

Case: In the Matter of GP Cars (Herts) Limited [2018] EWHC 2639 (Ch), Mr Edwin Johnson QC, 11 October 2018

Synopsis: The respondent should not be required to pay the officeholder's legal costs of an application under s236 IA 1986 unless unreasonable conduct otherwise justifies such an order. There is no general principle that the officeholder should pay the costs of the respondent. The court has discretion to award the respondent its costs of complying with an order under s236 IA 1986 but there is no presumption that such costs will be awarded and, to the contrary, the court will take into account the fact that compliance by the respondent is a public duty.

Topics covered: Investigation powers/examinations; s236 IA 1986; costs of application and costs of compliance

The Facts

The administrators (now liquidators) of the company made an application under s236 IA 1986 against the company's former solicitors for, among other things, the production of books, papers and other records in their possession or under their control relating to the company. Chief Registrar Briggs ordered the production of such books, papers and other records matching certain specified descriptions.

The Chief Registrar awarded the liquidators their costs of the application (save for costs of defending certain aspects of cross examination, which were awarded to the former solicitors) (the "Application Costs"). The former solicitors sought payment by the liquidators of certain of their costs of compliance with the order, being the costs of producing documents beyond the provision of the company's files (the "Compliance Costs"). Their application failed.

The former solicitors appealed the decisions in relation to the Application Costs and Compliance Costs.

The Decision

On appeal, Mr Edwin Johnson QC (sitting as a Deputy Judge of the High Court) set aside the Chief Registrar's decision in respect of the incidence of the Application Costs. The Deputy Judge upheld the Chief Registrar's decision not to order payment of the Compliance Costs.

(i) Application Costs

R12.22 IR 2016 does not state in express terms how the costs of an application under s236 IA 1986 are to be dealt with. The Deputy Judge considered and applied the decision of Mr Registrar Jones in *Re Harvest Finance Limited* [2014] EWHC 4237 (Ch) (technical

bulletin 600) and held that: the court had a discretion in relation to the costs of an application to produce documents under s236(2) IA 1986; the production of those documents by the respondent is the performance of a public duty; as a general principle, the respondent should not be required to pay the officeholder's legal costs unless unreasonable conduct otherwise justifies such an order (a question of fact); and there is no general principle which requires that an officeholder should pay the costs of the respondent (also a question of fact).

The application gave rise to difficulties for the former solicitors in relation to the production of files where they had acted for third parties (as opposed to the company) and which were the subject of a duty of confidentiality owed by them to the third parties (the "Confidential Documents"). It would have been both a civil wrong and a regulatory offence simply to hand them over to the administrators. Further, the files might have contained materials subject to legal professional privilege and the former solicitors had no right to waive that privilege.

The Deputy Judge held that the Chief Registrar failed to take into account at least two relevant principles which should have guided the exercise of his discretion as regards the incidence of the Application Costs. First, a respondent should not be required to pay an officeholder's legal costs unless unreasonable conduct justifies such an order (*Re Harvest Finance Limited* applied). Secondly, a solicitor in the position of the former solicitors could not, in terms of both the regulatory and legal positions, simply hand over the documents sought in the application. In order to produce the Confidential Documents, the former solicitors required both an application under s236 IA 1986 to be made by the administrators and a court order to be made on that application. The former solicitors were also reasonably entitled to have had some involvement in the court's consideration of the approach to privileged documents. There was no "open invitation", express or implied, by the former solicitors to the administrators to make the application and the Chief Registrar had been wrong to treat this as the justification for an adverse costs order against the former solicitors.

Having set aside the Chief Registrar's decision in relation to the incidence of Application Costs, the Deputy Judge held that the appropriate order was that there should be no order as to such costs.

(ii) Compliance Costs

The relevant guidance in relation to the court's discretion to award Compliance Costs was that set out in the judgment of Registrar Jones in *Re Harvest Finance Limited*. In particular, that the court does not presume that costs of compliance will be paid and, to the contrary, will take into account the fact that compliance is a public duty and that this creates a strong reason for not awarding the costs of compliance.

The Chief Registrar had followed the decision in *Re Harvest Finance Limited* and noted that, although the respondents in that case were innocent parties, they had control of the relevant files and their public duty required them to provide those files. He rejected the argument that there was any presumption that the former solicitors should be awarded the Compliance Costs. The Deputy Judge concluded that the Chief Registrar's decision was one which it was open to him to make, in the exercise of his discretion.

Further, Registrar Jones' actual reasons for refusing to award costs of compliance in *Re*

Harvest Finance Limited included reasons which went beyond the particular circumstances of that case. Registrar Jones' reasons included, among others: the existence of the public duty which is of particular importance in the context of a suspicion of fraud; that payment of the costs would transform a public duty into a professional service; that the liquidation should not have to bear the financial burden resulting from the fact that records are not easy to access; and that if the respondent met with particular difficulty concerning the identification or transfer of files, it should have raised that difficulty before incurring costs.

Comment

In respect of both the Application Costs and the Compliance Costs, the Deputy Judge applied the principles in *Re Harvest Finance Limited*. He was wary of the argument that the approach of the court in relation to costs involving applications against third parties in other contexts, and pursuant to other statutory or common law jurisdictions, could safely be applied to applications under s236 IA 1986.

This decision is helpful in the context of costs in s236 IA 1986 (and s366 IA 1986) where decisions are often very fact specific and there is relatively little English law appeal authority from which broader principles can be discerned and more widely applied.

The appeal was not concerned with the merits of the s236 application itself, being concerned only with the incidence of costs. However, in practice, costs are likely to be a significant factor in an officeholder's decision to use s236 IA 1986. The decision in relation to the Application Costs raises questions regarding the affordability of s236 IA 1986 in the context of some insolvent estates where the respondent is not in a position to produce documents on a voluntary basis and a court order is therefore required. As to compliance costs, the Deputy Judge indicated that, when considering *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36 (technical bulletin 585) and *Singularis Holdings Ltd v PricewaterhouseCoopers (No.2)* [2016] UKPC 33 (technical bulletin 745), the latter decision confirmed the discretionary nature of the jurisdiction to award the costs of compliance with an order of the kind made in *Singularis*.



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