

## Costs against insolvency practitioners

The case of *Jolyon Smurthwaite -v- (1) Robin Simpson-Smith (2) David Emmanuel Merton Mond* [2006] EWCA Civ 1183 is a reminder that insolvency practitioners should be careful to preserve their utter independence from any party, either the debtor or any creditor. If not, they may be personally liable for costs.

### The facts

In this case, proceedings were brought by Mr Smurthwaite under section 262(2)(a) and (b) of the Insolvency Act 1986 to set aside an individual voluntary arrangement (IVA) proposed, and subsequently effected, by Mr Robin Simpson-Smith as debtor, of which Mr David Mond, a licensed insolvency practitioner, was formerly nominee and latterly the supervisor.

### The decision

On 23 April 2005 HHJ Rich QC, sitting as a judge of the High Court in the Chancery Division, set aside the IVA; and ordered that Mr Mond be personally responsible for 50 per cent of Mr Smurthwaite's costs of the issues upon which he, Mr Smurthwaite, had succeeded. Mr Mond appealed against that order.

Mr Mond was chairman of the creditors' meeting at which the proposal for the IVA was considered and approved. Mr Smurthwaite was admitted to vote in an amount of £47,827. He voted against the proposal. Approval to the proposal was secured by the vote of Miss Dianne Williams, with whom the debtor was then living at a property known as The Old Mill in Gloucestershire. She was admitted to vote in an amount of £124,734; of which £120,401 was said to be a debt owed to her in consideration for her giving up a claim to beneficial ownership of one half share in The Old Mill.

It transpired that a meeting between Mr Mond, the debtor and Miss Williams took place on 30 March 2004, the purpose of which was to discuss and finalise the proposal to creditors. At that meeting Mr Mond suggested to Miss Williams that her claim to a beneficial interest in the house be treated for the purpose of the IVA as a creditor claim; but, nevertheless, her claim to a beneficial interest in the property would be reserved.

HHJ Rich QC decided that "Miss Williams was not a creditor in respect of £120,401 on the basis asserted by [Mr Mond]. He was [treating] what was clearly a claim to a beneficial interest in the property as if it had been converted by an arrangement made after the interim order for the purpose of a creditors' meeting into a debt. This was, in my judgment, a material irregularity in [Mr Mond's] conduct at the meeting". Both the Judge at first instance and the Court of Appeal agreed that it was self-evident that Miss Williams should not have been admitted to vote in an amount of £124,000.

### The issues

As against the chairman of the creditors' meeting, the costs of a successful application under section 262 do not necessarily follow the event. An order should be made against the nominee personally only if his conduct fell below that of a reasonable licensed insolvency practitioner, acting reasonably.

Mr Mond had a duty not only to the debtor, or even primarily to the debtor, but also a duty to the creditors, including particularly Mr Smurthwaite. However, he had taken sides in the dispute; rather than recognising that it was plainly wrong to admit Miss Williams to vote in

respect of a debt, which was not, at that time, owed to her and in relation to which there was no binding obligation.

The effect of admitting Miss Williams to vote was that she procured that the IVA was approved by claiming as a creditor – so appearing to surrender her claim in the property; but, once the arrangement was approved, she reverted to asserting her claim against the property to the prejudice of the other creditors. Both the Judge at first instance and the Court of Appeal decided that (1) that was not a position that a reasonable insolvency practitioner, acting reasonably, could have regarded as acceptable; (2) by treating Miss Williams' claim to a beneficial interest in the property as if it were a debt - and so admitting her to vote – Mr Mond fell below the standard of conduct that could be expected from a professional insolvency practitioner; and, (3) Mr Mond should accordingly be liable for the costs on which Mr Smuthwaite succeeded.

### **Summary**

If a liquidator brings proceedings in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. If a liquidator brings or defends proceedings in the name of the company, he is not a party to the litigation; and would not usually be personally liable for the costs.

A liquidator may, however, be liable to pay costs personally as a non-party to proceedings brought by the insolvent company. The court would only exercise that jurisdiction in exceptional circumstances where there had been impropriety on the part of the liquidator. It was not sufficient that the liquidator had been unreasonable. There had to have been impropriety. The action had to be brought or continued in bad faith in the sense of the claim not being reasonably arguable or being brought for an ulterior purpose.

In *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 All ER 418 the Judge at first instance made such an order against the liquidator. However, he failed to consider the question of impropriety and the Court of Appeal held that there was nothing improper in the liquidator's conduct and accordingly allowed the appeal.

### **Comment**

For more information on the circumstances in which the Court may make an order for costs against a non-party, see the article by Simon Hobbs in our October 2006 Corporate and Commercial newsletter. However, it should be borne in mind that the caution necessary in all cases where an attempt is made to render a non-party liable for costs is greater in the case of a liquidator having regard to public policy considerations; namely the public interest demands that liquidators should not be exposed to personal liability for costs simply where they act for insolvent companies in performing their duties to collect in the assets of that company.

The normal remedy for a defendant to an action brought by a liquidator on behalf of an insolvent company would be to obtain an order for security for costs.

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