

LIABILITY OF INSOLVENCY PRACTITIONERS FOR THE LEGAL COSTS OF LITIGATION

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Insolvency legislation and litigation costs

1. Whilst it is often described as a “statutory code”, the insolvency legislation is not an exhaustive code. Principles such as comity, the rule against double proof and the rule in *ex parte James* are nowhere addressed. In a similar way, there are no statutory provisions expressly referring to the law and practice relating to the liability of insolvency practitioners for the litigation costs of a successful defendant. As an example, where a liquidator adopts and proceeds unsuccessfully to trial with a claim in the name of the company, the adverse costs awarded against the company will be afforded super-priority ahead of the statutory expenses of the liquidation. This judge-made rule does not appear in the statutory code. It is an elephant trap for office-holders unaware of it because, of course, it trumps any rights of the office-holder to be paid his remuneration out of the estate – thereby indirectly rendering the office-holder liable for an adverse costs order made against the company.

Risks of undertaking litigation

2. In 1997 Sir Gavin Lightman gave two addresses in which he emphasised the special nature of insolvency litigation and the need for caution before an IP makes a decision to embark upon it :
 - a. his lecture given to SPI (now R3) on 6 March 1997 entitled: “Evidence in Insolvency Proceedings”¹;
 - b. his speech given to the Institute of Advanced Legal Studies on 11 December 1997 entitled: “Office holders’ charges – cost control and transparency”².
3. In his December address, Sir Gavin offered detailed guidelines to office-holders in relation to the minimisation of exposure to litigation costs under the following sub-headings :
 - A Alternatives to litigation
 - (1) ADR
 - (2) Assignment and financing
 - B. Reduction of risk and cost of litigation
 - (1) Conditional fee agreement
 - (2) Selection and remuneration of solicitors and counsel
 - (3) Prudent control of litigation
4. The justification for such guidelines is also the premise of this paper. Sir Gavin referred to: “[the] enormous risks of undertaking litigation”. He explained the self-evident proposition that, in the position of a prudent businessman holding funds on behalf of others, an office-holder: “is concerned, where litigation cannot reasonably be avoided, to limit his financial risk and, in particular, his risk as to costs.” So what are the risks?

¹ Reproduced in *Insolvency Intelligence* (1997) Vol 10, no.4 at pp.25-8

² Reproduced in *Insolvency Intelligence* (1998) Vol 11, no.1 at pp.1-6

The basic principle – when the office-holder is defendant/respondent

5. Although there is little in the statutory code which directly addresses the liability of an office-holder for litigation costs there is one special rule which perhaps deserves an early mention because it is an exception. Rule 7.39 directly protects an IP against litigation costs when he is made party to proceedings. Before looking at the rule, the historical context is as follows.
6. In many of the reported cases where an office-holder (usually a liquidator) was a defendant, orders were made that the successful applicants' costs be paid directly out of the assets of the company. When a liquidator is sued, and loses, there is a distinction between the role of the court which hears the action deciding that the winner should have his costs paid, and the court which conducts the administration of the liquidation deciding whether those costs should be allowed from the fund. However, one factor tended to differentiate the situation where a liquidator was a defendant from the situation where the liquidator was a plaintiff. It arose from a fundamental principle which equity courts used (and continue to use) in deciding questions of costs in actions for the administration of estates. That principle is stated in Daniell's Chancery Practice, 7th ed (1901), Vol 1 (at 987):

“As a general rule, wherever an estate or fund is administered by the Court, the costs of all necessary and proper parties to the proceedings are a first charge upon it, and must be defrayed thereout before the claims of the persons beneficially entitled thereto are satisfied. But the costs only of those proceedings which were in their origin properly directed for the benefit of the estate will be ordered to be thus paid; and the costs of any unnecessary and useless proceedings must be paid by the person at whose instigation they were taken.”

7. When a liquidator was sued as such, he did not instigate the litigation, had no real choice about whether to take part in the litigation, and in the vast majority of cases in opposing the litigation he was seeking to protect the fund. Thus, the working through of the principle articulated by Daniell meant that nearly always any costs which a liquidator was ordered to pay as a consequence of losing such litigation, would be a charge on the fund. It was because this principle concerning payment of costs out of a fund existed that it could be an appropriate order, even in a case where the court ordered a liquidator to be removed, for the costs of the application for his removal to be paid from the fund.
8. In *Re London Metallurgical Company* [1895] 1 Ch 758 (at 763), Vaughan Williams J said that the costs of litigants who successfully bring proceedings against a liquidator: “ ... are to be paid out of the assets of the company. That is the general rule, though under exceptional circumstances an order may be made going beyond that and giving them the right to be paid by the liquidator personally”.
9. In proceedings where a liquidator is sued as such, the proceedings are being brought in the court which has administrative control of the liquidation. This is because, when the liquidator is being sued as such, the relief sought is that he be required to carry out some particular task in the administration of the liquidation — for example to admit a proof of debt, or remove someone from a list of contributories. When it is the court which has administrative control of the liquidation which is hearing the litigation, it can short circuit the two steps of deciding, as an incident of the power to hear the litigation, who should bear those costs, and of deciding, as an incident of the administration, whether indemnity for those costs should be allowed from the estate, and make an order directly that the costs of the successful litigant be paid from the assets of the company.
10. Therefore, it might be argued that the appropriate form of order to give effect to the principle that the successful applicants' costs against the liquidator should be paid out of the assets of the company is an order against the liquidators personally, but one which limits their personal liability to their entitlement to be indemnified from the assets of the company. Moneys the liquidators are liable to pay under such a costs order are an expense in the winding-up and therefore rank ahead of remuneration. Thus, if there are available assets to pay remuneration, but not to pay general creditors, the liquidators would not be entitled to pay themselves remuneration and then say they had no liability to the applicants under the costs order because there were no remaining assets.

11. Against that common law background, rule 7.39 provides:

7.39 Award of costs against official receiver or responsible insolvency practitioner

“Without prejudice to any provision of the Act or Rules by virtue of which the official receiver is not in any event to be liable for costs and expenses, where the official receiver or a responsible insolvency practitioner is made a party to any proceedings on the application of another party to the proceedings, he shall not be personally liable for costs unless the court otherwise directs

12. This provision applies equally to an application brought by another party to which the trustee is joined as a necessary party (see *Re Mordant* [1995] 2 BCLC 647). In that case, Sir Donald Nicholls V-C indicated the approach of the court to r.7.39 as follows :

“I do not think these factors lead to the conclusion that it would be right to depart from what r.7.39 indicated is to be the starting point regarding costs orders against respondent trustees in bankruptcy, namely, there is no personal liability unless, in effect, there is good reason to direct otherwise. In my view this is not a case for me to direct otherwise.”

13. This is without prejudice to the other provisions in the Act or Rules by which the Official Receiver or trustee are not liable for costs in any event (e.g. 6.105(6), 6.132(4), 6.142(5), 6.177(2)).

The basic principle – when the office-holder is applicant/claimant

14. Where an office-holder makes an application or brings a claim, he is not afforded the same immunity from an order for costs should it fail. In *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 (at 285), Oliver J explained that an office-holder is not in a special position relating to costs when he institutes court proceedings in his own name :

“I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who initiates proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator ...”

15. The implications are obvious. No office-holder would wish to be the subject of the following observation of Chadwick LJ in *Walker v Walker* [2005] EWCA Civ 247, [2006] 1 WLR 2194:

“23. The stance adopted on behalf of the liquidator is that it is perfectly proper to bring proceedings against a defendant for a claim which can never be met having regard to the assets available to meet it; to pursue that claim until all those assets have been expended by the defendants in defending that claim, perfectly properly; and then to walk away on the basis that the defendants are left to bear all their own costs. If that is what the law permits or requires, then I am bound to say I find that startling.”

16. The application of the “ordinary” rules on costs to applicant//claimant IPs is addressed below.

The Insolvency Rules and the CPR

17. As to the application of the CPR to insolvency proceedings, see generally r. 7.51 Insolvency Rules 1986:

“(1) The CPR, the practice and procedure of the High Court and of the county court (including any practice direction) apply to insolvency proceedings in the High Court and

county court as the case may be, in either case with any necessary modifications, except so far as inconsistent with the Rules.”

18. As to costs specifically Chapter 6 of Part 7 of the Third Group of Parts of the Insolvency Rules 1986 applies. Rule 7.33 Insolvency Rules 1986 provides:

“Subject to provision to inconsistent effect made as follows in this Chapter, CPR Part 43 (scope of costs rules and definitions), Part 44 (general rules about costs), Part 45 (fixed costs), Part 47 (procedure for detailed assessment of costs and default provisions) and Part 48 (costs special cases) shall apply to insolvency proceedings with any necessary modifications.”

19. Thus the normal CPR rules as to litigation costs apply in insolvency (the key provisions of which are included in the schedule) to these notes).

20. The main points to note are:-

- a. the general rule that the loser pays the winner (44.3(2));
- b. the possible regard to the conduct of the parties both before and during the proceedings (44.3(4)(a) & (5));
- c. the possibility of awarding costs on an issue basis (44.3(4)(b), (5)(b) & (6)(f));
- d. the possible regard to any payment into court or Part 36 offer (44.3(4)(c)); and
- e. the ability of the court to award partial costs (44.3(4)(b) & (6)).

21. However, none of these points detracts from the overriding discretion. As Lloyd LJ said in *Taylor v Pace Developments Ltd* [1991] BCC 406 (at 408):

“[T]here is only one immutable rule in relation to costs, and that is that there are no immutable rules”.

Refusal to engage in ADR may be relevant as to conduct. In *Halsey v Milton* “[T]here is only one immutable rule in relation to costs, and that is that there are no immutable rules”.

22. *Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920 CA, the court held that the burden was on the losing party to show why the usual costs order should not be made. It was submitted that refusal to agree to ADR was a factor to be taken into account. The court held that it was necessary to show that a party had acted unreasonably in refusing to agree to ADR. Relevant factors to be taken into account were:

- a. the nature of the dispute;
- b. the merits of the case;
- c. the extent to which other means of settlement had been attempted;
- d. whether the costs of ADR were disproportionate;
- e. whether delay in ADR would have caused prejudice;
- f. whether ADR had a reasonable prospect of success.

23. The court may award costs on two bases, the standard basis and the indemnity basis (see schedule below).

Costs consequences of discontinuance

24. Where a claimant discontinues an action he is liable for the defendant’s costs incurred up to the date of service of the notice of discontinuance unless the court orders otherwise (see CPR Part 38.6(1) and Part 44.12(1)(d)). The claimant bears the burden to show that some other order for costs should be made. There are only limited circumstances in which the court should depart from the usual order (*In re Walker Wingsail Systems plc; Walker v Walker* [2005] EWCA Civ 247, [2006] 1 WLR 2194).

25. In *Re Southbourne Sheet Metal Co Ltd* Nourse LJ dealt with an exception to the general rule as to costs in circumstances such as these, considering,
- “Another [exception to the ordinary rule]...is where a successful defendant has so conducted himself, for example by withholding his true defence when he has had an opportunity to disclose it, as to encourage the plaintiff to bring or continue his action” (250 B).
26. Potter LJ held in *RTZ Pension Property Trust Ltd v ARC Property Developments Ltd* [1999] 1 All ER 532 that the general rule on discontinuing proceedings applied,
- “unless good reason could be shown to the contrary. The nature of that good reason will vary according to the form of order which the plaintiff seeks” (541 f).
27. That there is a discretion is clear from, for example, the judgment of Lightman J in *RGB Resources plc (in liquidation) v Rastogi* [2005] EWHC 994 (Ch), [2005] BCLC 592 (at [53]):
- “The question however arises whether the conduct of [the fourth defendant] and the attitude which he adopted in negotiations for settlement affords a good reason to depart (in whole or in part) from the normal rule. CPR 44.3 requires the court in exercising its discretion as to costs to have regard to the conduct of the parties and admissible offers to settle made by the parties [...] His unnecessarily aggressive approach in the litigation has been calculated to increase costs. [...] It seems to me that the totally unreasonable and unjustified stance adopted by [the fourth defendant] is a good reason to order that [he] should be deprived of a proportion of his costs.”
28. A liquidator is in no better position than any other person in relation to the general rule on discontinuing proceedings (*Walker v Walker* [2005] BPIR 454; *RGB Resources plc v Rastogi*).

Right of recoupment/indemnity out of estate – when disapplied

29. The principles giving rise to this “right” have already been mentioned in paragraphs 6 to 10 above. Whether there should be recoupment is a question which arises as a matter of the administration of the insolvent estate. The court which decides that question of administration of the estate is not necessarily the same court as the court in which the office-holder made his application in which he failed (though, as here, it often will be). In deciding whether the office-holder ought to be entitled to recover the costs which he has been ordered to pay from the assets of the company, the court dealing with the administration is exercising its supervisory jurisdiction over its officers. In *Re Wheal Vyvyan Mining Co, Wescomb’s Case* (1874) 9 Ch App 553, the Court of Appeal in Chancery refused to make an order for the payment of the liquidator’s costs out of the assets but left him to apply to the court having conduct of the winding up.
30. In *In re MC Bacon Ltd* [1991] Ch 127, at 140, Millett J stated that: “A liquidator’s right to recoup out of the assets of the company expenditure properly incurred by him, including costs of unsuccessful proceedings properly brought by him, has been recognised for over 100 years: see *In re Silver Valley Mines* (1882) 21 Ch D 381; *In re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274.” He decided that there was no automatic right to such recoupment (see also *Mond v Hammond Suddards* [1999] 3 WLR 697).
31. In *Lewis v IRC* [2001] 3 All ER 499; [2001] 2 BCLC 392, the Court of Appeal stated (para 41) that the legal source of the power exercised for over 100 years referred to by Millett J in *Re MC Bacon* was unclear. The Court of Appeal was unable to find any statutory basis for it in the statutory code and commented that it was surprising to find that, as was suggested, the source was in the inherent jurisdiction of the court.
32. In *Re Exchange Travel Ltd* Morritt LJ suggested that the right of recoupment arose in equity in respect of expenditure incurred by a fiduciary (i.e. the office-holder on behalf of the company).

However, the source of the power remains uncertain and that uncertainty increases the difficulty of ascertaining the principles which are to be applied in the exercise of the discretion.

33. In *Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274, Oliver J, at 286, referred to the presumption that “a liquidator litigating is entitled to recoup, himself, unless he has been guilty of misconduct”. In *Re Romar Engineering Co Ltd* [2003] BCC 535, an application by a liquidator for recoupment in respect of costs already incurred was refused, because it was premature (the litigation had not yet been tried, and the application was in respect of costs already incurred rather than costs to be incurred in the litigation) and in any event the evidence before the court was insufficient to allow the court to conclude that the liquidator had proceeded properly in pursuing the litigation.
34. Whatever the true source of the jurisdiction the following passage from the judgment of Bowen LJ in *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547 at 562 (relating to trusts and trustees) has stood the test of time and would appear to apply to office-holders by analogy:

"A trustee can only be indemnified out of the pockets of his *cestui que* trust against costs, charges, and expenses properly incurred for the benefit of the trust – a proposition in which the word 'properly' means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere *bona fides* is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee himself might recover over from his own *cestui que* trust costs which his own solicitor had unreasonably and perversely incurred merely because he had acted as his solicitor told him." (emphasis added)

35. So it is a safe rule of thumb that the right of recoupment or indemnity will not be lost unless the office-holder has been unreasonable or negligent or otherwise acted improperly. It follows that the circumstances in which the court makes an order for costs against an office-holder, the economic effect of which is to visit him with personal liability, are many and varied, for recent examples, see e.g. *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488; [2008] BCC 612³; *Howard v Savage* [2006] EWHC 3693 (Ch); [2007] BPIR 1097⁴; and *Smurthwaite v Simpson-Smith* [2006] EWCA Civ. 1183; [2006] BPIR 1504⁵.
36. As a postscript, in some cases “personal liability” of an office-holder is used in the economic (rather than legal) sense that the office-holder is liable in the usual way for the costs of his successful opponent **and** that he has no practical recourse to the estate in respect of that liability because there are no funds in his hands. In other words, where there are no assets left in the insolvent estate, the issue relating to the indemnity would appear to have no economic relevance to the office-holder who, for all intents and purposes, will be personally liable.

Super-priority of adverse costs

37. A successful litigant in proceedings either with the liquidator, or with the company through its liquidators, or with the company after liquidation has begun, is prima facie entitled to be paid immediately the costs ordered to be paid to him, and to be paid in full. The onus is on the liquidator to show that immediate payment cannot be made, or that other persons have claims in priority or ranking *pari passu*⁶. The court has jurisdiction to order that the costs of litigation which

³ See para 2 of the judgment of Rimer LJ

⁴ See paras [22] and [23] of the judgment of Lewison J

⁵ See para [25] of the judgment of Chadwick LJ

⁶ *Re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26; *Re London Metallurgical Co* [1895] 1 Ch 758; and see *Smith v UIC Insurance Co Ltd* [2001] BCC 11 (the principle in the cases cited is applicable in the context of provisional liquidation). The fact that costs orders are payable immediately and in full might lead the court to dismiss an application for security for costs made against the company in liquidation or provisional liquidation: *Smith v UIC Insurance Co Ltd* supra.

has been continued by the liquidator be paid as an expense of the winding up in priority to the general costs of the winding up: *Re Movitex Ltd* [1990] BCLC 785.

38. Costs of outside litigation are not specifically referred to in the general rules as to the priority of payment of the expenses of the liquidation out of the assets¹⁶; but nothing in the Insolvency Rules 1986 applies to or affects the power of any court, in proceedings by or against the company, to order costs to be paid by the company, or the liquidator, and nor do they affect the rights of any person to whom such costs are ordered to be paid. An order for costs is, in itself, sufficient to confer priority over the statutory list of expenses mentioned set out in r 4.218 (as amended): see *Re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26 and *Re Movitex Ltd*.
39. When adverse costs have to be met prior to any of the costs and expenses of the liquidation, this means that the successful litigant is entitled to look not only to be paid out the costs in hand but also to the repayment of any funds spent (.g. in paying remuneration to the office-holders). So, in *Re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26, there had been a balance at bank of £500 when judgment was entered against the company. The liquidator then paid £375 to his solicitors on account of his own litigation costs and the balance to his successful adversary who obtained an order that the liquidator should pay him the balance out of his own pocket. Although the liquidator was held to have a right of recoupment out of the estate, this was of no practical benefit to him unless and until any further assets should come into his hands. In a real, economic sense, the liquidator was made personally liable in respect of the costs which the company had been ordered to pay.

Security for costs

40. Applications for security for costs occur most frequently in relation to insolvent companies. Section 726 (1) Companies Act 1985 provides/d:

Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

41. However, the provision is to be/was repealed by the Companies Act 2006 (s. 1295, Sch 16). There is no corresponding provision in the Companies Act 2006. It would seem that in future a party seeking security for costs will have to rely on the CPR 25.12 ff.

CPR 25.13 provides:

(1) The court may make an order for security for costs under rule 25.12 if –

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b)

(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982⁷;

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.

42. As in the case of costs generally, the court has a wide discretion. However, the following long established factors are likely to be relevant to the exercise of the discretion:
- a. whether the claimant's case is bona fide and not a sham;
 - b. whether the claimant has a reasonable prospect of success;
 - c. whether there is an admission by the defendant that money is due to the claimant;
 - d. whether there has been a substantial payment into court or an open offer of a substantial amount;
 - e. whether the application for security for costs is being used oppressively, for example so as to stifle a genuine claim;
 - f. whether the claimant's want of means has been brought about by conduct of the defendant such as delay in payment or doing work;
 - g. whether the application for security has been made at a late stage in the proceedings;
- (*Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, [1973] 2 All ER 273).

43. Where the claimant company is in liquidation there will generally be a strong presumption in favour of granting security for a defendant's costs (see for example *Lydney and Wigpool Iron Ore Co v Bird* (1883) 23 ChD where security was ordered even when trial was imminent). Note, however, that in *Sir Lindsay Parkinson v Triplan* Denning MR rejected the idea that liquidation of itself meant that security for costs would inevitably be given, while in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 Millett LJ, as he then was, posited the idea that the inability of a liquidator to provide security might be in itself a ground to refuse to order it (page 1620).
44. Where the claimant company is in administration the approach is likely to be less strict than in the case of liquidation, having regard to the fiction that the company may well survive (*Re Atlantic Computer Systems plc* [1992] Ch 505).
45. For office-holders resisting an application, there will often be the possibility of running the *Aquila Design* "stifling" defence to an application for security (see *Aquila Design (GRB) Products v Cornhill Insurance* [1988] BCLC 134).

Costs consequences of failure to obtain sanction

46. In a compulsory winding up (but not in voluntary) sanction is required to bring or defend proceedings in the name of the company (s. 167, Sch 4 Pt 2 IA 1986). (The provision does not apply to most proceedings brought by the liquidator in his own name.)
47. Failure to obtain sanction when required is likely to be treated in the same way as any other costs application in respect of proceedings brought without authority (solicitors are the most common victims): see, for example, *Steans Fashions Ltd v Legal and General Assurance Society Ltd* [1995] 1 BCLC 332; for an example involving receivers appointed under a debenture see *Gwembe Valley Development Co Ltd (in receivership) v Koshy and others (No 2)*; *Deg-Deutsche Investitions- und Entwicklungsgesellschaft mbH v Koshy* [2000] 2 BCLC 705.
48. In practice, failure to seek sanction will rarely be a problem: the remedy for the officer-holder will be to seek it retrospectively, and it will almost invariably be given by the court provided the proceedings are brought bona fide.

Undertakings in damages given by IPs

49. The starting point is the decision of Millett J in *In re DPR Futures Ltd (No 00681 of 1989)* [1989] 1 WLR 778. In that case proceedings were brought by liquidators against the directors of a company and an application was made for freezing orders. The liquidators were not prepared to offer an unlimited undertaking as to damages because, they said, they did not have the authority

to commit their firm to the 'theoretically open-ended liability' that the giving of an unlimited undertaking would entail. Moreover, they did not have recourse to an indemnity by a substantial creditor to support their undertaking, because there were no large creditors but instead, several thousand creditors from whom an adequate indemnity could not be obtained. The liquidators also gave evidence of an unsuccessful attempt to secure insurance for the undertaking. The amount under the control of the liquidators was approximately 3 million of which it was likely only 2 million would be available to protect them in respect of their potential liability under the undertaking. The liquidators therefore offered an undertaking limited to 2 million.

50. His Lordship held that in the circumstances the provision of that undertaking was adequate. (at 786):

'In my judgment, a liquidator cannot be criticised for refusing to risk his personal assets by giving an unlimited cross-undertaking. It is right to require him to give an undertaking of an amount commensurate with the size of the company's assets and to take the risk that he may not be authorised by the court to have recourse to them to meet his liability. If the value of such an undertaking is considered insufficient in any particular case he should be required to fortify it by obtaining a bond or an indemnity from a substantial creditor, but in either case of a fixed amount. The court cannot avoid the need to make an intelligent estimate of the likely amount of any loss which may result from the grant of the injunction. There is nothing unusual in this. It is so in every case where the balance of convenience has to be considered. A plaintiff's resources are not infinite. But any such estimate can be reviewed from time to time and further fortification required if necessary. If fortification cannot be obtained this will affect the balance of convenience between the granting, or refusing, of the injunction. The court cannot abdicate its responsibility for deciding where the balance of convenience lies.'

51. Each case will depend on its facts. So, for instance, in a case where the liquidator was funded (*Franses (Liquidator of Arab News Network Ltd) v Al Assad* [2007] EWHC 2442 (Ch), Henderson J commented:

"The justification for limiting the cross-undertaking in damages given by the liquidator to the net proceeds of the liquidation was that he had no significant assets under his control apart from the unsatisfied judgment debt. In a situation of that type, a limited cross-undertaking may properly be given and accepted by the court: see *Re DPR Futures Ltd* [1989] 1 WLR 778 at 785-7, per Millett J. However, the matter takes on a different complexion if the liquidator is being funded by a third party which has a commercial interest in the recoveries to be made by the liquidator. In the present case, there appears to be some kind of funding arrangement in place between the liquidator and IM Litigation Funding, the details of which have not been revealed but which appear to give IM Litigation Funding, through Susan Dunn, an influential role in deciding how the litigation is to be conducted. In these circumstances it was in my judgment the duty of the liquidator and his advisers to inform Morgan J of the existence and terms of the relationship between the liquidator and IM Litigation Funding, and in the light of that information the judge might well have decided that the limited cross-undertaking should be buttressed in some way, for example by the provision of a bond or indemnity: compare *Re DPR Futures*, at 786D-F. Mr Mallin submitted that the unfortified cross-undertaking was sufficient for the purposes of the without notice application, and if the respondents wished it to be fortified it was always open to them to make an application for that purpose on the first return day."

52. It is an interesting question as to whether and if so to what extent the office holder is required to return to court whilst the interim remedy remains in force to disclose the subsequent diminution of the "pot" available to meet the undertaking in damages.

IP's own time as a recoverable legal cost

53. What are the nature and extent of the costs which may be recovered by an office-holder of an insolvent company in administration or liquidation where that office-holder succeeds in litigation to which he is party in such capacity? More specifically, where the office-holder (or his staff) expends time in successfully defending proceedings, can the "costs" of the litigation payable by

the unsuccessful applicant include compensation for the loss of that time or a sum representing the value thereof and, if so, on what basis ?

54. With very limited exceptions, the court's jurisdiction to award costs does not extend beyond reimbursing a litigant for costs actually incurred in the payment of third parties (principally solicitors, counsel and experts). The relevant provisions are s.51(1) of the Supreme Court Act 1981 and CPR rule 43.2(1)(a). Ignoring the special jurisdiction applicable to litigants in person, the CPR⁷, Practice Direction⁸ and Model Forms for Claims for Costs⁹ do not anywhere make provision for or contemplate remuneration or compensation for work done by the litigant himself.
55. "Costs" are defined¹⁰ as including "fees, charges, disbursements, expenses, remuneration, reimbursement". As to that definition:
- a. It is at least 70 years old¹¹.
 - b. There was no change to the relevant wording on the introduction of the CPR.
 - c. It is suggested that the court will interpret it post-CPR in no different way to the way in which it was interpreted pre-CPR.
 - d. Pre-CPR authorities still apply to determine the extent to which a party's expenditure of time is recoverable: in *Malkinson v Trim* [2003] 1 WLR 463 the Court of Appeal considered the pre-CPR authorities and held that the principle in *London Scottish Benefits Society v Chorley* (1884) 12 QBD 452 ("*Chorley*") survived the CPR and governed the position of a practising solicitor who chooses to represent himself in his firm name or to be represented by his firm (see para [20]); and in *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] 1 WLR 2722 ("*Admiral*") at paras [27] – [38] Stanley Burnton J applied the pre-CPR authorities.
56. The authorities fall into 4 broad categories:
- a. cases in which the successful litigant is not represented by independent solicitors and counsel, but being a solicitor conducts his own claim or defence (*Chorley* and *Malkinson v Trim*);
 - b. cases in which the successful litigant is not represented by independent solicitors and counsel, is not a solicitor but conducts his own claim or defence (*Buckland v Watts* [1970] 1QB 27);
 - c. cases in which the successful litigant is represented by solicitors and counsel, but properly requires expert assistance for its case which it provides by using its own in-house "employee experts" (*In Re Nossen's Letter Patent* [1969] 1 WLR 638, *Admiral and Amec Process and Energy Limited v Stork Engineers & Contractors B.V.*, unreported, 15 March 2002) and
 - d. cases where the litigant uses external litigation support from a non-solicitor without instructing a solicitor (*Agassi v S Robinson (HM Inspector of Taxes)* [2005] EWCA Civ 1507).
57. The authorities permit the time expended by (i) a party to litigation, (ii) his staff, (iii) his partners and (iv) the staff of the firm in which he is a partner, to be recoverable as costs of the litigation only in limited circumstances.
- a. The general rule at common law is that such costs are not recoverable: *Chorley* (1884) 13 QBD 872 at 875 per Brett MR; at 877 per Bowen LJ.
 - b. As an exception to the general rule, a litigant in person who is a solicitor can recover costs as if he had employed a solicitor, except in respect of items which the fact of

⁷ CPR Parts 43-48 and see the guideline hourly rates (charging rates) in Appendix 2 to the Guide to the Summary Assessment of Costs)

⁸ Practice Direction About Costs (supplementing Parts 43 and 48), paragraph 4

⁹ Precedents A, B, C, and D in the Schedule of Costs Precedents annexed to Practice Direction About Costs

¹⁰ By CPR 43.2(1)(a)

¹¹ Exactly the same formulation: (i) appeared in the former taxation provisions in the Solicitors Act 1932 (see section 4 and 81) and *In re Taxation of Costs, In re a Solicitor* [1936] 1 KB 523; (ii) was replicated in Rule 1(2) of the Supreme Court Costs Rules 1959 (see *Practice Direction (Costs) Chancery Division*) [1960] 1 WLR 114; and (iii) was adopted for the purposes of the RSC (see RSC Order 62 r 1(4)).

his acting directly renders unnecessary: *Chorley* at 875-876 per Brett MR; *Malkinson v Trim* at paras [8] - [25].

- c. Where the litigant in person or his staff are experts and perform work of an expert nature which is properly required in the litigation, rather than employing external experts, the expense of such work is in principle recoverable: *Re Nossen's Latter Patent* [1969] 1 WLR 638 at 643 - 644; *Admiral* at paras [27] - [38].
- d. In all other cases, the time spent by the litigant in person, his staff or partners etc is not recoverable as costs of the litigation, except under the litigant in person provisions of the Litigants in Person (Costs and Expenses) Act 1975 and CPR rule 48.6.

58. The limited nature of the exceptions to the general rule should be noted:

- a. The principle in *Chorley* only applies where the litigant seeking to recover time costs has acted in person in the litigation. The principle has no application where the litigant is represented by solicitors and counsel, and has never been applied more widely.
- b. None of the authorities suggests an extension of the *Chorley* principle to permit recovery by a litigant of its time costs when so represented: see, for example, *Malkinson v Trim* at para [9].
- c. The principle in *Chorley* has been consistently¹² applied to enable recovery by a solicitor of his time costs (or those of his staff or partners etc) incurred as a litigant in person in his own defence. *Chorley*, *Buckland v Watts* [1970] 1 QB 27 and *Malkinson v Trim* all concerned a solicitor (or his staff or partners etc) acting in his defence as a litigant in person. No authority has extended the principle to permit recovery as litigation costs of the time expended by a litigant who is a "professional person" or an office-holder of an insolvent company in administration or liquidation.
- d. Prior to the CPR, RSC Ord 62 r 18(6) expressly excluded from the litigant in person provisions a litigant who was a practising solicitor. The effect of that exclusion was that the position of a litigant who was a practising solicitor continued to be governed by the principle in *Chorley*: see *Malkinson v Trim* at paras [16] and [17].
- e. Under the CPR, a practising solicitor who represents himself in his firm name or is represented by his firm is similarly excluded from the litigant in person provisions: section 52.5 of the Practice Direction about costs. Such a solicitor's position continues to be governed by the principle in *Chorley*: *Malkinson v Trim* at paras [18] - [20].
- f. The exclusion of the solicitor litigant in person recognises the ambit of the *Chorley* principle. If the *Chorley* principle were to extend to any other "professional" person who devotes time to conducting litigation in person, such a person would similarly be excluded from the litigant in person provisions of CPR r 48.6 (and, before it, RSC Ord 62 r 18(6)).

59. Against this background, the facts of *Sisu v Tucker*¹³ are instructive. The applicant officeholders and employees of KPMG applied for the recovery of their costs from the respondent company (S), subject to detailed assessment. They had been involved primarily as provisional liquidators and administrators in a CVA in relation to two companies of which the respondent was a creditor. The respondent had unsuccessfully applied to remove them from office. Considerable time had been spent by them dealing with that application. The office-holders were entitled to recover payment of their own fees from the estates of the company as remuneration. Their costs related not only to some tasks that involved special expertise but also to costs that related to time spent on the litigation generally which, had they been undertaken by a litigant or his employees who had instructed solicitors and counsel, would not ordinarily have given rise to a liability to a party paying under a costs order. The office-holders submitted that, given their professional status, the cost of the time they had spent as litigants could be quantified and the respondent should be liable to pay those costs as litigation costs.

60. It was held, applying the *Chorley* principle, that a litigant in person could not recover costs for his own time, except where that person was a solicitor. Furthermore, a solicitor acting in person

¹² With the exception of *Amec Process and Energy Limited v Stork Engineers and Contractors Ltd* (unreported) 15 March 2002

¹³ [2005] EWHC 2321 (Ch) [2006] 1 All ER 167 : [2006] BCC 463

could only recover for certain costs that he would have been able to recover had he instructed an independent solicitor. Another professional, such as an accountant, would be able to recover as a litigant in person at most for items that he would have been able to recover had he instructed an independent professional, such as an accountant. Whilst he would have been able to recover for the cost of any expert advice given by that independent professional, he would not have been entitled to recover for the costs of general assistance in the conduct of litigation. A litigant in person, even if a professional, could not recover in respect of his time spent other than on matters within his own professional expertise and requiring the attention of an expert. The position of an office holder was no different. The fact that an office holder may have to bring or defend litigation as part of his duties did not mean that it was part of his profession to conduct litigation in the way that it was part of a solicitor's profession to do so. Accordingly, the fulfilment of that duty on the part of an officeholder did not afford any basis for a difference in treatment, in relation to the payment of costs by an opposing party, from any other litigant. Only those limited costs which would come within the *Nossen* principle were recoverable in principle.

Liability for costs as a third party - NPCO

61. An NPCO (non-party costs order) involves the court making an order for costs of the litigation against a person who is not a party to the proceedings. This is one of the most burgeoning areas of procedural law in recent years. As far as it relates to insolvency office-holders, there have been indications that creditors are becoming more demanding in relation to the pursuit of litigation and threatening consequences if their wishes are not met. Clearly, litigation is a step that is taken only after significant thought and after obtaining as much protection as possible by the use of after the event insurance and other such products. But no commercial litigator will nowadays formulate a litigation plan without regard to s.51 of the Supreme Court Act 1981 (as substituted by s.4 of the Courts and Legal Services Act 1990) which gives the courts wide powers to determine not just the extent to which costs are to be paid but as to the person who should pay them – it is the source of the court's jurisdiction to make a NPCO:

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—

(a) the civil division of the Court of Appeal;

(b) the High Court; and

(c) any county court,

shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives [or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs].

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

(4) [...]

(5) Nothing in subsection (1) shall alter the practice in any criminal cause, or in bankruptcy.”

(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

(7) In subsection (6), “wasted costs” means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

(8)-(12) [...]

(13) In this section “legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.]”

62. CPR 48.2 governs the procedure for making costs orders against non-parties. The procedure is to apply to join the insolvency office-holder (usually after trial) pursuant to CPR r 48.2(1)(a) with a view to having a hearing to determine whether he should pay the litigation costs of the successful party (who, usually, cannot enforce successfully against the insolvent company). Once joined, this brings into play CPR r 44.3, which sets out the court's discretion as to costs and the circumstances to be taken into account in its exercise:

(1) Where the court is considering whether to exercise its power under section 51 of the Supreme Court 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 –

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

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

63. The issue arises most frequently in connection with litigation on behalf of limited companies where the potential liability of the director(s) falls to be considered. Similar considerations must apply to office holders who litigate in the name of a company. In *Taylor v Pace Developments Ltd* [1991] BCC 406 Lloyd LJ said:

“The controlling director of a one-man company is inevitably the person who causes the costs to be incurred, in one sense, by causing the company to defend the proceedings. But it could not be right that in every such case he should be made personally liable for the costs, even if he knows the company will not be able to meet the plaintiff's costs, should the company prove unsuccessful. That would be far too great an inroad on the principle of limited liability. I do not say that there may not be cases where the director may not properly be liable for costs. Thus he might be made liable if the company's defence is not bona fide, as, for example, where the company has been advised that there is no defence, and the proceedings are defended out of spite, or for the sole purpose of causing the defendants to incur irrecoverable costs. No doubt there will be other cases. But such cases must necessarily be rare. In the great majority of cases the directors of an insolvent company which defends proceedings brought against it should not be at personal risk of costs.”

64. In *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 Millett LJ said:

“[A costs order against a non-party] may be made in a wide variety of circumstances, where the third party is considered to be the real party interested in the outcome of the suit. It may also be made when a third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the

absence of some impropriety or bad faith...the doctrine of the separate liability of the company would be eroded and the principle that such order should be exceptional would be nullified.”

65. The basis upon which the court ordered costs against non-parties was first set out comprehensively by Goff LJ in *Symphony Group plc v Hodgson* [1993] 4 All ER 143, 151 from which the following general principles emerge:
- (1) an order for the payment of costs by a non-party will always be exceptional. The judge should treat any application for such an order with considerable caution;
 - (2) it will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings;
 - (3) even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party;
 - (4) an application for payment of costs by a non-party should normally be determined by the trial judge;
 - (5) the fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party neither constitutes bias nor the appearance of bias;
 - (6) the procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action;
 - (7) the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings;
 - (8) the fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action;
 - (9) the judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant.
66. The primary source of principle is now the decision of the Privy Council in *Dymocks Franchise Systems & Todd*.¹⁴ Lord Brown stated that although NPCOs were to be regarded as “exceptional”, exceptional in this context meant no more than outside the ordinary run of cases, where parties pursue or defend claims for their own benefit and at their own expense (para 25(1)). The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. The jurisdiction was fact-specific (para 25(1)). Generally speaking, the discretion would not be exercised against “pure funders” (para 25(2)). Where a non-party not merely funds the proceedings but substantially also controls the proceedings or at any rate is to benefit from them, justice will ordinarily require that if the proceedings fail he will pay the successful party's costs (para 25(3)). Lord Brown considered cases in which a non-party was in substance “the real party” (para 25(3)). It was stated that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for its own financial benefit he should be liable for the costs, if his claim or defence or appeal fails. Lord Brown emphasised that a different view would be taken where the non-party, for example a director or liquidator, was acting in the interests of the company (and more especially its shareholders and creditors) rather than its own interests (para 29). At para 33, Lord Brown stated that impropriety “or the pursuit of speculative litigation” might support the making of such an order but the absence of those things did not preclude the making of such an order.

¹⁴ [2004] UKPC 39; [2004] 1 WLR 2807

67. *Dolphin Quays Developments Limited v Mills* [2008] 4 All ER 58 involved an application for an NPCO against administrative receivers. As is the case on all questions of costs, the enquiry is particularly fact-sensitive and, unsurprisingly, there is no reported case in this jurisdiction in which the facts are remotely similar to this case. The CA in *Dolphin Quays* rejected a submission (based on an Australian authority : *Knight v F.P. Special Assets Ltd*¹⁵) that there was a general category of case in which an order for costs should be made against a non-party in circumstances where the party to the litigation was an insolvent person or man of straw, where the non-party had played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she was acting or by whom he or she had been appointed, had an interest in the subject of the litigation.
68. *Dolphin Quays*¹⁶ involved an appeal from a judgment of Morritt VC on an application by the appellant, a Mr Mills, for an order that the Receivers should pay Mr Mills' costs of an unsuccessful action brought by Dolphin Quays Developments Ltd against him at their direction. The appeal raises the question whether, when a receiver appointed under a bank charge causes an insolvent company to sue, the action is unsuccessful and the successful party is unable to recover costs against the company, the successful party may obtain an NPCO against the receiver. That jurisdiction has developed to allow the real party to be visited with the costs of the successful party. So it is concerned with preferring substance to form. The Receivers commenced their proceedings in the name of the company against the Defendant at the behest of the Bank that had appointed them. They sought specific performance of a contract for the sale of a long lease that the Defendant had entered into with the insolvent company of which he was a director. It was unsuccessful and the Defendant director sought his costs.
69. Although the proceedings were issued in the name of the insolvent company, interestingly, no application for security for costs was made. The evidence on the part of the director was that no such application had been made because he did not believe that the administrative receivers or the bank would shelter behind the cloak of insolvency. The insolvency was ample and there were more than sufficient funds available to meet the costs which amounted to some £60,000 plus the costs of the appeal. His solicitors believed that he would be paid his costs as an expense of the administration and it came as a surprise to them when they discovered that he would not.
70. At first instance the judge refused to order that there should be an order for costs against the receivers because there were no “exceptional circumstances.” There was no element of impropriety in the initiations and prosecution of the claim. It could not be said that the Receivers were the real beneficiaries of the claim. The provisions of s.109 (2) LPA 1925 made the Receivers the agents of the company and the action had been bought for its benefit and not for the benefit of the Receivers or the Bank. Finally, he could have protected himself by applying for security for costs.
71. On appeal the court contrasted the position between receivers and liquidators. Receivers are agents of the company. The principles of agency are invoked by statute and by virtue of the contractual arrangements in the charge. Notwithstanding this, s.37(1) IA 1986 makes them personally liable on contracts entered into by them subject to the right of indemnity from the assets of the company. Receivers can issue proceedings in their own name without exposing themselves to personal liability if the application should fail.¹⁷ The agency terminates after insolvency but the receiver can continue with the litigation whether or not it is commenced in the name of the receiver or the company.¹⁸ The position of liquidators is different. The costs of an unsuccessful action are paid out of the assets in his own hands in priority to other claims including his own claim for costs.¹⁹

¹⁵ (1992) 174 CLR 178, at 192-193)

¹⁶ [2008] EWCA Civ 385

¹⁷ See *Newhart Developments Ltd v Co- Operative Commercial Bank Ltd* [1978] 1 QB 814 at 819.

¹⁸ See *Gosling v Gaskell* [1897] AC 575; *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd* [1980] 2 All ER 655 and *Gough's Garages v Pugsley* [1930] 1 KB 615.

¹⁹ See *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1, 20, per Lord Hoffmann.

72. The court held that the judge had rightly denied the defendant the right to his costs. The same principles apply to such applications as to any other application against a third party. The mere fact that the action was commenced by an impecunious party was not exceptional and there had been no impropriety. If the director wished to protect himself, he should have applied for security for costs. This last point is the most telling. The jurisdiction to award security for costs is designed for the situation which Mr Mills faced and the failure to make that application (i.e. once it was appreciated that there was a real risk that the claimant company could not meet any adverse order for costs) was a culpable error and probably a substantial cause of his ultimate loss.
73. Note also the decision of the Commercial Court in *Equitas Ltd v Horace Holman & Co Ltd* [2008] EWHC 2287 (Comm), [2008] All ER (D) 35 – a case about an insolvent insurance run-off - in which the fact that the third party had not been funding the litigation for his own benefit and had not received a warning of the intention to apply against him weighed heavily in the court's decision not to make a NPCO.

Personal liability of IPs – examples (SB/SD)

74. *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488; [2008] BCC 612²⁰ is an example of the costs penalties that can arise personally if the office-holder should reach a wrong conclusion as to how to proceed – especially if he is persuaded by management to adopt a certain method without relying on his own critical and objective eyes. Ulva Limited (“Ulva”) was sued by a creditor, DRC, for substantial damages for breach of contract. Its director, F, set up a phoenix company, Ulva Holdings (“U1”). In early June 2007, F caused Ulva to transfer the bulk of its business either to U1 or himself, for deferred and inadequate consideration (“June Transfer”). On 29 June, Ulva ceased to trade. Upon HMRC threatening to wind up Ulva, F consulted one of the proposed administrators.
75. Despite the fact that the proposed administrator had been : “given what was probably an incomplete and thoroughly suspicious picture, which ought to have rung alarm bells as to what had been going on”, he and his partner accepted appointment as joint administrators of Ulva. The CA observed (in para. 18) that:
- “Had [F] made an application to the court...for an administration order, supporting his evidence with evidence of how busy he had been stripping Ulva of its business and assets, the court would probably have checked the diary to see that it was not 1 April.”
76. After their appointment on 14 August 2007, without stipulating at the outset for a reversal of the June Transfer, the administrators considered that they could market whatever was left in the name of Ulva. On 23 August they did threaten F that they would apply to set aside the June Transfer unless he offered to pay full value for the business, but they then decided not to apply to recover the business. Instead, they received competing offers from F and DRC. Having regard to the June Transfer, DRC was informed that it was unclear what title to assets the administrators had to pass to DRC, such that they were minded to “sell” to F.
77. DRC applied to remove the administrators on various grounds, including that F had an improper motive when appointing them, or alternatively, on grounds that they had acted or were proposing to act in a way which would unfairly harm DRC. In effect, DRC alleged that the administrators had acted as stooges for F and allowed themselves to be used in F's plan to transfer the assets to U1, thereby creating an unfair negotiating position once Ulva was in administration. An adjourned hearing of DRC's removal application was fixed for 25 September.
78. In the meantime, U1 and F refused to complete a deal save on terms that prevented the administrators from pursuing them thereafter for compensation for losses caused by the June Transfer. On about 21 September, the administrators concluded that the purpose of the administration could no longer be achieved and that Ulva should enter into liquidation

²⁰ See para 2 of the judgment of Rimer LJ

immediately. The administrators issued a cross-application for the appointment to cease to have effect and for a compulsory winding up order.

79. At the hearing on 25 September, the judge made a winding up order. This left the question of costs. The judge concluded that he would have removed the administrators on the application of DRC on the basis that the administration order ought not to have been made unless they had first resolved to unscramble the June Transfer. After hearing full submissions from counsel but no oral evidence, the judge directed the administrators to pay the costs of DRC – expressly imposing upon them personal liability for which they had no right of indemnity out of Ulva’s assets.
80. The CA decided that the judge had been entitled to determine the question of costs on a summary basis and without hearing oral evidence from or cross-examination of the witnesses. On any view of the facts, the administrators ought to have concentrated first on the recovery of the entirety of Ulva’s business from F and U1. Only after recovery would they have been in a position to invite offers from interested parties on a level playing field and to deliver the business and assets to the winning bidder. The invitation to bid made to DRC had had an element of farce about it. In fact, the CA agreed with the judge that, without unscrambling the June Transfer, the purpose of the administration could not have been achieved. In this respect, the administrators ought to have concluded that, in F, they were negotiating with someone who was “bereft of the basic instincts of commercial morality”. Whilst the judge had expressed some of his comments and conclusions in over-critical terms, the CA concluded that it would have reached the same overall conclusion as the judge. As well as in cases where it was achievable on appointment as those where it was not, administrators remain under a continuing duty to satisfy themselves that the statutory purpose can reasonably be achieved and a breach of that duty may result in a personal liability for the litigation costs of an aggrieved creditor who demonstrates such a breach. More generally, the decision of the CA is a useful reminder (paras 63-4 and 68-69) that, when all litigation issues except costs have been resolved without judicial determination and/or a trial, it will often nevertheless be both reasonable and appropriate for one or both parties to seek a summary determination as to which party should bear the costs. In this case, it was the office-holder personally.
81. *Howard v Savage* [2006] EWHC 3693 (Ch); [2007] BPIR 1097²¹ serves as a warning to a trustee that he may be deprived of his indemnity out of the assets in the estate where he pursues a course of action that is not fruitful. The district judge granted an annulment of a bankruptcy order in the face of opposition from the trustee who contended that whilst known creditors of the bankrupt had been paid there could be other creditors whose claims had not been ascertained. The trustee appealed. Dismissing the appeal, Lewison J held that the court had wide powers in relation to a bankruptcy under s. 363(1) IA 1986. He went on to hold that it was questionable whether the trustee had acted in the best interests of the creditors. Accordingly he directed that the costs should not fall on the estate, the effect of which would have been to compel the bankrupt to pay them indirectly.
82. *Smurthwaite v Simpson-Smith* [2006] EWCA Civ. 1183; [2006] BPIR 1504²² concerned, inter alia, a dispute about the voting rights of a creditor which were crucial to the approval of an IVA. Chadwick LJ found that the conduct of the insolvency practitioner in admitting the creditor to vote “fell below the standard to be expected of a reasonable insolvency practitioner acting reasonably” and dismissed the appeal against the part of the order of the court below providing for the insolvency practitioner personally to pay 50% of the objecting party’s costs.
83. The approach of the court when making an order against a professional insolvency practitioner has been compared recently to the test for making a wasted costs order against legal practitioners i.e. “only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential” (*Ridehalgh v Horsefield* [1994] Ch 205). In *Tradition (UK) Ltd v Eaitisham Ahmed & Others* [2008] EWHC 3448 (Ch), despite a finding that the nominee and chairman of the creditors’ meeting to approve an IVA had fallen short of his professional standard in calling

²¹ See paras [22] and [23] of the judgment of Lewison J

²² See para [25] of the judgment of Chadwick LJ

the meeting without further investigation of various creditor claims, the claimant failed to discharge the burden of proving that, had the nominee performed his duties properly, the litigation would not have ensued in any event.

84. In this respect, litigation against a counter-party possessing excessive litigation zeal would appear to be less risky.

SCHEDULE

The CPR give the courts a wide measure of discretion but also set out matters to be taken into account in exercising the discretion.

“CPR 44.3 [Court’s discretion and circumstances to be taken into account when exercising its discretion as to costs]”

- (1) The court has discretion as to –
 - (a) whether costs are payable by one party to another;
 - (b) the amount of those costs; and
 - (c) when they are to be paid.
- (2) If the court decides to make an order about costs –
 - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
 - (b) the court may make a different order.
- (3) The general rule does not apply to the following proceedings –
 - (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
 - (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
- (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
 - (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
 - (c) any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences under Part 36 apply.
- (5) The conduct of the parties includes –
 - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
- (6) The orders which the court may make under this rule include an order that a party must pay –
 - (a) a proportion of another party’s costs;
 - (b) a stated amount in respect of another party’s costs;
 - (c) costs from or until a certain date only;
 - (d) costs incurred before proceedings have begun;

- (e) costs relating to particular steps taken in the proceedings;
 - (f) costs relating only to a distinct part of the proceedings; and
 - (g) interest on costs from or until a certain date, including a date before judgment.
- (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).
- (8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.
- (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either –
- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
 - (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.”

CPR 44.4

- (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
- (a) on the standard basis; or
 - (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 48.3 sets out how the court decides the amount of costs payable under a contract)

- (2) Where the amount of costs is to be assessed on the standard basis, the court will –
- (a) only allow costs which are proportionate to the matters in issue; and
 - (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.5)

- (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
- (4) Where –
- (a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
 - (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

Note that the indemnity basis does not give an indemnity for costs; it simply goes to the burden of proving the reasonableness of costs. The award of indemnity costs generally reflects “a significant level of unreasonableness or otherwise inappropriate conduct” (*White Book* 44.4.3).

**Chief Registrar Baister
Stephen Davies QC, Guildhall Chambers
May 2009**