Neutral Citation: [2016] IEHC 197

THE HIGH COURT

[2015 No. 102 COS]

IN THE MATTER OF BOD INVESTMENTS (IRL) LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW

ENFORCEMENT ACT, 2001

BETWEEN

GERARD MURPHY

APPLICANT

and

WILLIAM O'FLYNN and DEIRDRE O'FLYNN

RESPONDENT

JUDGMENT of Mr. Justice David Keane delivered on the 18th of April 2016

Introduction

1. This judgment concerns an application for a declaration of restriction against the first named respondent, William O'Flynn, pursuant to s. 150 of the Companies Act 1990 ("the 1990 Act"). On the 13th July 2015, I gave an ex tempore ruling, refusing to make such a declaration against the second named respondent, Deirdre O'Flynn.

2. Before dealing with the merits of the restriction application against Mr O'Flynn, it is necessary to address, as a preliminary issue, the question of the proper enactment by reference to which that application should be considered and pursuant to which any appropriate order should be made. The issue arises because, between the 9th March 2015, when the motion grounding the application issued, and the 13th July 2015, when it first came on for hearing, the relevant provisions of the Companies Act 2014 ("the 2014 Act") came into operation on the 1st July 2015, in accordance with the terms of the Companies Act 2014 (Commencement) Order 2015 (S.I. No. 169 of 2015).

Companies Act 2014 – transitional provisions

3. S. 4 of the 2014 Act repealed the whole of the 1990 Act, including s. 150. The jurisdiction to make a declaration restricting a director of an insolvent company can now be found in s. 819 of the 2014 Act, which is couched in similar, though not identical, terms to those of the section it replaces.

4. S. 5 of the 2014 Act deals with savings and transitional provisions. S. 5 (7) gives effect to the particular savings and transitional provisions contained in *Schedule 6* to the Act. *Paragraph 1* of that schedule states that the continuity of the operation of the law relating to companies is not affected by the substitution of the 2014 Act for the prior Companies Acts. *Paragraph 7 (1)* of the same schedule goes on to state that, without prejudice to the generality of paragraph 1, the continuity of the law relating to the restriction of directors is not affected by the substitution of the relevant provisions of the 2014 Act for those of Part VII of the 1990 Act.

5. *Paragraph 7 (2)* of Schedule 6 provides, also without prejudice to the generality of paragraph 1, that any s. 150 restriction declaration made and in force before the commencement of s. 819 of the 2014 Act on the 1st July 2015 shall continue in force and operate as a restriction declaration made under s. 819.

6. Paragraph 8 (1) of *Schedule 6* provides that:

> "Any thing commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act."

7. However, s. 5 (8) of the 2014 Act expressly states that the section in which it is contained "is without prejudice to the generality of the Interpretation Act 2005 and, in particular, section 27 of it."

8. S. 27 (1) (e) of the Interpretation Act 2005 ("the 2005 Act") provides that the repeal of enactment does not:

"prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal …."

9. S. 27 (2) of the 2005 Act further provides that:

> "Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

10. While s. 5 (8) of the 2014 Act makes particular reference to s. 27 of the 2005 Act, it is also expressed to apply without prejudice to the generality of that Act. For that reason, it may be significant to note that s. 26 (2) (c) of the 2005 Act provides as follows:

"(2) Where an enactment ("former enactment") is repealed and re-enacted, with or without modification, by another enactment ("new enactment"), the following provisions apply:

…

(c) proceedings taken under the former enactment may, subject to section 27 (1), be continued under and in conformity with the new enactment in so far as that may be done consistently with the new enactment…."

11. Presumably for the avoidance of any doubt, *paragraph 15* of *Schedule 6* to the 2014 Act also states that: "Save for any express limitation by this Schedule of that Act's terms, this Schedule is without prejudice to the generality of the Interpretation Act 2005."

12. In summary, whereas paragraph 8 (1) of *Schedule 6* of the 2014 Act and s. 26 (2) (c) of the 2005 Act provide that an application for a declaration of restriction under s. 150 of the 1990 Act, which commenced but was not completed prior to the repeal of that section, may be continued and completed under s. 819 of the 2014 Act, those provisions apply without prejudice to the terms of s. 27 of the 2005 Act, whereby proceedings commenced under s. 150 of the 1990 Act may be continued as if the 1990 Act had not been repealed.

13. It seems to me that the word 'may' in *paragraph 8 (1) of Schedule 6* to the 2014 Act; s. 26 (2) (c) of the 2005 Act; and s. 27 (2) of the 2005 Act is used in the truly permissive sense (that is to say, the enabling rather than mandatory sense) in each instance, which has the practical effect of conferring a discretion upon the Court to continue and complete an application such as the present one under either s. 819 of the 2014 Act or s. 150 of the 1990 Act, as the requirements of justice dictate in the particular circumstances of each case.

14. In considering the requirements of justice, it is useful first to take an overview of the potential effect of the transitional provisions of the 2014 Act upon the various situations that will arise. First, in the case of a declaration of restriction under s. 150 of the 1990 Act made prior to the commencement of the 2014 Act, *paragraph 7 (2) of Schedule 6* provides that, subsequent to the commencement of the latter Act, it will continue in force and operate as a restriction declaration made under s. 819 of that Act. It seems that this will be the case even though the conduct at issue is necessarily conduct that occurred prior to the commencement of the 2014 Act.

15. Second, in a case such as the present, where a restriction application has been brought under s. 150 of the 1990 Act but not determined prior to the commencement of the 2014 Act, the provisions described above confer a discretion upon the Court to continue and determine that application under either s. 150 of the 1990 Act or s. 819 of the 2014 Act. As with the previous case, such applications will necessarily relate to conduct alleged to have occurred prior to the commencement of the 2014 Act.

16. Third, in cases where a restriction application has been brought under s. 819 of the 2014 Act, subsequent to the commencement of that Act, though in relation to conduct alleged to have occurred prior to its commencement, there seems to be no question but that the application must be determined under the provisions of s. 819. Different considerations would, of course, arise should such an application be brought under s. 150 of the 1990 Act, after the commencement of the 2014 Act, in reliance upon the terms of s. 27 (2) of the 2005 Act whereby proceedings in respect of any obligation or liability incurred under a repealed enactment may be instituted as if the enactment had not been repealed.

17. Accordingly, its seems to me that, once it is acknowledged that in every case within the first and third categories the relevant order, where made, must and will operate as one under s. 819 of the 2014 Act, it is immediately apparent that to treat any case in the second category as one governed instead by the provisions of s. 150 of the 1990 Act, is to create an obvious anomaly.

18. Imagine the situation of three different directors of three separate insolvent companies, where the honesty or responsibility of each director is in question in respect of broadly similar acts or omissions in the conduct of the affairs of his or her company alleged to have occurred in each case in the latter half of the year 2014. Imagine further that: in the case of the first, a restriction application was brought and determined under s. 150 of the 1990 Act just prior to the commencement of the 2014 Act on the 1st July 2015; in the case of the second, a restriction application was brought under s. 150 of the 1990 Act before the 1st July 2015 but not determined until after that date; and in the case of the third, a restriction application was brought and determined under s. 819 of the 2014 Act after the 1st July 2015. Were each application to succeed, it seems to follow that the first and third directors would be the subject of a s. 819 restriction declaration, whereas, by sheer fortuity from the perspective of the director in the second case, the possibility arises that he might instead be the subject of a s. 150 restriction declaration by operation of the terms of s. 27 (2) of the 2005 Act.

19. For that reason, it seems to me appropriate, at least in the absence of any significant countervailing factor, to consider an application in the second category, such as the present one, in accordance with the terms of paragraph 8 (1) of Schedule 6 to the 2014 Act – that is to say, as one that falls to be determined pursuant to the terms of s. 819 of the 2014 Act.

20. In reaching that conclusion, I do not disregard the potential effect of the two significant differences between the old section and the new one.

21. The first such difference is that the test for restriction has been slightly recast under s. 819 of the 2014. Under the new section, the defence to restriction whereby it is open to a director to establish that he has acted honestly and responsibly in relation to the conduct of the company's affairs is now expressly required to be considered by reference to that conduct whether before *or after* the company became insolvent. Moreover, that defence now includes an express requirement that the respondent director establish that he or she has, when requested to do so by the liquidator, co-operated as far as could reasonably be expected in the conduct of the winding up.

22. There is plainly an argument to be made that these differences in form between the words of the new s. 819 and those of the old s. 150 add nothing of substance to the requirements of the relevant defence. Under both formulations, the respondent director must satisfy the Court that there is 'no other reason why it would be just and equitable' to make a restriction declaration. In La Moselle Clothing Ltd v Soualhi [1998] 2 I.L.R.M. 345 at p. 352, Shanley J. expressed the view that this requirement "allows the court to take into account any relevant conduct of the director after the commencement of the winding up or the receivership (for example, any failure to co-operate with the liquidator or receiver) in deciding whether or not to make an order under s. 150(1) of the Companies Act 1990." Decisions such as that of MacMenamin J. in *Re DCS Ltd* [2006] IEHC 179 (at para. 42), demonstrate that this Court has consistently construed and applied s. 150 in that way.

23. No doubt it was a consideration of authorities such as these that prompted the following observation in the judgment of Murphy J.

in *Cahill v. O'Brien* [2015] IEHC 817 at para. 54:

> "The Court notes that s. 819 does not differ significantly to s. 150 of the 1990 Act and such differences as exist merely involve giving statutory effect to considerations which were previously considered by courts in practice in applications of this nature."

24. Even if it were possible to advance an argument that the difference in wording between the old and the new section creates some difference of substance in the test to be applied, capable in turn of supporting the contention that a respondent director should not be deprived of whatever benefit might inure from the application of the old test, that is not an argument of any relevance to the present application. In this case, the liquidator has not sought to raise any issue of dishonesty or irresponsibility on the part of Mr O'Flynn after the company became insolvent, nor is any issue raised of any failure by him to co-operate with the liquidator. The resolution of any such argument as there may be should, therefore, await the presentation of a case in which it directly arises.

25. The second difference between the terms of the old section and those of the new one is the greater capitalisation requirements that the new section imposes in respect of any company with which a restricted director may lawfully be involved during the period of his or her restriction. Under s. 150(3)(a)(ii) of the 1990 Act, the applicable capitalisation requirement in respect of any such company - other than a public limited one - was €63,486.90, whereas under s. 819(3)(a)(ii) of the 2014 Act that requirement is €100,000.

26. Whatever argument may be advanced that the application of the new capitalisation requirements of s. 819 to any person the subject of an order made under that section in respect of conduct occurring prior to its commencement amounts to a breach of the constitutional prohibition on retroactive penal legislation, is one that would have to take account of the decision of the Supreme Court in *Minister for Social Community and Family Affairs v Scanlon* [2001] 1 I.R. 64. As I perceive it, that decision is authority for the proposition that a subsequent modification of, or limitation upon, a statutory concession, as opposed to a vested right, does not offend the prohibition. A company directorship is as much a creature of statute as a company itself. I hasten to add that, in the present case, there is no question before the Court regarding the constitutionality of paragraph 8 (1) of Schedule 6 to the 2014 Act or of any other provision of that Act.

27. The same authority would have to be considered and, it seems to me, distinguished in respect of any argument advanced that either the double construction rule or the presumption against retrospective effect prevents the application of the capitalisation requirements of s. 819 of the 2014 Act to a respondent director based upon his or her conduct prior to the commencement of that Act, as expressly permitted by the terms of *paragraph 8 (1)* of Schedule 6 to that Act.

28. It may or may not be relevant, in the context of any such argument there may be, to note that the concern of the legislature in this respect, prior to the enactment of paragraph 7 (2) of Schedule 6 to the 2014 Act, appears consistently to have been to ensure that any increase in capitalisation requirements applicable to a restricted directorship should take effect only in relation to a declaration made after the commencement of the primary or secondary legislation providing for that increase. Thus, s. 41 of the Company Law Enforcement Act 2001, having increased the relevant capitalisation requirements under s. 150 (3) of the 1990 Act in subs. (1), goes on to provide in subs. (2) that those amendments are not to have effect in relation to any declaration made prior to the commencement of that section. Neither that section, nor any other provision of the 2001 Act, attempts to prohibit the making of a declaration governed by the newly increased capitalisation requirements in respect of dishonest or irresponsible conduct occurring prior to the introduction of those increases.

29. Similarly, neither s. 835 (2) of the 2014 Act, which provides that any increase to any capitalisation requirement specified in s. 819, subsequently made by order of the Minister, "shall not operate to effect any increase in relation to a declaration under *section 819 (3)* made before the commencement of the order", nor any other provision of the 2014 Act, attempts to exclude from the effect of any such increase, a declaration made after the commencement of such order but concerning dishonest or irresponsible conduct that occurred before its commencement.

30. In summary, while I do not purport to express a definitive view on any of the arguments just described, as none of them was directly raised in the context of the present application, I have been unable to identify any applicable principle of construction or other countervailing consideration in the circumstances of the present case, sufficient to displace the conclusion I had otherwise reached that, in accordance with the terms of *paragraph 8 (1) of Schedule 6* to the 2014 Act, it is appropriate to deal with this application pursuant to the terms of s. 819 of the 2014 Act.

Background

31. The principal facts in relation to the company's trading history are not in dispute. It was incorporated on the 7th September 1994 and commenced trading at or about that time. While it was originally engaged in the business of security broking and fund management, in latter years its activities appear to have been increasingly focussed upon, or limited to, the operation of a single public house premises. The applicant was appointed as liquidator of the company at a meeting of the creditors of the company on the 18th of April 2014.

Formal proofs

32. No issue has been raised on the formal proofs which require a declaration of restriction to be made unless a defence is made out. It is the uncontroverted evidence of the liquidator that the company was unable to pay its debts at the commencement of its winding up and that each of the respondents was a director of the company at the material time. The liquidator provided a report in the prescribed form to the Director of Corporate Enforcement under cover of a letter dated the 2nd October 2014. The Office of the Director of Corporate Enforcement wrote to the liquidator on the 8th January 2015, informing him that he was not relieved of the obligation to bring the present application. The application commenced by way of notice of motion issued on the 4th of March 2015.

Have the directors acted responsibly?

33. The liquidator has drawn a number of aspects of the company's affairs to the Court's attention as relevant to the issue of whether the directors have acted responsibly. The matters to which the Court must have regard in assessing the position are primarily, though not exclusively, those set out by Shanley J. in *La Moselle Clothing Ltd v. Soualhi* [1998] 2 ILRM 345 at p. 352. They are:

> "(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts, [as amended].
>
> (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
>
> (c) The extent of the director's responsibility for the insolvency of the company.

(d) The extent of the directors' responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.

(e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

34. Against that background, the liquidator points to the following:

(i) The company had to be restored to the register on the 26th March 2000 and, again, on the 24th October 2005, having been struck off in each instance for failure to file accounts. After the restoration of the company, the directors again failed to file the appropriate accounts. This demonstrates a persistent failure to comply with the obligations imposed on both the company and its directors to maintain proper books and records and financial information and persistent breaches by the company of its obligation to make returns in accordance with the Companies Acts.

(ii) The company failed to discharge CGT liabilities in the sum of €93,785 arising in the year 2005 and €478,865 in 2006; PAYE and PRSI liabilities amounting to €41,211 between 2008 and 2011 (inclusive); and VAT liabilities in the aggregate sum of €183,340 for the period 2006 to 2011 (inclusive). This demonstrates, at the very least, a lack of commercial probity and want of proper standards on the part of the company's directors in using monies due to the Revenue Commissioners, including fiduciary taxes, to keep the company afloat and in permitting the company to continue trading while insolvent over an extended period.

35. In the course of a very brief affidavit that he swore in response to the application on the 20th May 2015, the first respondent Mr O'Flynn confirmed that he had 'no objection' to an order being made against him. He has not sought to contest the application or any of the evidence underpinning it. I accept the liquidator's evidence and, accordingly, the first respondent has failed to satisfy me that he acted responsibly in relation to the conduct of the company's affairs.

The second respondent

36. I have already declined to make a declaration of restriction in respect of the second named respondent Mrs O'Flynn. I did so on the basis that she has satisfied me on the balance of probabilities that she has acted honestly and responsibly in the conduct of the company's affairs.

37. Had the evidence adduced on behalf of Mrs O'Flynn gone no further than the assertion that she was a mere nominal or token director of her husband's company who assumed that role solely on the basis of the emotional ties between them, I could not have been so satisfied. Over thirty years ago now, Carroll J. felt constrained to point out in Re Hunting Lodges (In liquidation) [1985] ILRM 75 at p. 85:

"Any person who becomes a director takes on responsibilities and duties, particularly when there are only two…. A director who continues as director but abdicates all responsibility is not lightly to be excused."

38. The common law duty of a director to acquire and maintain a knowledge and understanding of a company's business sufficient to enable him or her to act properly as such, the articulation of which by Parker J. in *Re Barings plc (No. 5*) [1999] 1 BCLC 433, was accepted by the High Court (per Finlay Geoghegan J.) in *Re Tralee Beef and Lamb Limited* [2004] IEHC 139 and later endorsed by the Supreme Court in *Re Mitek Holding Ltd: Grave v. Kachkar* [2010] 3 IR 374, precludes a director from successfully arguing that passive or unquestioning trust (whether in another director, a manager or an external professional adviser and whether based on emotional ties or other considerations) amounts to responsible conduct. Similarly, the abdication of responsibility as a director during the trading life of a company cannot be cured or cancelled out by subsequent compliance with the further and quite separate duty to co-operate with the liquidator after the commencement of the winding-up.

39. As the Court of Appeal recently confirmed in the case of *Director of Corporate Enforcement v. Walsh* [2016] IECA 2, it would be contrary to the whole notion of proper corporate regulation to exonerate passive directors from liability or relieve them from restriction on the basis of the passive nature of their role. To limit the test for irresponsibility to cases where the evidence demonstrates, in addition, "some real moral blameworthiness" by reference to the decision of Carroll J. in *Re Hunting Lodges*, is to conflate the test for fraudulent trading under s. 297 of the Companies Act 1963 (which was at issue in that case) with that for irresponsible conduct under s. 150 of the 1990 Act or s. 819 of the 2014 Act.

40. However, in this case the uncontroverted evidence of Mrs O'Flynn went significantly further. In the affidavit that she swore on the 18th June 2015 in opposition to the liquidator's application, she has averred, in essence, that she was actively deceived by her husband, the first respondent, to the extent that, when she learned of hitherto undisclosed issues from a third party, moved immediately to retain an independent legal adviser prior to the decision to wind up the company and has since discovered, as she avers, that her signature as a director was forged on a number of identified documents executed on the company's behalf. These are serious matters, which it is hoped the liquidator will cause to be properly and thoroughly investigated by the appropriate authorities.

41. For present purposes, it is sufficient to refer again to the statement of Carroll J. in *Re Hunting Lodges*, at p. 85, that a director who abdicates all responsibility is not lightly to be excused, but:

"If she had reasonably endeavoured to keep abreast of company affairs and had been deceived…it might be possible to excuse her."

42. It was for that reason that I declined to make a declaration of restriction as against the second respondent Mrs O'Flynn.

Conclusion

43. For the reasons I have already set out, I will make a declaration of restriction in relation to Mr O'Flynn pursuant to the terms of s. 819 (1) of the 2014 Act, having already declined to make such a declaration as against Mrs O'Flynn.