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ARTICLE

Re GP Cars (Herts) Ltd [2018] EWHC 2639 (Ch)

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Synopsis

Re GP Cars (Herts) Ltd [2018] EWHC 2639 (Ch) is a High Court decision regarding the appropriate costs order to be made following an application under s236 of the Insolvency Act 1986 ('IA 1986') for an order requiring a firm of solicitors to provide documents to a liquidator.

Facts

The liquidators of GP Cars (the 'Liquidators') identified payments totalling £38,000 that had been made by GP Cars to Duffield Harrison LLP, a firm of solicitors (the 'Solicitors'), and requested that the Solicitors provide them with all documents relating to GP Cars. While GP Cars had been a client of the Solicitors, the relevant payments related to transactions in which the Solicitors had been acting for a third party. The Solicitors provided files for the matters in which they had acted for GP Cars, but indicated that they were under a duty of confidentiality in respect of the remaining documents. After further correspondence the Liquidators applied to the court for an order to require the Solicitors to provide all books, papers and other records in their possession relating to GP Cars in accordance with s236 IA 1986.

S236 and costs

S236 of IA 1986 allows a liquidator or official receiver to apply to the court to summon any person whom the court thinks capable of giving information concerning the insolvent company and to require them to produce any books, papers or other records in their possession or under their control relating to that company.

The treatment of any costs resulting from this procedure is governed by r12.22 of the Insolvency (England and Wales) Rules 2016, under which the applicant's costs are to be paid as an expense of the insolvency proceedings unless the application was necessary because information had been unjustifiably refused by the respondent, in which case the court has the discretion to order that the respondent pay the applicant's costs. While the Insolvency Rules require reasonable travel expenses to be paid, all other expenses incurred by a respondent, including any legal fees incurred in responding to the application and the cost of obtaining and reviewing the required documents, are at the court's discretion.

First instance decision

Chief Registrar Briggs ordered the Solicitors to produce papers relating to the insolvent company. The Solicitors complied with the order, but there was an ongoing dispute over costs. Each party claimed their costs of the application (the 'Application Costs'). The Solicitors also claimed £5,040 being the costs of complying with the order (i.e., the time spent searching their systems, reviewing documents and making appropriate redactions (the 'Compliance Costs')).

The Chief Registrar found that there was 'an open invitation' from the Solicitors to the Liquidators to apply for the court order, i.e. the application had been made at the Solicitors' request. Because of this, and because the Liquidators were successful in their application, the Chief Registrar ordered that the Solicitors pay the Application Costs: he could 'not see why, in these circumstances, the creditors should have to pay for the application'. On the subject of the Compliance Costs, the Chief Registrar followed *Re Harvest Finance Ltd* [2014] EWHC 4237 (Ch) in finding that there was no presumption that the Solicitors should be awarded the Compliance Costs. The Chief Registrar considered that the provision of these documents was within the Solicitors' public duty and that there was no reason to exercise the court's discretion to order that the Liquidators should pay the Compliance Costs.

Appeal

On appeal, Edwin Johnson QC sitting in the High Court referred to four principles applicable to these types of cases which can be drawn from *Harvest Finance*:

(1) the court has a discretion as to the costs of applying for an order under s236 of IA 1986;

(2) the production of documents by a respondent is a public duty;

(3) a respondent should not be required to pay the office-holder's legal costs unless unreasonable conduct otherwise justifies such an order; and

(4) there is no general principle that the office-holder should pay a respondent's costs, and this would have to be justified on the facts of the particular case.

The court set aside the first instance decision on Application Costs. The Solicitors' behaviour was not unreasonable: a solicitor in the Solicitors' position had legal and regulatory obligations which prevented them from simply handing over the documents. The Solicitors required the protection of a court order before delivering the documents in which they owed a duty of confidentiality, and were reasonably entitled to participate in the hearing to provide guidance on the issue of privilege. In these circumstances, the Solicitors' conduct in requiring that the Liquidators obtain an order did not justify an adverse costs order (i.e. an order that the Solicitors pay the Liquidators' Application Costs). Nevertheless, the court found that the Solicitors could have been more cooperative, had provided documents in a delayed, piecemeal fashion, and had omitted key documents. Therefore the circumstances did not require that the Liquidators pay the Solicitors' Application Costs under the fourth *Harvest Finance* principle, and it was appropriate that each party bear its own Application Costs.

Several cases from different contexts were cited to argue that as a general principle an innocent third party required to comply with a court order should be able to recover the expense of complying. However, the court did not consider it appropriate to transpose approaches from other contexts and jurisdictions to an application under s236 of IA 1986: the Chief Registrar had been correct at first instance to find, following *Harvest Finance*, that the court has a sufficiently broad discretion to award Compliance Costs, but there is no presumption that such costs should be awarded and the fact that compliance is pursuant to a public duty is a strong reason for not awarding Compliance Costs. It was therefore appropriate that the Compliance Costs be borne by the Solicitors. The Court went on, *obiter*, to briefly say how it would have exercised that discretion had it been necessary to set aside the first instance decision on Compliance Costs. The judge stated that he would have denied the Solicitors their Compliance Costs for the same reasons that he concluded they should bear their own Application Costs. This was essentially a finding that the way in which the Solicitors responded to the Liquidators' approach and complied with the eventual order was subject to reasonable criticism such that they should have to pay their own costs.

Comment

The High Court's decision confirms the four key principles in *Harvest Finance*. It does not, however, provide much, if any, general guidance as to when an office-holder should be required to pay a respondent's costs, particularly costs of compliance.

Registrar Jones in *Harvest Finance* left open the possibility of the court exercising its discretion to award a respondent's costs as an expense of the liquidation, holding that 'there is a case for finding [the Respondents' legal costs] should be an expense [of the liquidation] insofar as those legal costs were reasonably incurred in fulfilling the Respondents' public duty' and 'it was reasonable to incur legal costs…in dealing with issues that had to be determined by the court'. In *GP Cars*, the Court concluded that it should not exercise the discretion regarding liquidation expenses in a manner inconsistent with the decision in relation to *inter partes* costs. So the Court would not exercise a discretion to essentially require GP Cars' creditors to pay the Solicitors' costs in circumstances where, in view of the Solicitors' conduct, the Court had not exercised a different discretion to require the Liquidators to do that.

The court's exercise of its discretions (including *obiter*) on the facts of *GP Cars* reiterates that respondents to applications under s 236 IA 1986 must take care, from the beginning of the relevant correspondence, that their response cannot reasonably be criticised. The ability to recover their costs, particularly for compliance, may not be certain but it can definitely be undermined by conduct which is perceived to fall short. Responding promptly, making clear an intention to assist to the extent possible, and identifying promptly any practical or legal obstacles are all obvious but important protections against that.

In both *Harvest Finance* and *GP Cars* the respondent to the application was a firm of solicitors, and their claim for Compliance Costs was for their own time spent locating and redacting the documents in question. A different issue arises where the respondent is, e.g. a professional services firm which needs to use lawyers to help with review of documents and considering issues of confidentiality. In those circumstances, the respondent incurs real out-of-pocket expenses. In *Harvest Finance* Registrar Jones indicated that actual out-of-pocket expenses may be recoverable: 'it is more likely the discretion may be exercised favourably for payments the Respondents have had to make to third parties.' In that case rather than hearing full argument and making a decision on the point Registrar Jones urged the parties to 'be sensible and reach an accord'.

After *GP Cars*, it remains uncertain when s 236 IA 1986 respondents can expect to recover their costs, particularly costs of compliance. In practice, a realistic sequence of events may be that an initial request for information is (sometimes necessarily) broad but through correspondence it is possible to identify and

agree a set of documents and information that liquidators really need and a timescale and basis on which it is possible to provide them. That may or may not require an application so that a respondent has the cover provided by an order, and it may or may not require a respondent's active involvement in such an application (e.g. to deal with privilege issues). The continuing lack of certainty as to when costs are recoverable means that liquidators and respondents (whether solicitors or others) alike have an incentive to be mindful of the effect of perceived unhelpfulness on any claim for costs, and also to 'be sensible and reach an accord' – maybe after all, this is not a bad place to be.

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