during the proceedings,
>
> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
>
> (c) the manner in which the parties conducted all or any part of their cases,
>
> (d) whether a successful party exaggerated his or her claim,
>
> (e) whether a party made a payment into court and the date of that payment,
>
> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
>
> (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.'

ii. submissions on costs

8. The respondent seeks his costs of the application against the applicants as their application was one for a final, rather than interlocutory, order against him and it failed. Hence, the respondent submits that he was entirely successful in the defence of the application, and the applicants were entirely unsuccessful in pursuing it, so that the general rule under s. 169(1) of the 2015 Act ought to apply.

9. The applicants acknowledge that the respondent was entirely successful in resisting their application but invoke the discretion conferred by s. 169(1) of the 2015 Act to depart from the general rule where it is appropriate to do so, having regard to the particular nature and circumstances of the case and the conduct of the parties.

10. In doing so, the applicants rely on the decision of Murray J (Whelan and Ní Raifeartaigh JJ concurring) for the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 114, (Unreported, Court of Appeal, 16 April 2021) on the exceptional jurisdiction to depart from the general rule in public interest cases. The applicants contend that this case was located within what Murray J characterised as the wide terrain of such cases, relying on

the modern extension of that terrain to encompass, in appropriate circumstances, litigation brought to advance a personal interest.

11. Thus, while acknowledging that this was not a public interest case in its purest form, the applicants identify the following elements of the litigation as capable of engaging the public interest exception:

    (i) The Applicants were supported by a wider group of investors.

    (ii) The proposed proceedings for which the documentation was requested were intended to seek the return of assets to the liquidation fund, and thus – if successful – stood to benefit all 12,400 investors in the Companies;

    (iii) The application presented at least three issues of law which were not straightforward and on which there were two legitimate views, namely: (1) whether s. 631(1) of the 2014 Act granted the Court the power to direct a liquidator to furnish documents and information to a contributory; (2) whether the jurisdiction provided for by s. 684(1) of the 2014 Act could only be exercised in favour of a contributory where the documents were sought for a purpose which would benefit the liquidation; and (3) whether a contributory is required to have a prima facie case as a pre-condition to an order being made under Section 684(1).

    (iv) There was no domestic authority directly on point in respect of any of the three central issues of law in the case.

    (v) Each of the three central issues of law in the case went to the extent of the High Court's jurisdiction in respect of provisions in the 2014 Act which are frequently invoked both by liquidators and other stakeholders in companies being wound up;

    (vi) It was reasonable for the Applicants to seek to invoke the statutory provisions in question in the absence of any other mechanism for obtaining the documents and information sought and having regard to the fact that there were two legitimate views of the extent of the Court's jurisdiction and no domestic authority in point.

12. This is not a case that involves consideration of the further variable identified by Clarke J in *Cork County Council v Shackleton* [2007] IEHC 334, [2011] 1 IR 485, whereby it may be appropriate to disapply the rule where a State party has succeeded in litigation that was necessitated by the complexity or difficulty of legislation for which that State party was, in substance, responsible. In consequence, I do not think that the helpful gloss on the *Shackleton* principle set out by Murray J in *Lee* (at para. 20) identifies factors relevant to the potential disapplication of the general rule in the circumstances of this case.

13. Rather, I accept – as the respondent contends – that the test for the application of the public interest exception is that set out by Simons J in *Corcoran & Anor. v Garda Commissioner & Anor* [2021] IEHC 11, (Unreported, High Court, 4 January 2021), approved by Murray J for the Court of Appeal in Lee (at para. 6). In *Corcoran*, Simons J explained:

'19. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1), is the "particular nature and circumstances of the case". The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.

20. In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.'

14. The legal issues raised in this case concerned the nature and scope of the powers conferred on the court by ss. 631 and 684 of the 2014 Act to direct the provision by a liquidator of information or documentation to a contributory in the course of a winding up. The point was a novel one, given the absence of any domestic authority upon it and the different approaches adopted to the construction of equivalent provisions in other common law jurisdictions. The applicants' case, though unsuccessful, was not a notably weak one – the test they failed to meet more obviously involved an assessment of degree than the application of a bright-line rule. Although, as company contributories and forestry investors, the applicants are commercial actors pursuing a personal interest, their application was in effect a test case, in that it clarified the scope of the relevant entitlement of every contributory. As against all of that, the entitlement of a contributory to apply to the court in a winding up for the determination of any question or for inspection of the company's accounting records, books or papers, under s. 631 or s. 684 of the 2014 Act, whatever its scope, cannot be rightly characterised a sensitive personal right.

15. If it were necessary to decide the question solely based on the public interest exception to the application of the general rule, the issue would have been finely balanced, as the public interest asserted is undoubtedly an attenuated one.

16. However, as s. 169(1) of the 2015 Act makes plain, considerations of the public interest represent only part – albeit a very important part – of the broader discretion of the court to depart from the general rule, having regard to the particular nature and circumstances

of the case. In my view, the particular nature and circumstances of this case do warrant such a departure.

17. I preface the observations that follow by making absolutely clear that I express no view whatsoever on the commercial wisdom or prudence of the directors' decision in 2019 to sell the companies' forestry assets and place the companies in liquidation, still less do I express any view on whether there may have been any breach by the directors of ss. 608, 612 or 1349 of the 2014 Act in that context.

18. While it is important to acknowledge that the directors were authorised to manage the companies' affairs without reference to its preference shareholders, it is striking nonetheless that the directors did not provide those shareholders with any information about the factors that led to their decision to effect the sale of each company's forestry assets and, consequently, to liquidate each company until they did so in a memorandum dated 4 February 2020, approximately 9 months after the sale of those assets and almost 6 months after they placed each company in voluntary members' liquidation.

19. While the directors were perfectly entitled to manage the companies without reference to any of their preference shareholders, that does not mean that it was reasonable for them to keep those shareholders entirely in the dark about matters fundamental to each company's whole purpose as a shareholder investment vehicle. And while it is true that the chairman's letter, accompanying the audited financial statements of each company for the year ended 31 May 2018 (which it seems reasonable to assume would have been circulated at some time in 2019), included the statement that the directors were conscious of an increasing level of economic volatility and intended, for that reason, to monitor and investigate various strategic initiatives, including early disposal of the companies' forestry assets, there was no suggestion in that letter that a decision to implement such an initiative was imminent or had already been made.

20. Thus, it is impossible not to have considerable sympathy for the applicants' position, as exemplified by Mr Sheeran, who learned only indirectly, through a self-congratulatory press statement issued in May 2019 on behalf of another company with which the directors were associated, that the sale of the companies' forestry assets was to result in a summer bonanza for shareholders, only to discover, after the companies went into liquidation on 15 August 2019, that his twenty-year investment was to yield him a combined annual return of less than 2%, instead of the compound annual return of 12¼ % over thirty years projected in the prospectus, and an aggregate return of little more than one-twentieth of the sum projected there.

iii. conclusion on costs

21. Given that those were the circumstances of the case; that the application was in the nature of a test case; that it has served to bring greater clarity to the nature and scope of the powers conferred on the court by ss. 631 and 684 of the 2014 Act; and that it was efficiently conducted, I judge it right to exercise the court's discretion under s. 169(1) of

the 2015 Act to depart from the general rule by making no order for costs against the applicants.

22. At the same time, I do not accept the applicants' argument that it was unnecessary and, hence, unwarranted for the respondent to actively oppose their unsuccessful application, rather than simply set out his position in correspondence for consideration by the court. The respondent was entitled, if not obliged, to engage on the nature and scope of any order that might properly be made against him as liquidator under s. 631 or s. 684 of the 2014 Act, and that engagement greatly assisted in the resolution of that question. Needless to say, any failure of communication between the directors and the preference shareholders about the proposed cessation of the companies' business cannot be laid at the respondent's door. For those reasons, I will order that the respondent's costs of the application, including any reserved costs and the costs of submissions, are to be costs in the liquidation of each of the companies the subject of the application, and that they will rank accordingly.

Conclusion

23. In summary, I will make the following orders:

    (1) An order refusing the application.

    (2) An order granting the respondent his reasonable costs of the application, including any reserved costs and the costs of submissions, as costs in the liquidation of the companies, to rank accordingly.