Approved

No redactions required

THE COURT OF APPEAL

NEUTRAL CITATION NO. [2021] IECA 151

High Court Record No. 2018 No. 311 COS

Court of Appeal Record No. 2019 No. 65

Faherty J

Haughton J

Collins J

IN THE MATTER OF OPENHYDRO GROUP LIMITED

(IN PROVISIONAL LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2014 (PART 10)

AND

IN THE MATTER OF OPENHYDRO TECHNOLOGY LIMITED

(IN PROVISIONAL LIQUIDATION) AS A RELATED COMPANY WITHIN THE MEANING OF SECTION 517 & SECTION 2(10) OF THE COMPANIES ACT 2014

JUDGEMENT of Mr Justice Maurice Collins delivered on 21 May 2021

BACKGROUND

1. This appeal arises from an unsuccessful High Court petition to appoint an examiner to OpenHydro Group Limited (In Provisional Liquidation) (*"the Company"),* as well as to a related company, OpenHydro Technology Ltd (In Provisional Liquidation). That petition was refused by the High Court (Creedon J) on 7 September 2018, after a contested two day hearing. On 1 February 2019, the Judge ordered that the petitioners, Ann Gilmore, Brendan Gilmore, Donal O' Flynn, Patrick Kelliher, Oliver O' Mahony and Ashley Nominees Limited *("the Petitioners"*) should pay the costs of the Naval Energies SAS and Naval Group SA, who, as creditors of the Company, had opposed the appointment of an examiner ("*the Creditors*").

2. The Petitioners had urged the High Court to make no order for costs. In doing so they placed significant reliance on an earlier costs ruling of this Court in these proceedings to which I shall refer further below. However, the Judge was not persuaded to depart from the principle that costs should follow the event and proceeded to make an order for the costs of the proceedings in favour of the Creditors.

3. It is that costs order that is the subject of this appeal.

THE PROCEEDINGS

The Petition to Appoint an Examiner

4. Unusually, both Petitioners and Creditors were shareholders of the Company. At the time of the petition, the Petitioners collectively held just over 12% of the issued shares, whereas Naval Energies SAS held approximately 71%. The Petitioners (or some of them) had founded the Company in 2004 and had originally held the majority of its shares. Naval Energies SAS (then called DCNS SA) acquired its majority shareholding between 2010 and 2013. It was described in the papers as "*a leading contractor in the international naval market*", with operations in four continents and 16 countries. OpenHydro Technology Limited is a wholly-owned subsidiary of the Company.

5. According to the examinership petition, the Company specialised in *"the design, manufacture, installation and maintenance of marine turbines generating renewable energy from tidal streams."* The petition described it as "*a development company at an advanced pre-commercialisation stage of development.*" Its business clearly required significant capital. Its capital requirements were, it appears, largely funded by the Creditors, both through equity investment and through the provision of debt facilities. In an affidavit sworn on their behalf to oppose the petition, it is stated that since 2010 the Creditors had invested a combined total of more than €260 million by way of equity investment (including share buybacks) and debt finance.

6. In July 2018, the Creditors resolved not to continue funding the Company. On 26 July 2018, on the petition of Naval Energies SAS, the High Court (Costello J) appointed Michael McAteer and Stephen Tennant as provisional liquidators to the Company. At that point, the Creditors calculated that they were owed a combined amount of more than €120 million by the Company, making them its largest creditors. The Creditors presented a petition to wind-up OpenHydro Technology Limited at the same time and Mr McAteer and Mr Tennant were appointed provisional liquidators of that company on the same date.

7. The Petitioners then petitioned to have an examiner appointed to the Company (and to OpenHydro Technology Ltd as a related company). That petition did not issue until 17 August 2018. However, in contrast to the position obtaining where a receiver stands appointed to the company the subject of a petition (where, by virtue of section 512(4) of the Companies Act 2014, a petition will not be heard if the receiver has stood appointed for a period of at least three days prior to the presentation of the petition), there is no statutory time-limit within which a petition has to be presented following the appointment of a provisional liquidator. The Creditors were, nonetheless, very critical of what they characterised as the Petitioners' delay in bringing the petition.

8. In any event, on the same day (17 August 2018) the High Court (O' Regan J) made an order appointing Ken Fennell as interim examiner to the Company and to OpenHydro Technology Ltd ("*the Interim Examiner*").

9. The High Court (McDonald J) subsequently directed that both winding-up petitions and

the examinership petition should be heard together, with the examinership petition to be heard first. That hearing took place on 6 and 7 September 2018, at the conclusion of which Creedon J gave her ruling *ex tempore*. The Judge noted that the Petitioners acknowledged that the survival of the Company was almost entirely dependent on whether an investor could be found to make the investment necessary to fund its on-going loss-making operations while its technology was brought to fruition. She noted that, while the independent expert's report stated that there was a reasonable prospect of survival, that opinion was significantly reliant on the cash flow projections which had been provided by the Petitioners which showed positive cash generation in years 3 to 5. Those projections had not been audited by the independent expert. The Judge noted the views of the Interim Examiner but observed that no concrete detail of any proposed investment had been provided. She noted that there was disagreement on the evidence about the projected future cash flows of the Company (the Petitioners' projections had been described as "*speculative and unrealistic*" by the Creditors' expert accountant) and the level of investment required to generate those cash flows. While no "*definitive evidence*" of the scale of the required investment was before the court, it was "*significant*". The Judge then observed that the historical financial position was "*there for all to see*". The Company had not made a profit in 14 years and after 14 years was still claiming to be in the pre-commercialisation stage. In these circumstances, she said, she was not satisfied that the Petitioners' had met the requirement to establish that the Company and the related company had a reasonable prospect of survival and the petition was refused on that basis. The Judge then discharged the Interim Examiner and made orders for the winding up of both companies, with the provisional liquidators being appointed as joint liquidators. Those orders were subject to a short stay to enable

an appeal to be brought to this Court. At the request of the Creditors, the issue of costs was deferred.

Appeal to the Court of Appeal

10. An appeal was indeed brought by the Petitioners and it was given a hearing date of 4 October 2018. The stay granted by the High Court was extended pending the hearing of the appeal, with the result that the Interim Examiner remained in place. In September 2018, there were adverse developments in one of the Company's key projects, in the Bay of Fundy, Nova Scotia. The Bay of Fundy has very extreme tides and a very high tidal range and is thus considered an ideal location for tidal energy generation. The Company had deployed a 16-metre 2 MW turbine in the Bay of Fundy earlier in 2018 which, according to the examinership petition, was capable of earning up to 2 million Canadian dollars per annum. However, a "*catastrophic failure*" within that turbine was reported on 12 September 2018. According to the Creditors, there was "*no prospect of the Appeal succeeding*" in light of those developments and they called on the Petitioners to withdraw the appeal. However, the Interim Examiner advised that the parties who had expressed interest in investing had not in fact been deterred by the news from Nova Scotia and on that basis the Creditors declined to withdraw the appeal. However, by the end of September all investor interest had disappeared and on 28 September 2018 the High Court (O' Hanlon J) ordered that the Court protection of the Company and of OpenHydro Technology Ltd should cease and it terminated the Interim Examiner's appointment to the companies.

11. In these circumstances, the Petitioners' appeal obviously did not proceed on 4 October 2018. Instead, the Court heard submissions on costs, with the Creditors looking for their costs and the Petitioners urging the Court to make no order. For the reasons set out in the *ex tempore* ruling given by Peart J, the Court made no order as to the costs of the appeal. The ruling of Peart J looms large in this appeal also and so I shall set it out in full:

> *"This court is satisfied that at the time that the appeal was lodged it was a bona fide appeal. The appellants were entitled to have a view that differed from the conclusion reached by Ms. Justice Creedon in the light of the opinions that had previously been expressed. Critical to this court's decision is a conclusion that appeal was a bona fide appeal. The question is: Up to what point did that appeal remain a bona fide appeal? And it has been urged by Mr. Lavelle that from the 13th September 2018 it was clear that the appeal could not succeed because of what had occurred in relation to the Bay of Fundy development and that from that date the appellants must have known that there was no prospect of success. But one has to then look to fact that there was still optimism on the part of the clients that Messrs Mathesons were acting for and there was the opinion of the interim examiner that there was still some prospect of survival for the company.*
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> *So this court is satisfied that it was only from the 27th of September, when the position changed, that the appeal would no longer be capable of being pursued in a bona fide manner. It has been said that the appeal thereafter was moot. I*

don't think truly it became moot. I think it became devoid of, perhaps, substantive merit as a result of what had happened in the Bay of Fundy.

The overall conclusion, therefore, is that, given the particular nature of the statutory provisions, the legislation under which examinerships are provided for, the public interest nature of that legislation and, perhaps, what one might describe as special considerations to be given in the light of the overall objectives of that legislation as far as, perhaps, trying to preserve employment and so on, that this court should make no order as to costs in the particular circumstances, given that the climate changed really only on the 27th of September and the appellants acted very promptly thereafter, I think on the 28th September and indicated that the appeal would not be proceeding. So that is the order that the court will make, no order as to costs."

The Costs Hearing in the High Court

12. The High Court had deferred dealing with the costs of the examinership proceedings. Somewhat curiously, therefore, by the time that those costs came to be dealt with by Creedon J on 1 February 2019, this Court had already ruled on the costs of the Petitioners' appeal. Both sides referred to Peart J's ruling in the course of their submissions. Counsel for the Creditors submitted that costs should follow the event. The hearing of the petition was, he said, a contested *inter partes* hearing that had all the characteristics of an ordinary adversarial hearing, with a winner (the Creditors) and a loser (the Petitioners). There were no special circumstances which might justify a

departure from the ordinary principle. Counsel also submitted that the petition was doomed to fail in circumstances where the Company itself did not believe that it had a reasonable prospect of survival. As regards this Court's ruling, counsel emphasised that it had not substantively adjudicated on the merits of the appeal. The fact that the appeal had not been heard and had become a moot had been one of the reasons for the order made by this Court. Counsel for the Creditors opened Peart J's ruling in full and effectively relied on the factors identified in it as being equally relevant to the costs of the High Court. The petition had been presented *bona fide* and without any expectation of financial advantage on the part of the Petitioners. They were aware that any scheme of arrangement that might emerge from the examinership process would in all likelihood extinguish their shareholdings and write down the significant debts owed to them but they nonetheless believed that examinership was in the interest of the companies and their employees. Counsel also placed reliance on Peart J's discussion of the purpose of the examinership legislation and the interests which that legislation sought to protect. A petition for the appointment of an examiner was not in the nature of a *lis inter partes.* In the circumstances, it was submitted, it was not clear whether it could properly be said that there had been any "*event*" for the purposes of Order 99 but, even if there was, the court enjoyed a large measure of discretion to depart from the principle that costs should follow the event. In his reply, counsel for the Creditors submitted that this Court had not purported to trammel the exercise of the High Court's discretion to deal with the costs of that court and also made the point that simply because a case may have been prosecuted in good faith did not mean that the party that lost the case should get a pass from the costs consequences.

The Judge's Ruling on Costs

13. The Judge's ruling was brief and so I shall set it out in full:

> *"The court was aware in some small detail of the Court of Appeal's decision and can understand the reason that the Court of Appeal came to the decision that it did. It very fairly I think indicated that there had been a bona fide appeal up to a certain date and on that basis made no order as to costs.*
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> *The Court is aware that it has a discretion under [Order] 99. The Court is also aware that it is not at large in exercising that discretion and cannot just exercise that discretion without good reason. On balance, the Court is of the view that it should not exercise its discretion and that costs should follow the event in this case. I will make the order as sought..."*

The Judge put a stay on her order pending appeal.

THE APPEAL

Submissions

14. The parties made detailed written and oral submissions. In their fundamentals, those submissions did not depart significantly from the submissions made to the High Court. The Petitioners again emphasised the special character of the examinership jurisdiction which, they said, was not principally concerned with private interests but rather with wider public policy considerations. Again, it was emphasised that the petition here had been brought in good faith and not (or at least not primarily) to advance any personal or commercial interests of the Petitioners. It was said that Peart J's ruling provided strong support for the Petitioners' position. The Petitioners stated that they had been unable to find any direct authority on the question of costs in examinership proceedings but brought the Court to a passage from Courtney, *The Law of Companies* (4th ed, 2016) which states that it is "*open to the court to award costs against the unsuccessful petitioner(s)*".[1] The authority cited for that proposition was a decision of the Companies Court, *Re Land and Property Trust Co Plc (No 3)* [1991] 1 BCLC 856 where Harman J ordered the directors of certain companies to pay the costs of unsuccessful petitions for the appointment of administrators to the companies. He did so on the basis that the directors had acted irresponsibly and it was suggested on the Petitioners' behalf that the decision could be read as implying that no order for costs should be made where such an application was made responsibly, albeit unsuccessfully. *Re Land and Property*

[1] At para 23.047

Trust Co Plc (No 3) does not really assist the Petitioners in my view. The administration orders had been sought by the companies. Harman J was not concerned with whether *the petitioners* (the companies) should pay the costs; rather he was addressing himself to the issue of whether the court should make orders for the costs against their *directors*. It was in that context that the Court sought to identify whether there were exceptional circumstances such as would justify awarding the costs against non-parties. A similar approach is taken in this jurisdiction: see *Moorview Developments Limited v First Active plc* [2018] IESC 33, [2019] 1 IR 417. That is not the issue here. The costs order here was sought and obtained against the Petitioners, not against any non-party.

15. Counsel for the Petitioners criticised the brevity of the Judge's ruling and the absence from it of any meaningful explanation as why she had rejected the Petitioners' argument that there were special circumstances that compelled a departure from the normal rule. The terms of the ruling suggested that the Judge appears to have considered that she was bound to award the Creditors their costs, which was clearly an error. The Judge had failed to engage with the ruling of Peart J. Counsel went on to explain that, when petitions for the appointment of an examiner were opposed unsuccessfully, it did not appear to be the practice that costs would be awarded against them in favour of the petitioning company (examinership petitions are, in practice, normally presented by the company itself, though that was not the case here). Such an "*asymmetric*" approach gave rise to potential unfairness and counsel suggested that where a petition was refused, the practice should also be not to make any order for costs, absent any special factor. Counsel accepted that there were no special provisions governing the costs of examinership proceedings in either the Companies Act 2014 or in the Rules of the

Superior Courts. When pressed, he also did not dispute that the principle that costs should follow the event applied, at least formally, to such proceedings. However, that was simply the starting point and the special character of the examinership jurisdiction meant that the court should more readily depart from that starting position in this area.

16. In their submissions, the Creditors stressed the deference to be given to the High Court's exercise of its discretion in relation to costs. They contended that the default rule in civil proceedings – that costs should follow the event – applied with full force to these proceedings. Neither the Oireachtas nor the Rules Committee had seen fit to grant any form of exemption from the rule for unsuccessful petitioners. The Court was told that in *Re New Look Retailers (Ireland) Ltd* the High Court (McDonald J) had awarded the costs of an unsuccessful examinership petition to the opposing creditors. In the absence of any record of McDonald J's ruling on costs, however, it is not apparent whether the costs were disputed and if so on what basis nor is it possible for this Court to know the grounds on which McDonald J made the order he did. The Court was provided with a copy of McDonald J's substantive judgment refusing to appoint an examiner and it is clear from that judgment that he was very critical of certain aspects of the petition in that case. It may be that these matters were considered relevant by the judge when he came to determine the issue of costs. On the other hand, the judge may have taken the view urged on this Court by the Creditors, namely that the ordinary costs rules applies in the ordinary way to examinership proceedings. This Court does not know either way and in the circumstances the only (limited) significance that can properly be given to *Re New Look Retailers* is that it is an instance where, as a matter of fact, an order for costs was made against the unsuccessful petitioner in favour of the opposing creditors.

17. In his oral submissions, counsel for the Creditors argued that the petition here was a very weak one. There had been an independent expert's report but that was a statutory pre-requisite and did not distinguish the petition here in any way. He characterised the proceedings as a shareholder dispute where the petition had been presented on the basis of the Petitioners' perception of what was in their commercial interests and opposed by the Creditors on the basis of their perceived commercial interests. Counsel accepted that, where a petition was opposed unsuccessfully, the practice was that no order for costs was made against the creditors. There were, he said, a number of factors that could explain that approach. The creditors had a statutory right to be heard. The petition had to be presented and heard in any event, whether opposed or not so it could not be said that the creditors' opposition had given rise to the need for a hearing. Finally, it was suggested that, in such circumstances, the court might not want to add "*insult to injury*" by imposing a liability for costs on creditors whose interests were likely to be adversely impacted – potentially to a significant degree – by the examinership process. Counsel also accepted that where an examinership petition presented by the company was unsuccessful, an order for costs was often not made against the company. That could be explained, he said, by the fact that in such circumstances a costs order would be of no practical benefit to creditors. Of course, an order for costs had been sought and obtained in *Re New Look Retailers*, presumably on the basis that the creditors considered that such an order would be of value.

Analysis and Conclusions

18. As a preliminary matter, I note that the costs order under appeal was made on 1 February 2019, prior to the commencement of Part 11 of the Legal Services Regulation Act 2015 (*"the 2015 Act"*) in October 2019 and the consequent adoption of a recast Order 99 RSC in December 2019. The pre-2015 Act regime is therefore the relevant framework for assessment.

(i) General

19. The Petitioners appeared initially to contend that examinership proceedings fell outside the scope of Order 99, Rule 1(3)[2] or Rule 1(4)[3] (n their pre-December 2019 iteration) and therefore that the costs of such proceedings were, pursuant to Order 99, Rule 1(1),[4] at the general discretion of the court, untrammelled by any presumption as to how such costs should be allocated. When pressed, however, counsel for the Petitioners accepted that, even in examinership proceedings, the formal starting point (and counsel stressed that it was only the starting point), was that the default rule was that costs should follow

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[2] *"(3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct."*

[3] *"(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."*

[4] *"(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

the event.

20. I note in this context that Part 11 of the 2015 Act now governs the allocation of costs in "*civil proceedings*". The default costs rule is now set out in section 169(1) of that Act in the following terms: *"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.."* However, the term "c*ivil proceedings*" is not defined in the 2015 Act and the scope of its application may have to be considered in future litigation. As explained, it does not arise here.

21. The Court was brought to the helpful observations of Clarke J (as he then was) in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 IR 81:

> *"6 2.2 It seems to me that having regard, in particular, to the very substantial sums of money that may be at stake when a court is considering how to award costs, it is incumbent on the court, at least in complex cases, to at least give consideration as to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having been incurred before awarding costs. Furthermore, it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side.*
>
> *7 2.3 Having said the above, it seems to me that two matters traditionally taken into account by the courts in the award of costs remain of the highest significance and require to be re-emphasised.*

8 2.4 The first is that costs always remain discretionary and anything which is said concerning the principles which ought normally to apply in considering the award or refusal of costs should be subject to the caveat that the court always remains open to the suggestion that, by virtue of special or unusual circumstances, it is appropriate to depart from what otherwise might be the normal course in respect of an order for costs in a particular case. What I am about to outline is, therefore, in my view, properly described as the default position which should apply in the absence of such special or unusual circumstances. It should not be taken as, in anyway, diminishing the court's entitlement to depart from such a position in an appropriate case.

9 2.5 Secondly, the overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings. .."

22. *Veolia* itself involved a public law challenge to the award of a public contract pursuant to Order 84A RSC. It may seem difficult to characterise such proceedings as *"a claim or counterclaim"* within the meaning of Order 99, Rule 1(4) but it is clear from *Veolia* that Clarke J considered that the presumptive (though defeasible) rule that costs should follow the event was applicable to such proceedings.

23. In any event, as noted above, Counsel for the Petitioners accepted - albeit reluctantly - that the starting point here was that costs should follow the event, unless the High Court (or this Court on appeal) considered it appropriate to make a different order. That the court has a discretion to order otherwise is not, of course, in dispute. However, the court is not at large. Again, Clarke J aptly sets out the proper approach:

> *"4.1 ..... While it is often said that the court retains a discretion to depart from the ordinary rule in relation to costs, it seems to me that that discretion, like all other judicial discretions, needs to be exercised against a background of appropriate principles. To state that the court retains a discretion is not to give the court carte blanche. It may well be that it is neither possible nor appropriate to list all of the circumstances in which the discretion concerned might be exercised or all of the factors which might properly be taken into account. Experience has shown that new and different cases may lead to a refinement or expansion in the principles applicable. However, it does seem to me that all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned. .."*

[*Cork County Council v Shackleton* [2007] IEHC 334, at para 4.1]

24. It appears to me that, in principle, the requirement that the court's discretion on costs be exercised in a reasoned way applies equally to those cases where the court *declines to exercise* its discretion so as to depart from the default rule (or, as it may be more

correctly put, where it *exercises* its underlying discretion on costs in accordance with the default rule) as it does to those cases where it *exercises* that discretion. Both categories of decision are subject to review on appeal and, as I noted in *O' Reilly v Neville* [2020] IECA 215, an important part of the rationale for requiring cost decisions to be reasoned is so that they can be effectively reviewed. More generally, a court's decision on costs may have significant consequences for the parties and they are entitled to be given sufficient reasons to enable them to understand the basis for that decision. In most cases, of course, very brief reasons will suffice, particularly where the court's decision is to apply, rather than to depart from, the default rule that costs follow the event. However, where a party advances specific grounds for departing from the default rule, the court ought to engage with those grounds to the extent necessary to enable that party to understand why the court considers that the normal rule ought nonetheless to apply.

25. There is a further point. Counsel for the Creditors understandably placed some emphasis on the fact that the 2014 Act does not set down any special rules regarding the costs of examinership proceedings. Neither is there any such special rule in the Rules (or, for that matter, in the 2015 Act). That fact, counsel suggested, was fundamentally inconsistent with the Petitioners' contention that examinership proceedings were in a special category and that Order 99 should operate differently in relation to such proceedings. I am not persuaded that this is correct. There are a number of areas of litigation in which, though formally governed by the general provisions of Order 99 (including Rule 1), a different approach to costs applies in practice: see generally the discussion in *Delany and McGrath on Civil Procedure* (4th ed, 2018) at

para 24-107 and following. Family law proceedings (as to which see, by way of example, the Supreme Court's decision in *MD v ND* [2015] IESC 66, [2016] 2 IR 438) and wills suits (as to which see the discussion in *Delany and McGrath on Civil Procedure* at paragraph 24-147 and following) are perhaps the best-known examples. In such areas, any general statement to the effect that "*costs follow the event*", is at best incomplete and at worst is apt to mislead. Order 99 is clearly flexible enough to allow such an approach. So too, in my view, is section 169 of the 2015 Act.

26. There is authority to the effect that certain Companies Act proceedings – specifically restriction proceedings under section 819 of the 2014 Act (formerly section 150 of the Companies Act 1990) - fall to treated differently.[5] It is apparent from the authorities that where an application for a restriction order is brought by the liquidator and that application fails, the High Court may order the liquidator to pay the costs. However, there is no presumption that such an order should be made. The effect of the authorities was summarised by the High Court (Cregan J) in *Re Pierse Contracting (No 2)* [2015] IEHC 113. He identified a number of factors relating to the statutory scheme which he considered to be relevant to the issue of costs, including the fact that the purpose of the section was to protect the public and the fact that, if orders for costs were made against unsuccessful liquidators, it could have a "*chilling effect*" on future applications.[6] In other Companies Act proceedings, it has been held that the default rule applies. Thus in *Re MCR Personnel* [2011] IEHC 319, [2011] 3 IR 341, the High Court (Laffoy J)

[5] See the discussion in *Delany and McGrath on Civil Procedure* (4th ed, 2018) at para 24-175 and following

[6] At para 6.

held that the rule that costs should follow the event applied in relation to winding-up petitions (at para 12) though she also emphasised that each case had to be assessed on its own facts (para 14). She made an order for costs in that case in circumstances where the debt due to the petitioner was clearly due but was not paid until after the presentation of the petition. The "*event*" was the payment to the petitioner of the debt due to him. So characterised, it may seem unsurprising that Laffoy J considered it appropriate to award costs against the company in that case. Petitions under section 212 of the 2014 Act (formerly section 205 of the Companies Act 1963) are subject, it seems, to the normal rule: *Doyle v Bergin (No 2)* [2011] IEHC 518, [2011] 4 IR 676. There appears to be no authority which considers the correct approach to the costs of examinership petitions.

(ii) The Proper Approach on Appeal to the Judge's Ruling on Costs

27. The Creditors emphasise the high threshold that must be surmounted before this Court could properly interfere with the Judge's decision on costs. The Court should be *"very slow to interfere*" (*Sony Music Entertainment (Ireland) Limited v UPC Communications Ireland Ltd* [2017] IECA 96, per Finlay-Geoghegan J at para 9) and it must show " *reasonable margin of appreciation*" to the trial judge and "*should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of 'the event' itself*"(*Nash v DPP* [2016] IESC 60; [2017] 3 I.R. 320, per Clarke J at para 67).

28. There is no doubt that this Court will be slow to interfere with the exercise of a High Court judge's discretion in relation to costs and significant weight will be given to the views of the judge. But even a discretionary decision of the High Court is subject to review by this Court in exercise of its Article 34.4.3 jurisdiction: see *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 and the authorities referred to by Irvine J in her judgment. Furthermore, it is clear that this Court's power of review is not dependent on the demonstration of any error of principle on the part of the High Court judge: see *Godsil v Ireland*, [2015] IESC 103 [2015] 4 IR 535 at paras 65 & 66 (per McKechnie J), as well as *MD v DD* [2015] IESC 66, [2016] 2 IR 438, at para 46 (per MacMenamin J), both of which were concerned with appellate review of costs orders. Nothing in *Nash v DPP* suggests any departure from that approach.

29. Furthermore, it seems to me that, as a matter of first principle, the "*appropriate deference*" to be shown to the view of the High Court as to where the costs should fall in a given situation must surely depend on whether this Court is in a position to understand the basis on which the High Court reached that view. If the High Court fails to adequately explain its basis for exercising its discretion on costs in a particular way, it appears to me that there is little or no scope for showing any significant deference to its decision: see my observations in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327, at para 40.

30. The Judge's ruling here was very brief. That is not, in itself, a legitimate basis for complaint. The Judge correctly identified that she had a discretion in relation to costs under Order 99 and that such discretion was not at large but fell to be exercised on a

reasoned basis. The difficulty here is that the Judge did not explain why she took the view (as plainly she must have done) that the grounds advanced by the Petitioners did not justify the exercise of her discretion so as to make no order for costs. While the ruling referred to an important aspect of this Court's ruling on the costs of the appeal (the fact that the Court took the view *"that there had been a bona fide appeal up to a certain date"*) it made no reference to the broader statement in that ruling about the nature of examinership proceedings nor did it engage with the submissions made by the Petitioners – supported, it was said, by this Court's ruling – as to why no order for costs should be made. While the ruling states that *"[o]n balance, the Court is of the view that it should not exercise its discretion and that costs should follow the event in this case"*, that is a statement of a conclusion rather than a statement of reasons and it is not apparent whether the Judge reached that conclusion on the basis of rejecting the Petitioners' submission that examinership proceedings ought to be regarded as a special case for the purposes of Order 99, or whether she accepted that submission in principle but nonetheless considered that there were particular features of these proceedings that nonetheless warranted an order for costs being made against the Petitioners or, indeed, whether the Judge considered that an order for costs should made on some other basis. The Judge failed to engage with at all with the submissions made by the Petitioners.

31. Clearly some weight must be given to the fact that the Judge made the order she did. She had heard the petition over two hearing days. But, in the absence of any explanation of the Judge's reasons, however brief, it appears to me that such weight is necessarily limited.

32. In expressing that view, I do not overlook *Crofter Properties v Genport Ltd* [2005] IESC 20, [2005] 4 IR 28, which is referred to in *Delany and McGrath on Civil Procedure.* That was one of a number of decisions in very long-running and bitterly-fought litigation between Hugh Tunney and Philip Smyth. Crofter Properties was a company controlled by Hugh Tunney and Genport was a Philip Smyth company. An issue in that appeal related to the refusal of the High Court judge to give the plaintiff its costs for a claim for arrears of rent (relating to a lease of Sachs Hotel) in which it had been successful. The judge had not, it seems, given reasons for that decision. Giving the only judgment in the Supreme Court, Denham J said that it was "*unfortunate that no reasons were given. Such an approach is not best practice.*" Nevertheless, she continued, she "*would not intervene on this ground alone.*": para 24. From the further discussion in her judgment, it seems clear that Denham J considered that the basis for the judge's decision was evident from his findings concerning the plaintiff's conduct. When one looks at the judge's decision (reported at [2002] 4 IR 73, at page 96) – in the course of which he characterised the conduct of the plaintiff as "*quite beyond the bounds of normal civilised behaviour and far outside any accepted commercial relationships*" and "*calculated to damage the defendant unlawfully and through unlawful means to gain a benefit for the plaintiff*" as well as holding that the plaintiff had concocted or attempted to concoct "*a malicious prosecution against the defendant and did attempt to pervert the course of justice* " – the approach taken by Denham J is wholly unsurprising.

33. This aspect of the Supreme Court's decision in *Crofter Properties v Genport Ltd* must, in my view, be understood as turning on its own particular facts and not as an authority

for any principle that reasons need not be given for decisions on costs. On the contrary, Denham J clearly regarded the giving of such reasons as "*best practice*". I would also observe that, in the period since the decision in *Crofter Properties v Genport Ltd,* both the Supreme Court (in decisions such as *Donegal Investment Group plc v Danbywiske* [2017] IESC 14, [2017] 2 ILRM 1) and this Court (in decisions such as as *O' Driscoll v Hurley* [2015] IECA 158) have emphasised that the fundamental obligation of judges to *"explain to the parties why a particular conclusion was reached so that they may properly understand why they won or lost"*. That obligation applies to decisions on costs as it does to other decisions which significantly impact on the parties to litigation. The fact that such obligation is generally capable of being discharged by relatively brief reasoning does not imply that it is unimportant. It is trite to observe that the costs of litigation may be very substantial. Counsel for the Creditors accepted that, on a party and party adjudication, his clients' costs would be likely to exceed €100,000. As anyone with experience of modern litigation can attest, many proceedings involve costs on each side running to multiples of that level.

34. In my view, therefore, the correct approach to the costs decision under appeal is, while the Court should give some weight to the Judge's decision, her failure to give reasons for that decision means that this Court must otherwise exercise its own discretion as to what is the appropriate costs to be made.

(iii) The appropriate costs order to be made

35. The Petitioners rely significantly on the nature and purpose of the examinership jurisdiction as a basis for departing from the normal rule that costs should follow the event. They argue that, even if it is appropriate to speak of an "*event*" in this context, such event cannot be equated with the determination of an *inter-partes* hearing where the court is concerned with adjudicating on the respective rights and liabilities of private parties *inter se*. The examinership jurisdiction is quite different, it is said, involving the Oireachtas legislating for the protection of wider societal and economic interests.

36. The position was, it was said, well-captured in *In the matter of Traffic Group Limited* [2007] IEHC 445, [2008] 3 IR 253, where Clarke J stated:

> *"[21] 5.5 It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."*

37. The Petitioners also placed significant reliance on the ruling given by this Court (Peart

J) regarding the costs of their withdrawn appeal. This Court had, it was suggested, recognised that the appeal was a *bona fide* appeal and it followed that the application made to the High Court was a *bona fide* application. Furthermore (and this aspect of the ruling was stressed particularly) this Court had clearly considered that the nature of the examinership jurisdiction was a relevant factor in the costs context *and* that it weighed against the making of any order for costs against an unsuccessful petitioner. This, it was said, was evident from the following passage of the ruling:

> *"The overall conclusion, therefore, is that, given the particular nature of the statutory provisions, the legislation under which examinerships are provided for, the public interest nature of that legislation and, perhaps, what one might describe as special considerations to be given in the light of the overall objectives of that legislation as far as, perhaps, trying to preserve employment and so on, that this court should make no order as to costs in the particular circumstances.."*

38. I did not understand Counsel for the Creditors to take issue, *at the level of principle,* with the proposition that examinership proceedings differ significantly from ordinary *inter partes* litigation. Nor did I understand him to dispute the proposition that the nature of such proceedings was, *in principle*, a relevant factor in adjudicating on costs in such proceedings. In any event, the first proposition clearly follows from the terms of the 2014 Act itself (and the Companies (Amendment) Act 1990 which it repealed and replaced) and from authorities such as *In the matter of Traffic Group Limited.* In my view, the second proposition follows from the first, as this Court recognised in its

ruling on the costs of the appeal.

39. However, Counsel for the Creditors argues that the proceedings here ought to seen as amounting, in substance, to a dispute between the majority and minority shareholders in the Company. There was no material difference, it was suggested, between such proceedings and (for instance) shareholder oppression proceedings under section 212 of the 2014 Act or any other form of shareholder dispute. Thus, whatever the position might be in principle, and whatever might be the position in other applications for the appointment of an examiner, it was urged that these proceedings ought to treated as ordinary *inter partes* litigation in which the Petitioners had been unsuccessful and where they should, accordingly, be required to pay the costs of the Creditors.

40. I do not accept that characterisation of the proceedings here. True it is that the Petitioners and Creditors were shareholders in the Company but the application to the High Court to appoint an examiner to the Company did not involve any issue as their respective rights and obligations *qua* shareholders. The Creditors were before the High Court not as shareholders but as creditors and while they may have been the largest creditors, they were not the only creditors to appear. The Court was concerned not with any issue as between the shareholders but with whether the statutory conditions for the appointment of an examiner set out in section 509 of the 2014 Act had been satisfied and, if so, whether it was an appropriate case to appoint an examiner (the High Court retaining a discretion in that regard under the terms of section 509). No doubt, the Petitioners made the application based on some assessment of their interests but in my view it is wholly wrong to suggest that these proceedings should be seen as analogous

to ordinary *inter partes* litigation between shareholders.

41. I respectfully share the view of Peart J that "*the particular nature of the statutory provisions, the legislation under which examinerships are provided for, the public interest nature of that legislation and.. [the] ... special considerations to be given in the light of the overall objectives of that legislation*" are significant factors that ought to be taken into account in the context of adjudicating on costs in proceedings under Part 10 of the 2014 Act, including petitions for the appointment of an examiner under section 509. The Oireachtas has recognised that there is a significant *public* interest in seeking to divert insolvent companies from liquidation, thus protecting employment, for the benefit both of employees and the wider community. The jurisdiction vested in the High Court under Part 10 involves the exercise of the public power of the State. As Counsel for the Creditors correctly observed, even the initial step of the appointment of an interim examiner or examiner has significant consequences and where a scheme of arrangement is ultimately approved by the High Court, it may have profound implications for shareholders, creditors, employees and the wider economy. The failure of examinership proceedings may also have significant wider implications.

42. The costs of presenting a petition under section 509 are already significant. The prospect of facing further – and potentially significant – cost liabilities in the event that the petition fails may well deter the bringing of meritorious petitions, particularly by petitioners other than the company. That would undermine the policy objectives underpinning Part 10.

43. Such factors do not exclude the making of orders for costs against unsuccessful parties but they certainly weigh against any reflexive application of the normal rule that costs should follow the event in proceedings such as this. Examinership proceedings appear to share certain characteristics with other proceedings in which the approach to costs actually adopted in practice differs from that suggested by the default rule that costs should follow the event. The "*event*" itself differs from the "*event*" that normally characterises ordinary *inter partes* litigation. The "*event*" – and "*outcome*" may be a better term in this context – derives from the court's assessment of the requirements of the statutory scheme and that scheme is concerned, or concerned primarily, not with the private interests of the persons before it but wider considerations of the public interest. This is reflected in the fact that many of the factors identified in Order 99 (in its pre-December 2019 iteration), and now in section 169 of the 2015 Act, as being relevant to the assessment of where costs should fall in any given case, simply have no application to examinership proceedings. Payments into court cannot be made. Settlement offers cannot be made. Mediation does not offer an alternative to court. All of this points to the essential public law character of examinership proceedings. The outcome of the proceedings is certainly a relevant factor but, in this context, it ought not be given decisive weight, even on a presumptive basis. A broader and more flexible assessment must be undertaken in my view.

44. It already appears to be the *de facto* position that the default rule that costs should follow the event has little force in this context. As already noted, the Court was told that the practice in petitions for the appointment of examiners is that, if an examiner is appointed over the opposition of some or all of the creditors of the company, an order

for costs is not made against the creditors. The fact that the creditors have a statutory right to appear on such a petition cannot explain that practice in my view. The creditors are not obliged to appear and, having elected to do so and having been unsuccessful in their opposition, the normal costs rule, if applicable, would suggest that they should be liable for at least some of the costs involved. Neither is that practice satisfactorily explained by the fact that the petition would have to be presented in any event. That is true as far as it goes but it is obvious that, where a petition is opposed, the time and cost involved is likely to be significantly greater (not just in terms of the duration, and therefore the cost, of the petition hearing itself but also in terms of the preparation of affidavits, expert reports and the like). That is illustrated here, where the petition took two full hearing days. If the court was minded to apply the normal rule that costs should follow the event, it could readily fashion an appropriate order covering the additional costs involved arising from the unsuccessful opposition to the petition. It appears to me that the practice of not making orders for costs in such circumstances must be connected to the particular statutory jurisdiction at issue.

45. It certainly appears anomalous – and unfair – that, having successfully opposed the petition here, the Creditors should be awarded their costs on the basis that costs ought to follow the event in the ordinary way whereas, if their opposition had been unsuccessful, it seems likely that they would have escaped any adverse costs consequences and the Petitioners would have been left to bear their own costs.

46. Here, the application failed. That is a fact and it is undoubtedly a material factor in any costs assessment, as I have made clear. However, the Court is asked to go further and

to hold that the petition was so weak as to be doomed to failure. I do not think that the Court can properly conclude that the petition was frivolous or doomed to fail. It was supported by an independent expert's report from a very experienced practitioner in this area. The Interim Examiner was clearly of the view that the Company had a reasonable prospect of survival and remained of that view until after the disaster in the Bay of Fundy. While of course the petition failed, nothing in the Judge's ruling on the petition suggests that she considered it to be frivolous or doomed to fail nor is there any such suggestion in the Judge's ruling on costs. Equally, the Judge did not at any stage suggest that the petition was presented other than in good faith or for any ulterior or improper purpose. It has not been suggested that the petition was presented for any ulterior or improper purpose or otherwise than for the avowed purpose of seeking to save as much of the undertaking of the Company as possible.

47. Having regard to all of the considerations just mentioned, if I were undertaking an entirely *de novo* assessment of where the costs should fall here, I might be inclined to make no order in respect of the costs of the petition in the High Court. However, as I have indicated, I do consider that some weight must be given to the fact that the Judge came to a different conclusion, albeit without adequately explaining the basis for it. In the circumstances, it appears to me that the appropriate order to make is that the Creditors should recover 50% of their costs from the Petitioners, such costs to be the subject of adjudication in the default of agreement. I would, accordingly, set aside the High Court order and substitute for it an order in those terms.

48. As regards the costs of this appeal, the Petitioners have succeeded in part. They have

not, however, obtained the order which they sought and which it was the purpose of the appeal to obtain. In these circumstances, it would clearly not be just to the Creditors to award the Petitioners the full costs of the appeal. However, their success ought properly to be reflected in the order to be made. The Creditors elected to stand over the order made by the High Court and have been unsuccessful in doing so. My provisional view is that, in all the circumstances, an order giving the Petitioners 50% of their costs of the appeal would best meet the justice of the case. However, that is a provisional view only. If either party wishes to contend for a different costs order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested by either party and results in an order in the terms I have provisionally indicated above, that party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Faherty and Haughton JJ have authorised me to record their agreement with it.