THE SUPREME COURT

[Appeal No. 148/19]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Charleton J.
O'Malley J.

BETWEEN:

ETEAMS INTERNATIONAL (IN LIQUIDATION)

APPELLANT

V.

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

Ruling on Costs of Mr. Justice John MacMenamin dated the 18th day of February, 2021

1. On the 29th June, 2017, the High Court, (Keane J.), granted (i) a direction that the agreement in suit in the proceedings effected a valid purchase of the company's debts by the bank and does not constitute a registrable charge under s. 99 of the 1963 Act; (ii) a direction that the liquidator pay to the bank forthwith the proceeds of all the debts which he, or the company, had collected and received; (iii) a direction that the liquidator provide the bank with all such documentation and information within his possession, power or procurement that the bank requires in connection with the collection of the debts. The High Court judge ordered that the applicant bank recover the costs of the application from the respondent, to be taxed in default of agreement. On the 14th May, 2019, the respondent's appeal from that order was dismissed by the Court of Appeal. On the 27th May, 2019, the Court of Appeal ordered that the respondent liquidator should personally pay the applicant the costs of the appeal to be taxed in default of agreement. On the 8th May, 2020, this Court dismissed the respondent liquidator's appeal. The appeal to this Court was confined to the order for costs made in the Court of Appeal directing the respondent personally to discharge the costs of the appeal to this Court. The judgment of this Court affirmed the order of the Court of Appeal awarding the costs of the appeal against the respondent, and ordered that the liquidator be precluded from having any recourse to the assets of the company for the purpose of satisfying the costs order.

2. This Court has now received written submissions from the appellant, and from the respondent, both stating that they are content that the question of costs be dealt with on the basis of the written submissions. These will be placed on the Courts Website, along with this Ruling.

3. The costs issue before this Court in the appeal arose in the context of the interpretation of s.280(1) of the Companies Act, 1963, and whether, in the circumstances, it was justifiable for the proceedings to have been brought in the name of the company, rather than in the name of the liquidator personally. The appellant liquidator contended that the Court of Appeal had erred in making the award of costs against him personally.

4. The judgment of this Court in May, 2020, and the earlier authorities cited there, all make clear that, under s.280(1) of the Companies Act, 1963, these proceedings should have been brought in the name of the liquidator personally, and not the company. In its judgment, this Court noted that the appellant had had the benefit of legal advice, but that it had not been contended at any stage that these proceedings, brought in the name of the company, rather than the liquidator, had been initiated as a result of legal error.

5. It is true, as counsel for the appellant now submit, that this Court did not conclude that the appeal on the award of costs was frivolous, vexatious, or tainted by bad faith or unreasonableness. But the Court did conclude that the appellant's case on the interpretation of s.280(1) of the 1963 Act had no merit, as had the Court of Appeal.

6. The contention that the liquidator was prejudiced by not having been joined personally must be seen in light of the fact that, from the time of the High Court judgment onwards, he was on notice of the fact that the intention of the respondent was to seek costs against him personally, if the matter was pursued further.

7. The following points must also be made. First, the appellant wholly failed on the main issue raised in the appeal, that is, the award of costs personally against him. The bank was successful in the appeal The well-established rule is that costs follow the event. In considering the issue of costs, the Court must have regard to the conduct and reasonableness of this appeal to this Court. While the appeal to this Court was not frivolous or vexatious, the appeal nonetheless proceeded in the face of clear contrary authorities on the questions raised, and in the absence of convincing argument that the authorities were incorrect or distinguishable. These are relevant features as to the conduct and reasonableness of the appeal, and, now, the primary question of the costs of this appeal. (See now also s.169(1)(a) to (c) of the 2015 Act). No issue was raised which takes this case out of the category where the general rule

under O.99, RSC 1986 should apply. The appeal was brought by the liquidator in pursuance of his own individual concerns, rather than those of the company. The fact that Mr. Fitzpatrick was, in fact, directly concerned with the costs award was reflected in the application for leave to this Court, which identified him specifically as a party affected. Having been on notice of the respondent's intention, he cannot be said to be prejudiced by his non-joinder. He continued to be on notice of the Bank's intentions as to costs after the decision of the Court of Appeal, and before the appeal to this Court.

8. It follows from all these considerations that the liquidator should pay the costs of the appeal to this Court personally, and should not be entitled to have any recourse to the assets of the company for the purpose of satisfying the order for costs of the appeal against him. The order of the Court of Appeal is affirmed; with the addition, for clarity, that the liquidator be precluded from having any recourse to the assets of the company for the purpose of satisfying the costs orders in the Court of Appeal also. It follows that any orders made to stay directions, or orders made earlier, are now removed.