Fountain Street Developments Limited and The Companies (Guernsey) Law 2008 costs
Royal Court
20th December 2018

JUDGMENT 51/2018

Costs decision in respect of the compulsory winding up of the Company

IN THE ROYAL COURT OF GUERNSEY
Civil No. 2148
ORDINARY DIVISION

IN THE MATTER OF FOUNTAIN STREET DEVELOPMENTS LIMITED

AND IN THE MATTER OF PART XXXIII OF THE COMPANIES (GUERNSEY) LAW 2008

BETWEEN:

(1) DAVID HODGE
(2) EMMA HODGE
(3) ELIZABETH FITZGERALD

Applicants

and

(1) FOUNTAIN STREET DEVELOPMENTS LIMITED
(2) MGC GROUP LIMITED

Respondents

Judgment handed down: 20th December 2018

Her Hon. Lt Bailiff Hazel Marshall QC

Legislation and Cases referred to

(1) Legislation:

Companies (Guernsey) Law 2008, s. 406,

(2) Cases

Guernsey

Jefcoate vs Spread Trustee Company Ltd and others (Royal Court, 17 November 2014),
Puma Brandenberg Ltd v Aralon Resources (etc) Ltd (Court of Appeal 6 June 2017)

England and Wales:

Re Aurum Marketing Limited [2000] 2 BCLC, 645

Supplemental JUDGMENT on costs

on written submissions

Introduction

1. This judgment is supplemental to the approved judgment handed down on 30th November 2018 in the two main applications in this matter, following written submissions as to costs made on behalf of the Applicants, and a response made on behalf of the two Respondent companies, and also on behalf of Messrs Malcolm, Richard and Jordan Gallienne, whom the Applicants seek to convene as parties and to make personally liable for their claimed orders for costs.

2. Malcolm and Richard Gallienne were the two directors of the first Respondent company ("FSDL"). All three were directors of the second Respondent company ("MGCG") the other shareholder, apart from the Applicants, in FSDL. Jordan Gallienne was closely involved with the administration of both companies and the events giving rise to the main applications, as well as presenting the case in court on behalf of all the Respondents.

3. The ultimate result of the applications was that FSDL was ordered to be wound up by the court on the "just and equitable" grounds (see s 406 (i) of the Companies Law 2008), which was the subject of the first Application (the "J&E Application"), the Applicants having proved to the satisfaction of the Jurats a justifiable loss of confidence on their part in the proper management of FSDL by its directors Malcolm Gallienne and Richard Gallienne. The grounds for this comprised principally (as the Jurats found) a failure to provide proper financial information to the Applicants as substantial shareholders in FSDL, and specifically the improper issue of additional shares in FSDL to MGCG, in order to give that company (and thus the Gallienne family) sufficient voting control of FSDL to be able to procure the continued conduct of its affairs – a particular scheme of redevelopment - in the way in which the Gallienne family wished, combined with other matters, such as further borrowings and inter-company transactions not disclosed to the Applicants at the time they took place, and which gave rise to questions and concerns. Being satisfied that it was appropriate to make a winding up order on this basis the court did not closely investigate the question whether it would be justifiable to make an order on the grounds that the FSDL was, on a general basis, insolvent and unable to pay its debts, although inclining to the view that this was likely.

4. With regard to the Second Application (the "Insolvency Application"), which had been brought by the Applicants on the premise that their investment in FSDL had been a loan rather than a subscription for shares, the court found that the investment had not been a loan and consequently dismissed that application.

The Applicants' arguments

5. On behalf of the Applicants, Advocate Dawes applies for an order that all his clients' costs, ie of both Applications and an ancillary injunction application, and also the costs of this costs application, should be paid, by MGCG and by Messrs Malcolm, Richard and Jordan Gallienne personally, on a joint and several basis as between them, and also on the indemnity basis. Alternatively (either totally or as to any unrecoverable shortfall) he asks that these be paid out of the assets of FSDL as a cost of the liquidation. He submits that MGCG should bear its own costs and that FSDL's costs should also be paid by MGCG, and Messrs Malcolm, Richard and Jordan Gallienne. He also submits (presumably as an alternative, as this would seem to be contemplating payment of the costs out of FSDL's own assets) that FSDL's costs should be postponed and subordinated in priority to all the unsecured creditors of FSDL.

6. Whilst accepting that the usual order in a simple but successful contested winding up application would be for the costs of the Applicant and of the company (at least as far as the costs of preparing for and appearing initially on the application see *Puma Brandenberg Ltd v Aralon Resources (etc) Ltd* (Guernsey Court of Appeal 6 June 2017 para [9]), and also one set of costs for contributories or creditors supporting the successful application, to be paid in priority as costs of the liquidation, Advocate Dawes submits that a different result is appropriate here. He does so on the grounds that, here, the effective opposition was not FSDL itself, but the other shareholder, MGCG, such that it would be appropriate to make (in effect) a hostile dispute order recognising that the Applicants had been the successful party.

7. However, he goes further and submits that it is appropriate to convene the three individuals, Messrs Malcolm, Richard and Jordan Gallienne to the proceedings in order to make costs orders in favour of the Applicants and against them, personally, on the grounds that it is "just and reasonable" to make such an order in the particular circumstances of this case. He submits relying principally on dicta in *Re Aurum Marketing Limited* [2000] 2 BCLC, 645 that the test does not need to meet what might be the more exacting standard of "exceptional circumstances".

8. He cited the various factors listed at p 650 of that case as potentially justifying the making of a costs order in proceedings against a non-party. These can really be summarised as being either the non-party's causing the (unsuccessful) resistance to the applicant's claim to be raised in the first place, or unreasonably persisted in, or – although the two are likely often to overlap, where the non-party has procured or assisted in such resistance for his own personal ends or interests.

9. Advocate Dawes submits that this amply characterises the conduct of Messrs Malcolm, Richard and Jordan Gallienne in this case, in particular with regard to the improper issue of the additional shares to MGCG. He further submits that even though Jordan Gallienne was not a *de iure* director of FSDL, his involvement in the running of that company was clearly sufficient to constitute him a *de facto* director, and thus to have responsibility for actions taken on its behalf. All three individuals, he submits, joined in the conduct which caused the making of the J&E Application (the wrongful withholding of financial information and the improper issuing of the additional shares), and they further caused both FSDL and MGCG to resist the Applicants' J&E application unjustifiably, and for their own purposes. He submits that the voluntary liquidation of Mac Gallienne Construction Limited, which took place immediately after the order winding up FSDL was granted, supports the need for an order against the three individuals personally, because it suggests that liquidation of MGCG may well follow, and the Galliennes should not be allowed to shelter from liability behind insolvent group companies. He submits that the same considerations also apply to the Insolvency Application, even though it was not successful, because the two applications were very closely related, and indeed *crochetées*.

10. He submits that FSDL's costs ought to fall on MGCG and the three Messrs Gallienne because otherwise they would unfairly fall on the creditors and shareholders of FSDL in its probable insolvent liquidation. For obvious reasons he also submits that MGCG should not be the beneficiary of any costs order, not least because it unsuccessfully opposed the J&E Application.

11. Separately, as regards the Insolvency Application, he submits that this application was caused or provoked by the statement made in sworn evidence of Malcolm Gallienne asserting that the Applicants' investments had been unsecured loans; this statement, persisted in in FSDL's accounts (thereby implicating at least Richard Gallienne and also, he would submit, Jordan Gallienne by his *de facto* involvement), was only withdrawn after the Applicants, acting upon it, had issued the Insolvency Application which (he submits) was therefore reasonably continued, such that no distinction should be made between the costs of the Insolvency application and the J&E Application.

12. As regards the claim for indemnity costs, he refers to the various criteria and examples summarised in *Jefcoate vs Spread Trustee Company Ltd and others* (Royal Court, 17 November 2014), submitting that the essential principles – namely that there must be something taking the conduct of the paying party "out of the norm" in the sense of "unreasonableness" but not necessarily going so far as attracting moral condemnation – are made out in this case, both as to conduct in the way in which the affairs of the company were conducted by all three Messrs Gallienne, and as to the conduct of the proceedings themselves (including the false allegation that the Applicants' investments were a loan), and the unjustified resistance to the winding up application itself.

The Respondents' arguments

13. On behalf of the Respondents and the individuals as potential respondents, Jordan Gallienne resists these submissions. His commendably concise submissions are, first, to the effect that the two Applications should be treated separately.

14. With regard to the J&E Application he submits that the costs of the Applicants, and of MGCG and FSDL should all be paid as costs of and in the liquidation of FSDL, in the usual way; the circumstances of this case do not justify departing from the usual order that the successful Applicants' costs be paid as a cost of the liquidation itself. He secondly submits that on any basis, the court having found that this was essentially a dispute between shareholders, any other costs order which the court thinks fit to make should be only against MGCG as a convened party, and there is no justification for making a personal costs order against any of the three Messrs Gallienne. Thirdly, even if the actions of the directors of FSDL do fall to be taken into account as regards the possibility of a personal costs order, he submits that because the Jurats expressly found that their actions were "not dishonestly motivated" there are no grounds for making a costs order against any of Messrs Malcolm, Richard or Jordan Gallienne personally.

15. In any event, he resists the suggestion that payment of FSDL's costs should be subordinated to the payment of other unsecured creditors of FSDL (although it is of course the case that making them costs of the liquidation, as he initially submits, results in their having priority over unsecured creditors rather than simply ranking as company debts).

16. As regards the Insolvency Application he submits that the Applicants should pay the costs of MGCG and of FSDL in that application on an indemnity basis (or that at the very least those costs should be paid as an expense of the liquidation of FSDL) and that the Applicants should not be entitled to their costs out of the assets of FSDL. This somewhat ambitious proposition is made on the simple basis that the Respondents were successful on that Application, and that, on their own case, the Applicants had pursued that Application knowing that they had not provided their finance as a loan.

17. He resists any cost order in respect of the costs of this costs application.

Discussion

18. The court's discretion as to the making of an order in costs is very wide, and is simply a discretion to do what appears to be just and reasonable in all the circumstances of the particular case, including both the result of the actual proceedings and the conduct of the parties involved, both as regards the subject matter of the proceedings and the conduct of those proceedings.

19. A further material consideration is also the practical effects of any particular costs order, and the need to try to minimise the potential for incurring yet further costs in working out the costs order itself. For this reason (a matter which I considered in some detail in the *Jefcoate* supplementary judgment, above) the court will lean against making "issue based" costs orders, where the conceptual nature of the order invites further judgment, interpretation and therefore argument about what particular items of costs may, or may not, or may partly, be

included. It is preferable, where justice can reasonably be achieved, to make orders which can easily be applied without the potential for argument, by using time based orders (eg, costs up to, or after, a specified date), orders in respect of particular identifiable items of costs (such as particular reports or suchlike), or even a percentage order in respect of overall costs, as a simple and easily applied formula based on the court's view of the overall balance of merits, or the achievement of success, where the court considers this needs to be reflected. In appropriate cases a combination of these can be deployed.

20. The court's discretion can thus be exercised very flexibly, according to the requirements of the case. But also, the exercise of arguing for and making a costs order ought to be in itself proportionate, and not elevate the issue of costs to the equivalent of a trial in itself, except where the costs are so great as to be of major significance. A just and reasonable outcome with regard to the incidence of costs can and even must, because of the requirements of proportionality and practicality, be appropriately based on a relatively broad brush and high level approach.

21. In the present case, the position is complicated by the fact that there are two applications, three actual parties (the Applicants, FSDL and MGCG), three individual non-parties, against whom the Applicants seek costs orders on the grounds of their factual involvement in the proceedings and matters associated with these, ancillary applications such as the injunction proceedings initiated in the J&E application, and the fact that, with these being winding up proceedings, it is not simply a question of ordering costs as between opposing parties, but there is the third possibility of ordering costs to be paid as an expense of the liquidation of FSDL. In addition and on any basis, a particular costs order may, on examination, have inappropriate indirect effects on the positions of the parties.

22. As regards the fact of two applications, whilst these were *crochetées*, which conveniently enabled them to be tried together as one set of proceedings, this does not seem to have any immediately obvious effect on the issue of costs as a whole; the costs as a whole fall to be dealt with as conveniently as possible, and whether this means distinguishing between the Applications themselves, or any particular aspects of them, then becomes a matter simply of the court's general discretion on costs, and the practicalities of the particular case.

23. I have taken into account all the arguments advanced by both Advocate Dawes and Mr Jordan Gallienne, and all the circumstances and considerations referred to above. But before turning to my decision, I make just some particular comments.

24. First, as regards one aspect of Advocate Dawes' submission, I leave out of account the liquidation of Mac Gallienne Construction Limited as an irrelevant consideration. I am concerned with the merits of what has occurred before this court and the inferences and conclusions to be drawn therefrom. It is not the court's function to protect any party from ordinary commercial consequences of what would, in terms of proper legal analysis, be the appropriate costs order in the particular case.

25. Second, I reject Advocate Dawes' argument that I can, or should, treat Jordan Gallienne as a *de facto* director of FSDL. This was not an issue which was in any way explored at the hearing of the applications, and it would not be right to deal with Mr Gallienne, as a non-party, on the basis of a finding of fact which has not been argued and which he has had no opportunity to contest. His involvement with the affairs of FSDL is clear, and is even admitted, but the precise effects of this as regards *de facto* directorship and whether he assumed such a role is a different matter. It is plain that Jordan Gallienne is more articulate and has more commercial education than his father or uncle, and it is also an observable fact that he presented the Respondents' case in these hearings with some competence. However, I do not consider it legitimate to infer merely from these facts that his position with regard to the conduct of the affairs of FSDL was that of a *de facto* director, or was anything more than a competent administrator, in the absence of proper argument and investigation directed at that proposition and also directed at its application to the particularly material decisions made. None of that has occurred.

26. Third, as regards general approach, I bear in mind the basic proposition that where a limited company, which is a separate legal entity in itself, is faced with a winding up petition, the costs of the company in preparing to engage with the actual application up to and including the first appearance before the court are properly regarded as costs of the liquidation. This is logical, as that first hearing is the earliest occasion on which a winding up order might actually have been made, but without getting to that first hearing no winding up would have occurred.

27. Fourth, I also accept Advocate Dawes' submission that the court has jurisdiction, in a case such as this, to make an order in costs against a non-party, whose involvement in the proceedings has been such that it can fairly be said that he became a *de facto* protagonist in the proceedings, or that he was aiding or procuring the continuance of the proceedings for his own purposes to such a degree that, having failed and thereby caused costs to be incurred by the opposing parties, he ought in justice to be liable for such costs.

28. I exercise my discretion in this matter with the above propositions in mind.

Decision

The Applicants' costs

29. I accept Advocate Dawes' submission that this is a case where the overall facts call for a costs order other than simply the usual order that the Applicants' costs be costs in the liquidation of FSDL. The dispute was, in essence and in company structure terms, a dispute between shareholders, and I would therefore, in principle order that MGCG as the convened opposing unsuccessful Respondent to the Applications, should pay the Applicants' costs of and incidental to these, certainly as to the J&E Application.

30. However, I also accept Advocate Dawes' submission that both the conduct which gave rise to the justifiable J&E Application, and the subsequent resistance to this, was, in reality put forward in the interests of the Gallienne family, and, I find, in particular the interests of Malcolm Gallienne, who was, after all, the initial instigator of the relationships underlying FSDL. I therefore conclude that it would be right to convene him as a party (if formally necessary) and to make a costs order against him personally.

31. With regard to Richard Gallienne, whilst I take into account his accepted lack of direct involvement in the relationships with the Applicants, and how FSDL's affairs were run on a day to day basis, I cannot ignore the fact that he was a *de iure* director of FSDL, and is not entitled to be a "sleeping" director. He therefore has responsibility for the proper conduct of FSDL's affairs and I consider it right also, therefore, that he be convened as a party with a view to imposing costs liability also on him personally if appropriate. I emphasise that this is on account of his directorship of FSDL.

32. With regard to Jordan Gallienne, I have, with some hesitation, come to the conclusion that it would not be right to make any costs order against him personally. I have indicated that I do not find it shown sufficiently that he can be regarded as a *de facto* director of FSDL to incur such liability for that reason. He is a director and shareholder (I believe) of MGCG, but I do not see that the court's jurisdiction properly extends to rendering a director of an unsuccessful Respondent to the Applications personally liable in costs without more than merely that relationship, and this is all the more so in the case of a mere shareholder.

33. This leaves only Jordan Gallienne's actual, personal involvement in the conduct of the affairs of FSDL, or his own personal pursuit of his own interests as a reason for the resistance put up as against the Applicants' Applications (and in particular the J&E Application), as potential grounds for imposing personal liability on him. With some hesitation, and on balance, I have concluded that I am not satisfied that it would be "just and reasonable" to make Jordan Gallienne personally liable for such costs. I am not satisfied that he has done more than

reasonably use his own education and knowledge for the benefit and assistance of the results which his father wished to achieve. To hold him personally liable would probably be, unjustly, to impose on him liabilities which are in essence and more properly seen as those of his father, simply because he has taken a more visible and prominent part in the conduct of the matter, on the Respondents' side of the dispute, because of his practical abilities.

34. I will therefore order, in principle, that the Applicants' costs of and incidental to both Applications shall be paid, jointly and severally, by the Respondent, Mac Gallienne Construction Group Limited and by Mr Malcolm Gallienne and Mr Richard Gallienne personally. For the avoidance of doubt such order includes the costs of the Applicants' Applications for injunctive relief of 1st June 2018, and subsequent hearings

35. As regard the basis of such costs order, having regard to all the submissions which I have heard, my order is that such costs are to be agreed or taxed on the indemnity basis but that the Applicants should be entitled to 90% of the costs taxed on that basis.

36. My reasons for this are that I do consider that the conduct of both the Directors of FSDL whom I have made personally liable, and of MGCG as the vehicle for supporting the Gallienne interests against those of the Applicants, take the facts of this in regard to the J&E Application in the first place "out of the norm" as regards ordinary reasonable (but defensive or disputatious) behaviour, and that it also surmounts the standard of "unreasonable" such that it would be appropriate to consider ordering indemnity costs. However, I also take into account the countervailing features and considerations which I feel militate against awarding the full force of an indemnity costs order.

37. These are that it is accepted that the Respondents were not dishonestly motivated in what they did, but were guilty of an unreasonable degree of ignorance and failure to understand the proper duties of company directors with regard to pursuing the interests of the company, as a separate legal entity, dispassionately and as a paramount consideration, to exercise the powers of directors only properly for the purposes for which they are conferred, and to take into account, again dispassionately, the prejudice to any particular group of shareholders which any particular action by the company or it is directors would impose.

38. Although I judge it to be a small point, I have also taken into account the circumstances of the Insolvency Application, being that whilst it was plainly provoked by the incorrect assertion, by Malcolm Gallienne and the Directors of FSDL, that the Applicants' investment had been a loan (which would *prima facie* justify an adverse costs order on the indemnity basis), the Application was not actually abandoned by the Applicants when that assertion was withdrawn, although, again, the amount of time taken in arguing this contingent and theoretical point in the context of the consolidated general hearing of the two Applications was not very significant.

39. I should add, for the avoidance of doubt, that if the above costs order were to result in a shortfall in actual recovery of the costs which I have ordered by the Applicants from MGCG, and Messrs Malcolm and Richard Gallienne, I do not consider it appropriate to make any further order giving any priority or even equality in respect of payment of those costs to the Applicants ahead of the ordinary creditors of FSDL in its liquidation. FSDL's position with regard to the substance of the dispute in this matter was really neutral, and it is not appropriate to bring the consequences of the costs orders which are appropriate against others within the general structure of the liquidation of FSDL.

MGCG's costs

40. I will make no order as to the costs of MGCG, as the unsuccessful Respondent to the winding up Applications.

FSDL's costs

41. In acknowledgment of the general principle relating to the actual company's costs of a winding up petition launched against it, I will order that FSDL's costs of the J&E Application, up to and including the first hearing thereof (on 6th June 2018) shall be paid as a cost of the liquidation.

42. The later costs of FSDL, if any, were incurred as a result of the unsuccessful resistance to the J&E Application. Whilst I am mindful that it could be said that those costs were incurred because of the unreasonable behaviour of the directors of FSDL which justified the bringing of the J&E Application in the first place, such that they should not, therefore, fall directly or indirectly on the Applicants, I do not accept this argument. The right to bring an application to wind up on the just and equitable grounds is an aspect of company law generally, and the general costs of vindicating that right by seeking the court's intervention are, in my judgment, properly viewed as a general cost of obtaining the winding up to which the Applicants then show themselves to be entitled, and are not to be subject to any special considerations which might be called in aid to affect the incidence of the *further* costs incurred, and as to which an order might be justified against others on the grounds either of the previous conduct of the company's affairs or the conduct of the proceedings themselves.

43. I do not consider the situation with regard to the Insolvency Application to be the same, because that Application only happened at all because of Malcolm Gallienne and the Directors of FSDL having wrongly asserted that the Applicants' investments were loans, and having failed to withdraw that assertion prior to the issue of the Insolvency Petition, as long afterwards as 10th October 2018. I therefore make no exception for any part of FSDL's costs incurred in respect of this Application, and hence my order can be correctly formulated by reference to time, as mentioned above.

44. Therefore, if and insofar as this order with respect to FSDL's costs might leave unpaid any costs actually incurred *by FSDL* (and I mean by FSDL in contradistinction to any other party) in respect of either application, then those further costs would in *prima facie* fall to be paid as a n ordinary unsecured debt of FSDL in its winding up.

45. However, that would have the potential effect that three quarters of this debt would ultimately fall to be paid by the Applicants, and one quarter by MGCG Ltd. This would seem to be wrong, and although it may be a relatively small sum, I am able easily to make an order in these proceedings to counter this effect. I will therefore do so, by ordering that insofar as any costs of FSDL do not fall to be paid as expenses of its liquidation, those costs are to be paid by MGCG.

46. The distinction between the situation regarding FSDL's own costs, and the earlier situation regarding any shortfall in recovery of the Applicants' own costs, is that the latter are extraneous to the liquidation process and the former are already a part of it.

47. Since it appears to me that costs which are directed to be paid in a liquidation will be paid on the indemnity rather than the recoverable basis, these orders are on the indemnity basis.

Conclusion

48. Overall, therefore, my conclusion as to the appropriate order to reflect the justice of the case is that it should be as follows. I will add a liberty to apply, in case of any problems which are perceived to arise.

    (1) Malcolm Gallienne and Richard Gallienne be treated as formally convened as Respondents to the combined Applications.

    (2) 90% of the Applicants' costs of and incidental to both of the combined Applications (including, for the avoidance of doubt, the injunction application of 1st June 2018 and subsequent hearings thereof), such costs to be taxed (if not agreed) on the

indemnity basis, shall be paid, jointly and severally, by the Respondents Mac Gallienne Construction Group Limited, Malcolm Gallienne and Richard Gallienne.

(3) There be no order as to the costs of Malcolm Gallienne Construction Group Limited.

(4) The costs of the company Fountain Street Developments Limited up to and including those of the hearing on 6th June 2018, assessed on the indemnity basis, shall be costs in the liquidation of Fountain Street Developments Ltd.

(5) The costs (if any) of the company Fountain Street Developments Limited incurred after 6th June 2018 shall be paid on the indemnity basis by Malcolm Gallienne Construction Group Limited.

49. Lastly, with regard to the costs of this costs application, I consider that the Applicants have substantially succeeded, and should be entitled to their costs, but only on the recoverable basis. That will therefore be added to the costs order under Paragraph 2 above, such that the final paragraphs of the appropriate order will be:

(6) The Applicants shall have their costs of this costs application on a recoverable basis, such costs to be added to the costs payable under Paragraph 2 above.

(7) Liberty to Apply.

Her Hon Hazel Marshall QC
Lieutenant Bailiff

20th December 2018