

Application pursuant to section 18(1) of the Court of Appeal (Guernsey) Law 1961 and Rule 12(3) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, for the costs of the appeal and of ancillary applications against the Director and an order that the Director be joined to these proceedings for the purposes of costs.

[2021]GCA022

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

**ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT
CIVIL APPEAL NO. 545**

26 May 2021

BEFORE:

James McNeill QC, President

Clare Montgomery QC JA

George Bompas QC JA

IN THE MATTER OF JJW LIMITED (IN LIQUIDATION)

AND

**IN THE MATTER OF AN APPLICATION PURSUANT TO PART XXIII OF THE
COMPANIES (GUERNSEY) LAW, 2008, AS AMENDED**

Between:

JJW Limited (in liquidation)

Appellant

and

Aareal Bank AG

Respondent

**Advocate J. Barclay for the Appellant
Advocate A. Williams for the Respondent**

The President

Introduction

1. On 21 April 2021 we refused an appeal against the making of a compulsory winding up order under section 406(e) of the Companies (Guernsey) Law 2008 (the "Companies Law") by the Royal Court (Roland, DB, with Jurats Hooley, Boyle and Burnard), through its decision given on 31 July 2020. The appeal had been brought in name of the company in liquidation (the "Appellant"), without objection or participation by the joint Liquidators, but in truth at the behest of the former sole director (the "Director"). The Respondent was the holder of a judgment debt who had served the Statutory Demand which led to the winding up order.

Application for costs

2. The Respondent now seeks an order pursuant to Section 18(1) of the Court of Appeal (Guernsey) Law 1961 (the "Appeal Law") and Rule 12(3) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 (the "Appeal Rules") for the costs of the appeal and of ancillary applications against the Director and, to that end, an order that she be joined to the proceedings for the purposes of costs. Also sought pursuant to Section 18(1) and Rule 12(3) is an order for release of a sum paid into Court by the Appellant as security for the Respondent's costs of the appeal.
3. For the Appellant, essentially for the Director, it was contended that the Respondent was seeking a third party costs order and that it was contradictory of that approach to have the Director joined as a party. As to the third party costs order itself, Advocate Barclay submitted that there was a public interest in appeals from compulsory winding up orders being possible and to be presented by those in a practical position to do so. Moreover, the Respondent's present application failed to discharge the burden of establishing the test set out in the authorities that the Director had been gaining access to justice for her own purposes and for financial or other benefit. The release of the monies held as security was not opposed.
4. In response, Advocate Williams for the Respondent maintained that Section 18(1) was wide enough to include a costs order against a third party and that, whilst the Appeal Rules were silent as to the joinder of non-parties for the purpose of costs (as were the Royal Court Civil Rules 2007), the Court could look to the Civil Procedure Rules in England and Wales (SI 1998/3132) for guidance. Such guidance would require joinder, with an opportunity to make submissions.
5. The Liquidators were notified of the application and response and were content not to comment.

Discussion

6. In our judgment there is ground upon which the Director should be joined as a party for the purpose of the costs application only, with the right to respond to the application by the Respondent for costs but, for the avoidance of doubt, with potential additional liability for the appropriate costs of this costs application in the event of a finding in favour of the Respondent, in addition to the costs of the appeal. The Respondent equally would have an exposure to the costs of the costs application in the event of failure.
7. Section 18(1) of the Appeal Law provides:

"The costs of and incidental to all proceedings in the Court of Appeal under this Part of the Law shall be in the discretion of the Court, and the Court shall have the power to determine by whom and to what extent the costs are to be paid."

8. In our judgment this provision is perfectly adequate to include the making of a costs order against a person who has not been a party to the relevant proceedings.

9. Rule 46.2 of the CPR is in the following terms:

“(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must —

(a) be added as a party to the proceedings for the purposes of costs only; and

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.”

10. In our judgment not only is such a provision sensible, but it is difficult to envisage how else a court could proceed in making a non-party costs order. The court must exercise its jurisdiction in a proper fashion, there must be a court record upon which judgment is given and the person in respect of whom the order is proposed to be made is entitled to a fair trial, that is at the very least the opportunity to make representations.
11. It is clear to us that the Director is a person in respect of whom a costs order might be made. At the hearing on the Appeal, Advocate Barclay confirmed that his instructions came from the Director. Having regard to such authorities as there are we see no suggestion that the applicant for costs must always show that the directing mind was seeking to gain access to justice for their own purposes and for financial or other benefit. It seems to us, on an appeal against the making of an order for a compulsory winding up, to be all but incontrovertible that the external directing mind must have perceived there to be a benefit to themselves or to some other person or persons to put an end to the winding up and to revert to the position before the winding up order. In some cases there may perhaps be good reasons in the interests of the company concerned (that is, the company together with its creditors and, if solvent, other stakeholders) for the winding up order to be set aside; and in some cases perhaps the circumstances may suggest that those reasons motivated or could reasonably have motivated the bringing of the appeal. In other cases the appropriate inference will be that the perceived benefit had little if anything at all to do with the interests of the company.
12. In the present case, having regard to the matters which we raised at the conclusion of the substantive judgment this inference is especially strong. The initial evidence for the Appellant was that it had unencumbered net assets with a value in excess of €1,300,903,000, comprising shares in the company JJWF, and immediate and unfettered access to a very large amount of cash. However, its 2019 accounts showed no income, outgoings or liabilities and only £100 of assets and in an Affidavit before this court the Director deponed, without supporting evidence, that the shareholding had been disposed of in 2009 and that the Appellant was merely a dormant bare trustee.
13. To pursue the appeal in such circumstances infers ineluctably the perception by the Director on her own behalf, or on behalf of others anxious to retain control of the JJWF shareholding, that there is a benefit to persons other than the Appellant itself and its creditors of its affairs not being the subject of investigation by the Liquidators and of its assets not being secured and applied towards payment of its debts.
14. We would therefore be minded to order that the Director should be joined as a party to these proceedings for the purpose of the costs application only. However, there are other considerations which lead us to the view that to make such an order at this point would be premature.
15. As noted above, the Respondent seeks an order for the release of a sum paid into Court by the Appellant as security for the Respondent’s costs of the appeal. That application is not opposed by the Company and no case is made by the Joint Liquidators that the money falls to be treated as assets in the liquidation. Within the submissions on costs the Respondent indicated that the

amount available is £54,602.20. As it seems to us, given the relatively straightforward issues in the appeal, a sum of that magnitude ought to go a significant way towards meeting the litigation costs of the Respondent, at least on the recoverable basis.

16. On the evidence before us we do not consider that there is here any proper ground for an award against the Appellant on an indemnity basis. We have therefore determined to award the Respondent its costs in respect of what have been referred to as the Extension Costs, Fresh Evidence Costs and the Appeal Costs, on the recoverable basis, against the Appellant. Following that determination, we shall also order the release to the Respondent of the sum paid into Court by the Appellant as security for the Respondent's costs of the appeal. We shall grant to the Respondent liberty to apply, on notice to the Director, for a third party costs order against the Director to the extent that the Respondent's recoverable costs are not covered by the security.
17. We should add at this point that the Respondent, in its third party costs application against the Director, sought costs on the indemnity basis. Given our views just stated it is not necessary for us to reach a definitive view on this point. We have reached the provisional view that indemnity costs would not be appropriate: hence our order, as regards the Appellant, only for recoverable costs. For all that we know, it may be that the security sum exceeds recoverable costs: in which case we would expect the excess to be made over to the Joint Liquidators. However, in the event that the Respondent wishes to exercise its liberty to apply, we leave open the issue on any appropriate further evidence as to whether, in the whole circumstances, not only ought an order for costs to be made against the Director but also as to whether any such order should be on the indemnity basis.