Application for costs orders in respect of contested applications in compulsory liquidation; appropriate principles

[2020]GRC071

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Civil Matter 2119

IN THE MATTER OF CANARGO LIMITED (in liquidation)

AND IN THE MATTER OF PART XV, XXIII AND XXIV OF THE COMPANIES (GUERNSEY) LAW 2008

Between:

BENJAMIN ALEXANDER RHODES and ALAN JOHN ROBERTS as Joint Liquidators of CanArgo Limited (in liquidation)

Applicants

-and-

MND GEORGIA BV

Respondent

-and-

(1) ACHERNAR ASSETS AG

(2) ACHERNAR PARTNERS LIMITED

(3) NINOTSMINDA OIL COMPANY LIMITED

(4) MARTKOPI OIL COMPANY LIMITED

Joined Respondents

Judgment handed down: 11th December 2020

Before: Her Hon. Hazel Marshall QC Lt Bailiff

JUDGMENT ON COSTS

on papers

Applicants: **Advocate J A Tee**

Respondent: **Advocate M C Newman**

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1st and 2nd Joined Respondents: Advocate A C Williams

3rd and 4th Joined Respondents: Advocate M D P Jones

Cases, texts and legislation referred to:

Legislation

(a) Guernsey

The Companies (Guernsey) Law 2008 ss 418

Cases

(a) Guernsey

Ladbrokes plc v Galaxy International GLR [2007-8] 101
Broadhead v Spread Trustees Ltd and ors (2015) (Royal Court 10/2015)
In re CanArgo Limited (23rd October 2020) [2020] GRC064

(b) Jersey

Des Pallieres v JP Morgan Chase & Co [2013] JCA 146

(c) England and Wales

Re Buckton [1907] 2 Ch 406 at 414
Re Lehman Bros International Europe (in Administration) [2010] EWHC 3044 (Ch)
Lomas v Burlington Loan Management Limited [2018] EWHC 924 (Ch)

Text books

Lewin on *Trusts* 20th Ed para 48.052

JUDGMENT

1. This judgment is supplemental to my judgment in the main Application of 11th October 2019 (**"the Application")** made by the Applicant Joint Liquidators which was handed down on 23rd October 2020 (see Judgment GRC064), and reference should be made to that judgment for any background detail where necessary, and for terms there defined.
2. In Paragraph 137 of that judgment, I proposed that costs should be dealt with by written submissions, and this is what has occurred. I have received written submissions and reply submissions, principally from the Applicants (hereafter "**the Liquidators**") and the First and Second Joined Respondents (together "**Achernar**") and also from the Respondent ("**MND**") and the Third and Fourth Joined Respondents (together, "**the JV Companies**").

The parties' respective costs positions

(i) The Liquidators

3. The Liquidators have ultimately submitted that Achernar should pay their costs of the Application on the recoverable basis, on the grounds that the Application was effectively hostile litigation between them and Achernar, in which they were the successful party and therefore costs should "follow the event" accordingly. They support this argument by reference to the English cases of *Re Lehman Bros International Europe (in Administration)* [2010] EWHC 3044 (Ch) (Briggs J) and *Lomas v Burlington Loan Management Limited* [2018] EWHC 924(Ch) (Hildyard J), which, they contend, demonstrate the appropriate approach, namely that where disputes arise in an insolvency context, the court is quite ready to see these as being, in reality, hostile litigation rather than a necessary part of an administrative process. Even if the Application might be said to have begun as part of an administrative process, simply being necessary to progress the course of the liquidation, it ultimately turned into a hostile application, such that those principles were appropriately applied; see *Albany Trustee Co Ltd v Jeandin* (Guernsey Royal Court, 32/2012), 16 IETLR 28.

4. I say "ultimately submitted" because the Liquidators initially submitted only that they should have their costs on the recoverable basis, without specifying where or who from. This was somewhat confusing, therefore, in that it failed to take account of the general principle of s 418 of the Companies (Guernsey) Law 2008 that

> *"418 All costs charges and expenses properly incurred in the compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims."*

The Liquidators are thus entitled to take their proper costs as liquidators out of the assets of the company, obviously on an indemnity basis, as an expense of the liquidation in priority to all others.

5. It was the Liquidators' reply submissions which made it apparent that they were seeking costs on a recoverable basis from Achernar, on the "hostile litigation" analogy to which they had referred. However, and as was freely disclosed and acknowledged, the effects of terms (particularly Clause 5.4) of the Conditional Asset Purchase Agreement entered into between the Liquidators and MND, which was the subject of the Application, were that MND undertook to indemnify the Liquidators against the costs of the Application, and MND had apparently already paid some if not all of those costs. In the circumstances the Liquidators accepted that insofar as they recovered any cost from Achernar by way of a court order, these sums would be being paid back to MND, pursuant to Clause 5.5 of the CAPA.

(ii) **MND**

6. MND submitted that Achernar should pay their costs of the Application, on the recoverable basis, for the same reasons, (that the Applicatoin was effectively hostile litigation in which they had been on the successful side) adopting the arguments of the Liquidators.

(iii) **Achernar**

7. Achernar submitted that their costs should be met by "*the Company and the Joint Liquidators as an expense of the liquidation, payable on the indemnity basis*", on the grounds that, in the circumstances of the case, such an order was appropriate to make, following the general and analogous principles of costs orders in trust cases, and in particular (i) either the "Buckton No 1" category (see *Re Buckton* [1907] 2 Ch 406 at 414 and *Des Pallieres v JP Morgan Chase & Co* [2013] JCA 146 per Nugee JA at [28] and

[29] or (ii) on the general grounds that the application was a necessary part of administering the trust/insolvency, where the usual rule would be for necessary parties to have their costs out of the estate on an indemnity basis.

8. However, Achernar further submitted that MND should be ordered to pay the costs of the Application, expressly including their (Achernar's) costs, because MND had contracted with the Liquidators to pay the costs of the Application which (they submitted) was not limited to the Liquidators' costs but must include all the costs of all parties – or at least Achernar's costs – so that such an order merely implemented that agreement. They supported this on the basis that if MND were not obliged to pay such costs so that they fell on the assets of the Company, then they (Achernar) would be "penalized" (because they were the majority creditor) for having joined in the Application and having made successful (but opposed) submissions which had in fact preserved the value of an Asset, namely the Martkopi Funding Claim, for the benefit of the liquidation.

9. In any event, they submitted that MND should bear its own costs of the Application, as they were not a creditor of the Company, but had insisted, as a matter of contract, on being joined in the Application, obviously for their own benefit.

10. Achernar further submitted that there should be no order as to the JV Companies' costs, alternatively that any such order should limit their recovery from the Company's assets to the costs of their initial brief supporting evidence and skeleton argument, on the grounds that they had subsequently played no substantive part in the Application.

(iv) **The JV Companies**

11. The JV Companies submitted, supporting the Liquidators, that the Court should order Achernar to pay the Liquidators' costs of the Application on the recoverable basis and the JV Companies' costs on the indemnity basis, and that Achernar should not be permitted to recover any of its costs from the Company's assets.

Discussion

12. I do not consider that the contractual undertaking by MND to pay the Liquidators' costs of the Application, on its true construction, in fact extends to paying the costs of any other party to the Application except insofar as such a payment might become a liability of the Liquidators themselves under an adverse costs order. This clause does not begin to provide any direct basis for any order that MND pay Achernar's costs.

13. Neither do I regard this obligation as a circumstance which would justify ordering MND to pay Achernar's costs. The obvious intent of the obligation was to protect the Liquidators from any personal liability which they might incur as a result of pursuing the Application. It did not relieve the Liquidators of primary liability towards those to whom they incurred costs or expenses in the course of the liquidation, but provided them with protection by way of indemnity from MND. The indemnity was for the benefit of the Liquidators, and not for the benefit of Achernar or any other party. In my judgment, the presence of this contractual obligation is therefore irrelevant to the principles on which I should make a costs order, and I therefore ignore them.

14. The main contest in the matter took place, in practice, between Achernar and the Joint Liquidators. I accept, and indeed I commented, that there was also in my perception, a commercial battle going on somewhat behind the scenes between Achernar and MND, but I do not consider that this justifies my treating the matter as hostile litigation between Achernar and MND for the purpose of awarding costs. This is because subject of the proceedings was the Joint Liquidators' decision and its validity/reasonableness, and not a dispute of rights between Achernar and MND. The issue which was to be decided

concerned the court's approval (or otherwise) of the process by which the Joint Liquidators had decided that the progress of the liquidation was best pursued by their taking a course of action which in fact favoured MND by agreeing to a commercial transaction which they had offered, and it was the making of that decision to which Achernar objected, and as to which the court was required to give a ruling. The substance of the actual contest was between Achernar and the Joint Liquidators.

15. With regard to the Joint Liquidators' costs, the Joint Liquidators have the right to take their costs of litigation reasonably undertaken from the assets of the Company on an indemnity basis under s 418 of the Companies (Guernsey) Law 2008. The effect of the order sought by the Joint Liquidators, and supported by MND and the JV Companies, would be to relieve those ultimate assets of the Company of the burden of bearing the Liquidators' costs to the extent of their costs assessed on a recoverable basis and recovered from Achernar.

16. Considering whether and if so to what extent, the circumstances justify that course with regard to costs, I take account of the authorities cited by both sides of that argument, ie *Re Lehman Bros, Lomas* and *Albany* (above) on behalf of the Liquidators and *Re Buckton*, and *des Pallieres* (above) and also Lewin on *Trusts* 20th Ed para 48.052, on behalf of Achernar. In my judgment, the combined effect of these authorities is that in a matter such as this, where there is a contest between a trustee or a similar office holder (including in an insolvency context) and a beneficiary, in which the interests of other beneficiaries come into the equation, the court, in awarding costs can have regard to the extent to which the actual proceedings are appropriately characterized in any identifiably separate respect, or at any stage, as inevitable administration, or as hostile *inter parte*s litigation, and can make whatever order as to costs appears fairly to fit the situation. The approach should always, though, have regard to the principle that costs orders should be as simple and easily applied and workable, as possible, in order to do general justice in the case.

17. Applying this approach, I do consider generally that the Application was a proper and reasonable application for the Joint Liquidators to have made to the court, in the first place; it was a reasonably necessary part of administering the progress of the liquidation. I also consider that the Joined Respondents (ie Achernar and the JV Companies) were properly convened, as significantly interested creditors. It follows that all those parties should, in principle, have their costs up to and including the first hearing, at any rate, as costs of the liquidation (albeit the Liquidators' own costs will take priority).

18. I also consider that, in principle, those costs should be assessed on the indemnity basis, and I see no reason to depart from this.

19. With regard to the further progress of the hearing, in respect of each of those parties, I take the following view:

    a. **The Liquidators**

    I consider that the Liquidators continue to be entitled to their costs out of the assets, on the indemnity basis, on the general principle of s 418 of the Companies Law. They have, indeed, ultimately been the successful party, and insofar as Achernar argue that they should not be so entitled, it seems to me that this could only be the case if I took the view that the conduct of the Liquidators had been so unreasonable or otherwise worthy of a sanction in costs that I ought to impose such a sanction and deprive them of their apparent statutory right by pronouncing particular costs incurred by them as being unreasonably incurred. Whilst there may be aspects of the Joint Liquidators' conduct which were less than perfectly efficient, or which could have been done better, I do not consider that, in the difficult situation in which they found themselves in managing this liquidation and as disclosed in evidence, their conduct was so deficient as to merit a sanction in costs.

Equally, however, I do not consider that the extent to which, and the circumstances in which, the Liquidators were the "successful party" goes so far as to justify their being given any more favourable position in respect of their costs, to the benefit of the liquidation and the general body of unsecured creditors generally, than that provided in the usual case by s 418, by being granted an order to recover costs from any other party, except in one respect, mentioned later.

b. **Achernar**

As regards Achernar, I consider that the arguments which they put forward to the court justify viewing their involvement in the Application as being in the interests of the proper administration of the liquidation (albeit this was having regard to a question of resolving a disputed situation within that context), and that this position applied up to and including the third hearing of the Application. I consider that they should be entitled to their further costs of involvement as an expense of the liquidation up to that time, but because they were ultimately unsuccessful in their objective of defeating the pursuit of the CAPA at all, this should be only on the recoverable basis. However, after the third hearing, I take the view that the objections raised by Achernar, were of insufficient general substance to justify their continuing to receive any form of indemnity for their costs after that time. They should therefore pay their own costs from that point. I do not, however, consider that their involvement after that point was so far unreasonable or illegitimately pursued for their own extraneous purposes as to justify requiring them to pay any part of any other party's costs, except as mentioned below.

I will make two specific orders affecting Achernar, however. The first is that, in my judgment, Achernar ought to pay the costs of the preparation of Mr Rhodes' 8th affidavit. Whilst it is correct that it was the court which indicated that, in the light of there being an adjournment of the matter anyway, Mr Rhodes ought to put in evidence explaining the apparent discrepancy with regard to deposit funds being available for the Liquidators to take legal advice which had come to light, the need for this was the extremity of Achernar's submission that what turned out to be, at its very highest, a possible misjudgment of how much material it was necessary to burden the court with was, rather, a culpable breach of the "golden rule" about full and frank disclosure. I have found that this dramatic submission was part of Achernar's general underlying objective of trying to get the Application dismissed on any basis. In terms of the reasonable conduct of proceedings this went too far, in my judgment and as it was this unreasonable attitude which caused the incurring of these further costs and which were in the event, unnecessary, in my judgment Achernar should therefore pay these.

(I should add, as an aside, that in considering this point I have noted that in the fifth line of paragraph 99 of the judgment, the word "non-refundable" ought to be "refundable". I shall instruct this to be corrected on the approved version of the judgment appearing on the Court website.)

The second point is that insofar as I have allowed Achernar's costs, I accept their submission that the costs of instructing English Counsel to advise should be allowed to them as proper costs. This is because I accept that the advice which was required as regards their reasonable participation in the Application related to a complex suite of contractual documents expressly governed by English law. English counsel's opinions were therefore material, and reasonable to take on this point, and I consider that such instruction was therefore reasonable under the third class of situations in which the instruction of foreign counsel is reasonably allowable as a disbursement o Guernsey lawyers, described by LB Southwell in *Ladbrokes plc v Galaxy International* GLR [2007-8] 101 at [21] and summarised

in *Broadhead v Spread Trustees Ltd and ors* (2015) (Royal Court 10/2015) at [31]. This is confined to advice on English law, however, and does not extend to advice on the strategic or tactical conduct of the Application itself, that being a matter of Guernsey law, and a matter on which Guernsey Advocates could and should have been able to advise competently.

c. **The JV Companies**

With regard to the two JV Companies, they were properly convened parties, and are therefore entitled to their costs on an indemnity basis out of the assets of the Company up to and including the first hearing, as mentioned above.

However, after that, although professing to support MND and the Joint Liquidators (or, perhaps more accurately, to oppose Achernar) they took no part in the substance of the Application at all, being entirely content to rely on the submissions of the Liquidators or MND to defend their interests. In all the circumstances I do not consider that it would be fair and reasonable to make a costs order in their favour against Achernar.

The only question then is whether I should allow them their costs of further involvement out of the assets of the Company. I have borne in mind that the final question raised in the proceedings, though in fact after the final oral hearing, concerned the weight to be given to the views expressed by creditors, and they are such creditors. However, I have still concluded, having regard to the degree of the JV Companies actual practical participation in the Application, and the fact that others were advancing all the arguments in their interests, I do not think it is justified to do so. I therefore confine their costs entitlement to their first attendance, as indicated; thereafter they must pay their own costs.

MND

20. This leaves only MND. With regard to MND, I accept Achernar's argument that MND were not a creditor of the company, and that their joinder and attendance at the hearing was really entirely for their own benefit. It was not a cost of the liquidation. I do not consider that the costs of their attendance or involvement are costs which ought properly, therefore, to be borne by the assets of the Company available for distribution. I have asked myself if they ought to be borne by any other party (notably, of course, Achernar) but for reasons already given, namely that the actual dispute was between Achernar and the Liquidators, albeit MND had a personal interest in the outcome being in favour of the Liquidators, I do not think that that is justified

Decision

21. Having read and considered the parties' submissions, and for the above reasons, the costs order which I shall make is as follows:

(1) Achernar shall pay to the Liquidators the costs of the 8th Affidavit of Benjamin Alexander Rhodes sworn on 15th September 2020.

(2) Save as aforesaid, the Liquidators' costs of and incidental to the Application, assessed on the indemnity basis, shall be paid out of the assets of the Company as costs of the liquidation in priority to all other claims.

(3) There shall be no order as to the costs of the Application of MND.

(4) The costs of Achernar of and incidental to the Application up to and including the costs of the third hearing (of 12th August 2020) shall be paid out of the assets of the Company as an expense of the liquidation, assessed as follows:

a. As to the period up to and including the first hearing (of 1st and 2nd July 2020) on the indemnity basis.

b. As to the period from 3rd July 2020 up to and including the 12th August hearing on the recoverable basis, and;

c. The costs of Achernar awarded above shall include their reasonable costs of English lawyers' advice on English law matters.

There shall be no order as to Achernar's costs in respect of the period thereafter.

(5) The costs of the JV Companies of and incidental to the Application up to and including the first hearing (of 1st and 2nd July 2020) assessed on the indemnity basis, shall be paid out of the assets of the Company as a cost of the liquidation.

22. I should make it clear that in considering this order, I have taken into account the practical effect of the position that Achernar are presumptively either a 71.6% or a 99% creditor of the Company, and that the JV Companies are the remaining creditors, apart from a very small (£16,000) creditor, Hautville Ltd, whose interest is de minimis in the general scheme of things. I have borne in mind the fact, therefore, that any orders which I make with regard to costs being met out of the assets of the Company will have the effect, insofar as there are assets available for distribution, of reducing distributions to creditors in proportion to those entitlements. Having taken this effect into account, though, I am satisfied that the final result of the orders which I propose to make are not unfair, or unreasonably as a matter of their general effect, and having regard to the overall purpose of orders regarding costs.

23. This leaves only the question of the costs of this costs application itself, ie the costs of the written submissions. I do not consider that any party has been significantly "successful" in the costs applications made. In my judgment the right order is therefore that there be no order as to the costs of the costs application. I will, however give a liberty to apply in my order, in case any party wishes to contend otherwise.

Hazel Marshall QC
Lieutenant Bailiff

11th December 2020