IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF CEONA CREWING LIMITED
(IN ADMINISTRATION)

Decision on papers in respect of costs

Judgment handed down: 18th April 2016

Before: Richard James McMahon, Esq., Deputy Bailiff
Jurats: S M Jones and J G Hooley

Counsel for the Applicants: **Advocate M C Newman**

Cases, Texts & Legislation referred to:

The Companies (Guernsey) Law, 2008
The Trusts (Guernsey) Law, 2007
Practice Direction No. 3 of 2015

Introduction

1. By an Application dated 1 March 2016, the Joint Administrators of Ceona Crewing Limited ("the Company"), in respect of which an administration order was made pursuant to section 374 of the Companies (Guernsey) Law, 2008 on 16 September 2015, and the Company seek orders in respect of the costs associated with their earlier application pursuant to the Trusts (Guernsey) Law, 2007 ("the Trusts Law application"), which the Court also granted on 16 October 2015. In support of the Application, one of the Joint Administrators, Stuart Gardner, has sworn a Fifth Affidavit on 25 February 2016. Advocate Newman, who has appeared on behalf of the Company and the Joint Administrators, invites the Court to resolve the Application on the papers rather than following a further oral hearing. The Court is content to accede to that request.

2. The Joint Administrators seek an order that their costs of the Trusts Law Application may be recovered from the administration estate. The Company seeks an order that its costs of the Trusts Law application, specifically those incurred by Ogier and more particularly described in Mr Gardner's Fifth Affidavit, may be recovered from the administration estate. The

Company and the Joint Administrators also seek their respective costs associated with making this latest Application.

Background

3. In order to place the present Application into context, we need to explain briefly what has happened in this matter. The original application for an administration order in respect of the Company under the 2008 Law was made on the afternoon of 16 September 2015. It was supported by three Affidavits of Johan Rasmussen, a director of the Company, sworn on 8th, 14th and 15th September 2015. (The hearing also involved an application for an administration order made by Ceona Holding Limited.) The evidence explained that these applications were part of a solution proposed in relation to the Ceona group of companies.

4. The Jurats were satisfied that an administration order should be granted and identified the purpose of it as being a more advantageous realisation of the Company's assets than would be effected on a winding up of the Company. The Joint Administrators were appointed and Mr Gardner was sworn into office. (Mr Hudson was sworn into office at a later date.) Pursuant to section 383(2) of the 2008 Law, the Court ordered that the remuneration of the Joint Administrators could be charged on the basis of time spent, as particularised in Mr Rasmussen's First Affidavit.

5. The evidence given explained that the Company was used to hold contracts of employment for offshore crew members deployed to the Group's vessels. Certain of the employees concerned were required in order to support the administration strategy set out in a letter dated 8 September 2015 signed by Mr Hudson of Ernst & Young LLP and sent to Ceona Holding Limited. It set out that the Company employed approximately 30 staff, none of whom resided in Guernsey. Some of those employees were needed to be retained to fulfil the strategy set out to deal with the insolvency situation. The cash balances of the Company as at 31 August 2105 were said to be US$1,444,000, which was insufficient to meet its trade creditors as at 23 July 2015, who were owed US$117,000, an amount of US$305,000 owed to another company within the Ceona Group as at the same date, and payroll liabilities as 30 June 2015 of US$1,085,000. During the hearing of the application for an administration order, Advocate Newman was closely questioned about these assets and liabilities and whether it was all readily available to the Company or whether its use was restricted in any way.

6. In respect of the Company, this letter set out the estimate of the costs of an administration as follows:

> "*The Proposed Guernsey Administrators estimate that their time costs for acting as administrators to Crewing will be £65,930.*
> *The Proposed Guernsey Administrators estimate that other costs incurred will include statutory advertising and filing fees of approximately £500, disbursements relating to travel of approximately £500 and legal costs of approximately £25,000. Legal costs of £25,000 relate £15,000 for the administration application of Crewing and an estimate of £10,000 for ad hoc legal advice during the administration. A detailed analysis of the Proposed Guernsey Administrators' and their firm's charge out rates and estimated time costs is included at Appendix 5 and 6.*"

This information was provided in accordance with Practice Direction No. 3 of 2015.

7. Within a week of the administration order being made, the Company and Joint Administrators were applying pursuant to the 2007 Law for declaratory relief in respect of monies held in a segregated numbered account held at Barclays Private Clients International Limited in Guernsey. The Trusts Law application dated 22 September 2016 was listed before

the Deputy Bailiff sitting alone on 24 September 2015. It was supported by the First and Second Affidavits of Mr Gardener sworn on 22 and 23 September 2015.

8. Despite hearing oral evidence from Mr Gardner as a means of filling in the apparent gaps in the evidence, the Deputy Bailiff was unable to consider granting the relief sought on the material adduced and so adjourned the Trust Law application. He directed that further evidence be lodged by 29 September 2015, which he would consider, and then indicate whether the hearing would need to be resumed on whether he could determine the application on the papers. Accordingly, Mr Gardner's Third Affidavit, sworn on 29 September 2015 was lodged as was an Affidavit of Steven de Jersey, sworn the same day. Mr de Jersey is an associate director of Elian Corporate Services (Guernsey) Limited, but more relevantly, had been a director of the Company. He explained more detail about how the account in respect of which a declaration that it holds trust monies was being sought had been opened and operated. The monies had been kept separate from the other assets of the Company because the account was used to hold deductions the Company made from its employees' remuneration to cover possible tax liabilities, described as "*notional tax withheld*". As Mr Gardner further explained, the contracts of employment and of service of those working for the Company had provisions in them under which these deductions were made. There was a system for repaying to those workers the deductions made and not used at the times mentioned in their contracts.

9. When the Deputy Bailiff reviewed the further material, he remained unconvinced that the Trusts Law application was capable of being granted whilst it was being pursued ex parte. In his view, the Company and the Joint Administrators needed to get some indication from the alleged beneficiaries of the trust fund that they were content with what was being proposed. He initially fixed a resumed hearing for 8 October 2015 but, when it became apparent that the further information that was needed could not be prepared before then, that hearing was vacated and re-listed for 16 October 2015. The Deputy Bailiff further directed that this was a matter where he considered it sensible to sit with the Jurats who had comprised the Court when the administration order in respect of the Company had been granted. Mr Gardner swore a Fourth Affidavit on 13 October 2015.

10. At the hearing on 16 October 2015, the Court also had regard to an Affidavit of Patrick Green, which had been sworn on 13 October 2015. Mr Green held the position of Group HR Manager for the Ceona group of companies. He had undertaken the task of contacting the 41 employees individually to ascertain from them whether they wished to be heard when the Trusts Law application came back to Court or whether each was content to be represented by Mr Green. Because the employees were content for the matter to be dealt with in their absences and indicated their willingness to be represented by Mr Green, in order to have a nominal respondent to the application, Mr Green was joined to the application in that capacity, but did not actively participate because those he was to represent were content for the appropriate relief to secure their interests as beneficiaries of the bank account monies.

11. The overall tenor of the evidence adduced in support of the Trusts Law application was that the monies in the bank account, being approximately £788,000, were not assets of the Company itself but held by the Company on trust for the various individuals working for it in proportion to the amounts they had paid in through the contractual mechanism of notional tax being withheld from the payments each had been receiving. Accordingly, the Jurats were satisfied that an appropriate declaration should be made. As recorded in the Act of Court, it:

> "*Declared pursuant to sections 14(1) and 69 of the Trusts (Guernsey) Law, 2007 (**Trusts Law**) that the sum of £788,815.88 held in a numbered account at Barclays*

*Private Clients International Limited in Guernsey (**Assets**) in the name of the Company is held on trust by the Company for the persons listed in the Schedule pursuant to part II of the Trusts Law and does not form part of the Company's beneficial estate for distribution to its creditors*".

In broad terms, this was the relief sought by the Company and the Joint Administrators. The effect was to reduce the assets available in the administration, and also to reduce the liabilities. The Court further directed that the Company, acting by the Joint Administrators, was permitted to distribute the Assets to the beneficiaries of the Trust, being those persons listed in the Schedule. In respect of the costs of bringing the Trusts Law application, the Deputy Bailiff ordered that the Joint Administrators' costs would rank as an expense of the administration of the Company and he made no order as to the Company's costs of the Application.

Present application

12. Having regard to Practice Direction No. 3 of 2015, by a letter dated 12 November 2015, Advocate Newman sought the Court's permission for the Joint Administrators to increase their estimate of the costs of the administration by £35,000 to cover the costs of the Trusts Law application. They also sought permission to pay a capped fee of £40,000 to Ogier in respect of that application.

13. Paragraph 3 of the Practice Direction provides:

> "*If in the course of the Liquidation or Administration it is necessary to seek a variation of the estimate or if additional information comes to light which will make a significant difference to the work involved in the total costs, an application for directions should be made to the Royal Court supported by a statement by the, or one of the, Liquidators of Administration explaining why the original estimate has been, or is expected to be, exceeded together with details of the additional work required and the revised estimates total fees and expenses.*"

Having regard to the bare details set out in Advocate Newman's letter, on 29 December 2015 the Court, through the Greffe, informed Advocate Newman that more detail was required before a proper assessment of the matter could be made. This has resulted in the present Application supported by Mr Gardner's Fifth Affidavit, in which he has set out what work was done by whom in relation to the Trusts law application.

14. The Jurats have carefully considered this evidence and borne in mind what transpired when the application for the administration order was made and thereafter. The Company sent a letter dated 7 September 2015 to Ernst & Young LLP (exhibited at page 125 to Mr Gardner's First Affidavit) in which it stated that "*monies held on this account are not the Company's and are held on trust and managed for the employees*". Despite that clear indication being given, the Strategy Letter dated the following day, which was relied on in Mr Rasmussen's evidence in support of the application for an administration order in respect of the Company, does not deal with the account in this way. Had it done so, all these problems that arose thereafter would probably have been avoided.

15. The purpose of putting to the Court revisions to the estimated fees and expenses is for the administrator of a company to obtain comfort that the work being undertaken will be viewed as having been undertaken properly. Section 383 of the 2008 Law provides that:

"*The administrator's remuneration, and any costs, charges and expenses properly incurred in the administration, are payable from the company's assets … in priority to all claims.*"

Where an estimate is given and the fees and expenses match the estimate, there is effectively a presumption that those fees and expenses have been properly incurred. If the estimate is exceeded, any additional fees and expenses being claimed by an administrator are likely to be scrutinised closely to ensure that they have been properly incurred.

16. Given that the Jurats consider that there remains the possibility that some or all of the additional work that has had to be undertaken has had a negative impact on the creditors of the Company, and could probably have been avoided, they are not prepared to approve the Joint Administrators' revised estimate at this stage of the administration. They take the view that this is something that should be looked at when the administration is coming to an end, at which time it will be easier to assess whether what has happened and the costs associated can all be regarded as having been properly incurred. In reaching that conclusion, they wish to stress that this is not a case of disallowing these additional expenses so that they cannot be pursued later, but rather of deferring consideration of them until the fuller picture has unfolded.

17. It should have been apparent to the Joint Administrators and their Advocates that the Court was unimpressed that the Trusts Law application had needed to be made at all. Whilst there is some understanding that the Company was a small cog in the overall situation in which the Ceona Group found itself in the summer of 2015 and that insufficient care was taken to consider the account that has been found to hold trust monies rather than the Company's own assets, those advising the Group appeared to have been handsomely rewarded for what they did and yet have fallen into error. It was for that type of reason that, when determining the costs order to make at the conclusion of the Trusts Law application the Deputy Bailiff expressly refused to award any costs to the Company, as is recited in the Application itself. In any event, it was questionable as to why the Trusts Law application needed to be pursued by the Company and the Joint Administrators together. Accordingly, for para. 2 of the Application now to seek an order that the Company's costs of that application come from the administration estate arguably flies in the face of the order previously made, namely that there be no order as to the Company's costs. In any event, the Application is pleaded as being made pursuant to section 379(3)(b) of the 2008, which enable an administrator to apply to the Court for directions in relation to any matter arising in the course of his administration. The Company, as distinct from the Joint Administrators of it, cannot pray in aid this paragraph as entitling it to apply for its costs. For these reasons, para. 2 of the Application has to be rejected anyway.

Conclusion

18. This Application is dismissed for the reasons set out. It really should not have been brought in the manner that it has been. We consider that the Joint Administrators and their advisers should have realised that, although para. 3 of Practice Direction No. 3 of 2015 enables them to seek directions, this was not a case where it could be said to be necessary to do so. It would have been far wiser, especially as the effect of the Trusts Law application being granted had impacted on what fell to be administered, to have waited until the administration had run its course and then explain how this had affected what, if anything, is left in the Company's assets. Instead, more time and money has been incurred pursuing this Application in the way it has and to no avail. Someone should have acknowledged that there has been a slip somewhere in the way the case had been presented to the Court and that slip can only properly be put into context when how it has affected matters is known. To seek comfort that fees and expenses will be recoverable is unrealistic. This is a classic example of where a dose of pragmatism was needed before unnecessary further expense is incurred.

19. Because the Application has failed, the Deputy Bailiff declines to make any order on para. 3 in respect of the costs of the Application. The costs associated with this Application of the Company certainly cannot be recovered from the administration estate because its position had been finally dealt with on 16 October 2015. The costs of the Joint Administrators would usually be left until the end of the administration, but in the circumstances of this Application, the Deputy Bailiff regards those costs as having been thrown away on an unnecessary application and so they will be disallowed as not being capable of coming within section 383 of the 2008 Law.