

COSTS – Provisional liquidation – Appeal against assessments – Application by provisional liquidator for leave to intervene in appeals without substitution as Appellant – Application by ex-director financing appeals for costs against provisional liquidator – Whether provisional liquidator "applicant" within Rule 29 – Whether ex-director a party to appeal or application – No – No power to make costs application – No power to make wasted costs order – Trib Rules 1986, r.29

LONDON TRIBUNAL CENTRE

NEIL FORRESTER - Applicant
and
R A J HOOPER, formerly provisional Liquidator
of Anglo-German Breweries Ltd (in liquidation) - Respondent

Tribunal: THEODORE WALLACE (Chairman)

Sitting in public in London on 30 January 2003

Andrew Young, Counsel, instructed by Vincent Curley & Co, for the Applicant

Adam Deacock, Counsel, instructed by Hammonds, Solicitors, for Mr Hooper

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DECISION

1. This was a costs application arising in unusual circumstances out of appeals by Anglo-German Breweries Ltd, which is now in liquidation, against VAT assessments, excise duty assessments and a civil penalty.

2. Neil Forrester is the former director of Anglo-German Breweries Ltd which was placed into liquidation by the High Court on 29 November 2002. R A J Hooper was appointed by the Court as Provisional Liquidator on 9 May 2002 and as liquidator on 29 November.

3. This application was listed in response to an application dated 15 November 2002 in the name of the company before the liquidation order naming the Commissioners as Respondents and was under the reference LON/2002/966. It was headed "Notice of Application for Wasted Costs" and applied "for a direction that the Provisional Liquidator does pay to Vincent Curley & Co wasted costs in the appeal." That appeal was dated 31 May 2002 against VAT assessments notified by letters on 24 May 2002 in the sums of £381,610, £119,630 and £123,935. It was given reference number LON/2002/966. On 6 June 2002 the Tribunal directed that it be consolidated with LON/2002/398 and 399 which were

appeals against assessments made on 8 May 2002 in the same total sum and for the same period in respect of which two VAT 641 forms were served on 9 May 2002 the day on which the provisional liquidator was appointed, in which a notice of appeal was served on behalf of the company on 9 May 2002, the same day.

4. On 6 June 2002 at a hearing when the company, the Commissioners and the provisional liquidator were all represented, the Tribunal among other matters directed that the appeal served on 31 May 2002 (in fact LON/2002/966) be consolidated with LON/2002/398 and 399. The appeals were in effect duplicated.

5. On 24 June 2002 by agreement the company withdrew its appeals numbers LON/2002/398 and LON/2002/399 which were against the VAT 641 "assessments" and the parties asked by consent for a direction that the Commissioners pay the Appellant's reasonable costs.

6. This left the appeal in LON/2002/966 outstanding, in effect removing the duplication.

7. Mr Young applied at this hearing for the application to be amended to make Neil Forrester the Applicant and R A J Hooper, formerly the provisional liquidator, the Respondent. This was on the basis that Vincent Curley & Co had been instructed by Mr Forrester.

8. Mr Deacon did not oppose the application for Mr Forrester to be named as applicant without accepting that Mr Forrester had the locus standi (or legal right) to make the application. I considered the application on that basis.

9. Valentina Sloane, Counsel, who attended on behalf of the Commissioners, made no representations, not being concerned with the subject matter of the application, although the Commissioners were originally named as Respondents.

10. The basis on which Mr Young sought an order against Mr Hooper was that the Provisional Liquidator by applying to the Tribunal by letters on 13 August 2002, seeking leave to intervene in LON/2002/398, 399, 8163 and 8168, made himself "an applicant" within Rule 29(1) of the Tribunals Rules 1986 in relation to the appeals.

11. He accepted that on this basis his costs application must be confined to the application in which the Provisional Liquidator was a party as opposed to the whole appeal or appeals.

12. Mr Young said that Mr Forrester was now making the application on the basis that the matter was being conducted on his instructions. He accepted that Vincent Curley & Co, whose instructions came from Mr Forrester as the director before the company was liquidated, had no authority to act for the company or to instruct him as counsel for the company once the winding-up order was made on 29 November 2002.

13. He produced no authority for the proposition that the Tribunal has power to make a wasted costs order and asked instead for indemnity costs. In my judgment there is no power to make a costs order otherwise than under Rule 29.

14. He said that the appeals were financed by Mr Forrester and that he would not have embarked on the appeals if he had not believed that at the lowest he had Mr

Hooper's acquiescence until 8 November 2001 when formally informed that the directors did not have the authority of the Provisional Liquidator.

15. Mr Deacon said that the application for wasted costs of the appeal was wholly without foundation and was bound to fail. The Provisional Liquidator was not a party to the appeal, nor was Mr Forrester. Mr Hooper only asked to be substituted as Appellant after the winding-up order. He said that the reduced application with different parties was also wholly tendentious. The letter of 13 August had not led to any hearing or application; Mr Forrester was not a party to the appeal at any time. Mr Forrester could not make himself a party to the application by the Provisional Liquidator by himself asking for costs now.

16. In my judgment there is no basis on which Mr Forrester could make an application under Rule 29. If Mr Hooper was an applicant within Rule 29(1) when he applied to intervene in August 2002, that did not make Mr Forrester a party also.

17. Mr Deacon said that if Mr Forrester was able to substitute himself as applicant in these proceedings, then Mr Hooper could ask for the costs of the present application. In my view that is correct.

18. In my judgment however Mr Forrester could not render himself a party in the way suggested. If any costs order had been appropriate against Mr Hooper, by reason of his application prior to the winding-up order, those costs would have been an asset in the liquidation and would not have gone to Mr Forrester.

19. My conclusion is that Mr Forrester had no power to make an application for costs. The Tribunal has therefore no power to make any order as to costs either to him or to Mr Hooper. I should add that there was nothing advanced by Mr Young would started to justify consideration of indemnity costs.

20. Finally I would observe that the position in a VAT appeal when a provisional liquidator is appointed is confused and unsatisfactory. Once a winding-up order is made the assets including rights of appeal pass to the liquidator. Before then the rights do not automatically pass. Although the order appointing Mr Hooper on 9 May 2002 empowered him to bring legal proceedings on behalf of the company, he did not do so but applied to intervene but not to be substituted. He appeared on 6 June 2002 and did not object to Vincent Curley & Co acting in relation to the VAT appeals but did not formally consent either.

21. By letter on 6 September 2002 the Tribunal stated that the proper course, if the Provisional Liquidator wished to intervene, was to apply to be substituted as Appellant under Rule 13. This was recorded at paragraph 12 of the judgment of Lawrence Collins J on the winding-up, *Re Anglo-German Breweries Ltd* [2002] EWHC 2458 (Ch) on 29 November 2002 and appears to have been accepted. What is unclear is what happens when a provisional liquidator neither asks to be substituted nor authorises the directors to continue the appeal for the present. Nor is it clear upon whom notices should be served by the Tribunal in such circumstances.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/2002/966

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