Neutral Citation Number: [2008] IEHC 456

THE HIGH COURT

2007 48 COS

IN THE MATTER OF ANDERSON KERSHAW LIMITED
IN THE MATTER OF ANDERSON CONFORMING LIMITED
AND
IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
ANTHONY DOMINIC COLLINS AND PATRICIA O'CONNELL

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 11th day of April 2008

1. This as an application by the Director of Corporate Enforcement ("the Director") for the disqualification of the respondents pursuant to section 160(2)(h) of the Companies Act 1990, as amended. That section provides as follows:

> *"(2) Where the court is satisfied in any proceedings or as a result of an application under this section that*
>
> > *(a) - (g) .....*
> >
> > *(h) - a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act 1982, to the company and the name of which, following the taking of other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section; or...*
>
> *the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit."*

2. Relevant to this application also in this section 160 (3A) of the 1990 Act, as inserted by the Company Law Enforcement Act 2001 which provides as follows:

> *"The court shall not make a disqualification order under paragraph (h) of subsection (2) against a person who shows to the court that the company referred to in that paragraph had no liabilities (whether actual, contingent or prospective) at the time its name was struck off the register or that any such liabilities that existed at that time were discharged before the date of the making of the application for the disqualification order."*

3. There is no dispute arising on this application that the respondents are the persons who were directors of the companies on the date upon which the Director sent a letter under s. 12(1) of the 1982 Act, and that those companies were struck off the register following the sending of that letter. Neither is there any dispute that following the sending of that letter, no annual returns then outstanding were delivered to the Registrar of Companies within one month of the date of that letter, and that the notice referred to in s. 12 of the 1982 Act was published in Iris Oifigiúil with a view to striking the name of the companies off the register.

4. Following the sending of the section 12 letters, and the publication of the notice in Iris Oifigiúil both companies were struck off the register and were dissolved.

5. Subject to addressing a submission on the respondents' behalf in relation to the service of the letter under s. 12 of the Act, the Court is satisfied that all the statutory formalities have been complied with by the Director, prior to the bringing of the present application.

6. The application before the court is grounded principally upon the affidavit of Eamonn Mc Hale, an officer of the Director of Corporate Enforcement, sworn on the 2nd February, 2007. The essential facts in relation to each company are the same. He avers that on the 3rd October, 2003, being the date upon which the section 12 letter was sent to the companies, the respondents were notified to the Companies Registration Office as being the directors of the company, and that by that date no notice had been received by the Companies Registration Office indicating that the respondents, or either of them, had ceased to be directors of the companies.

7. He states also that as of that date, the registered office of the companies was notified as being 56, Fitzwilliam Square, Dublin 2, and that on that date a letter was sent to each company by registered post at its registered office 56 Fitzwilliam Square, Dublin 2 pursuant to s. 12(1) of the 1982 Act. He goes on to state that following the sending of that letter to each company, neither company submitted annual returns and that subsequently on the 12th December, 2003 each company was struck off the Register of Companies pursuant to s. 12(3) of the 1982 Act, and that the said strike off occurred following the taking of the other steps specified in s. 12 of the 1982 Act consequent upon the sending of those letters.

8. Mr Mac Hale states also that on one previous occasion Anderson Kershaw Ltd was struck off the Register of Companies, namely on the 29th June, 1999 and was dissolved on the 9th July, 1999, following which it was restored to that register on the 7th July, 2000 pursuant to an application made to the Registrar of Companies in accordance with the provisions of section 311A of the Companies Act 1963, after all outstanding annual returns had been filed.

9. Mr Mac Hale further states that these section 12 letters to which I have referred, and which were sent by *registered post* as required, were returned by the postal authorities marked "*Gone Away*".

10. It is further averred that on the 21st June, 2006, letters were sent by registered post to each of the respondents herein in relation to both companies, to the addresses of the said directors at Ballycorus Road, Kilternan, Co Dublin. That is a different address for these respondents than was contained in the records available in the Companies Registration Office. But it appears that this new home address for the respondents had been ascertained. Those letters were not returned by the postal authorities as undelivered. He refers to the fact that those letters invited the respondents to show cause, by written reply, why an application for disqualification

orders should not be made, and that no such reply was received by the Director prior to the commencement of the present applications. An affidavit of service in respect of the service of these letters on the respondents by registered post has been sworn by Ms. Deirdre McElroy, a legal secretary in the office of the Director, and filed herein.

11. There has also been filed an affidavit of service sworn by Brendan Byrne, Court Process Server, wherein he avers that on the 17th February, 2007 and on the 28th February, 2007 respectively, he personally served the respondents with a copy of the Notice of Motion herein and the grounding affidavits relied upon, together with the exhibits referred to therein.

12. The respondents filed a replying affidavit sworn on the 20th March, 2007 in which they set out briefly the history of the two companies, Anderson Kershaw Limited and Anderson Conforming Limited. It appears that the first company was set up in 1994. It is described by them as being a small company offering services from its office at 56, Fitzwilliam Square, with a small number of part-time employees and one full-time staff member. They state that they engaged the services of a form of accountants to look after their tax affairs and company filing obligations, as well as their own personal tax affairs. They state that twice per year they would sign any documents which these accountants asked them to sign.

13. The first named respondent avers that as his work for the company involved him in travelling around the country he expected that his accountants were looking after the companies' affairs and that the small cohort of staff at the company's office were looking after appointments being made by customers of the company.

14. The respondents aver that they engaged a lady as office manager for which she was paid a basic salary and commission on sales, and that she had full in-office authority, and that she from time to time engaged students on an hourly basis to assist with the making of appointments. They state that their accountants set up direct debit arrangements for the monthly payment of taxes, and that they were assured by their accountants that all such matters were being properly attended to.

15. They state that the second named company, Anderson Conforming Limited, was set up by them in the year 2000 for the purpose of carrying out one particular large commission contract with a hospital in Raheny, Dublin, but that after about three weeks work on that contract they were informed that their services would no longer be required.

16. The deponents then outline a number of matters which they say caused their main problems with Anderson Kershaw Limited. Firstly, they state that a customer brought to their attention the fact that Anderson Kershaw Limited had been struck off the Companies Register for failure to file returns, and that the first named respondent had to bring a clerk from the accountancy firm to the Companies Registration Office in order to file the outstanding returns, having been informed by the accountants that it often happened that a company would be struck off the register and that they would sort the matter out. That company appears to have been restored to the register following the filing of the outstanding returns.

17. Secondly, it is averred that some tax assessments were received by the company and that when these were brought to the attention of the accountants they were again assured that these would be sorted out, and the first named respondent states that he presumed that everything was being attended to by the accountants thereafter.

18. Thirdly, the deponents describe a lack of satisfaction with the manner in which the office manager employed by the company was carrying out her duties whereby customer business was being lost. The first named respondent states that this person was let go, following which the company was brought before the "Labour Tribunal" (sic). This resulted in a small ex gratia payment to that employee.

19. Fourthly, it is averred that the first named respondent discovered that the accountants had done very little work on behalf of the company, following which he instructed a solicitor to request all the company's books and records from the accountants, who refused to hand them over without payment of additional monies. Eventually the accountants returned these books and records.

20. This affidavit then states that at some point the lease of the company's office came to an end and that a renewal would have involved a rent three times as high as the rent previously paid, and in addition would have required an expenditure by the company in relation to a roof repair. It is averred also that when the first named respondent attempted to engage other accountancy firms to help sort out the company's problems, none would take on the work without a substantial payment of fees "up front", which was not possible. The company then moved its office to a Portacabin in order to keep going as best it could. The company attempted to continue in this way but they were unable to sort out matters outstanding without being able to engage other accountants. This resulted in the respondents attempting to continue trading by using the second named company, Anderson Conforming Limited, and it is averred that these respondents attempted unsuccessfully to raise personal finance to assist in this end. However, the unresolved difficulties made it impossible for the business to continue trading. By this time also, this company, as well as Anderson Kershaw Limited for a second time, had been struck off the register of companies.

21. This grounding affidavit concludes by setting out a number of matters which were critical to these events. In addition to these matters already stated, it is averred that everything happened very swiftly, that as customers fell away cash flow dried up, that the first named respondent's mother became very ill at his house and subsequently died causing him great distress which took a long time to get over, that the strain of these events had a very draining effect on the first named respondent personally, that since the collapse of the companies' business he has borrowed heavily and, finally that he hopes to do a sales course in Life Insurance. With regard to this last matter he requests the court not to make an order which would prejudice his chances of achieving this objective, and states that he has no intention "of being involved in further limited company operation in the future"(sic). He states that he never set out to do anything other than what was right and proper, and feels that he was very unlucky in the way circumstances occurred as outlined in his affidavit.

22. Mr McHale has sworn a second affidavit in reply to the respondents' first affidavit. *Inter alia*, he refers to the fact that in the financial statements filed by Anderson Kershaw Limited for the purpose of restoring that company to the register following it being struck off the register and dissolved in July 1999, the accountants referred to by the respondents had qualified their audit statement by stating that they had not received full information and explanations from the company which they considered necessary in relation to cash sales, and he notes that accordingly it would appear that the company was not keeping proper books and records as required. He believes that it is clear from these statements that the company was insolvent at least by 31st August, 1997 when the deficit on the company's balance sheet was in the order of IR£81,283, and that this deficit had increased by 31st August 1998 to a sum of IR£144,656, and that the company's assets were negligible. He states also that the indebtedness of the company to the Revenue Commissioners constituted a very significant portion of these deficits. He is of the opinion that the company was grossly undercapitalised and that it relied upon the amounts owing to the Revenue for working capital. There were no bank overdraft facilities in place. No accounts for any period after 31st August, 1998 have been exhibited, and no annual returns were filed after 7th July, 2000. He exhibits also a judgment obtained by the Revenue Commissioners and which was registered against the company in July 2003

in the sum of €274,061.83. This sum appears to have been based on estimates and Mr McHale speculates that consequently the true figure of indebtedness to the Revenue might well exceed the amount for which judgment was obtained.

23. Mr McHale avers that no annual returns whatsoever were filed for Anderson Conforming Limited.

24. Mr McHale notes also that the affidavit filed by the respondents does not set out in any detail what, if any, steps were taken by the respondents to address the indebtedness of Anderson Kershaw Limited, and that it ought to have been apparent to the respondents that the company was insolvent, and yet it continued to trade thereafter. He does not accept that the respondents can simply seek to blame their accountants for what occurred, since in order to sort out the company's difficulties it was necessary for the company to receive funds, and that without this cash injection the accountants would have been unable to sort out the problems which the company faced. He is very critical also of the decision taken by the respondents to simply cease operating the business through Anderson Kershaw Limited, and continuing to attempt to trade through Anderson Conforming Limited.

25. In response to Mr McHale's second affidavit, the respondents have filed a second affidavit in which they comment on a number of matters raised by Mr McHale in his affidavit, such as his comment in relation to the accountants' qualification of their audit statement. It suffices to say that the respondents do not accept that they failed to keep proper books, and state that all but one payment was made to the company by cheque. Other points are briefly addressed but it is unnecessary to set out all those matters in detail now. The respondents have filed two affidavits from former employees of the company which seek to confirm, *inter alia*, that no cash sales were made.

Submissions

26. For the Director, Michael Cush SC has submitted that all the necessary proofs have been adduced by the Director in accordance with the statutory requirements of s. 160 of the Act, and in this regard has referred to the judgment of Finlay Geoghegan J. in *Clawhammer Limited & other companies; Director of Corporate Enforcement v. McDonnell and ors* [2005] 1 I.R. 503. He submits in particular that the Director has shown that the respondents were directors of the companies at the relevant time, when a letter was sent to the respondents under s. 12(1) of the Companies (Amendment) Act 1982, and that the companies were struck off the register after the other required steps had been taken. He submits that it is not required that the Director establish the insolvency of the companies, but, rather, a statutory defence to the application exists where the respondents can show that the companies in question had no liabilities at the date on which they were struck off, or that such liabilities as existed were discharged before the date of the making of the application for the disqualification order. He submits that, absent any mitigating or aggravating circumstances, the period of disqualification should be five years, and in this regard also, he has referred to the judgment of Finlay Geoghegan J. in *Clawhammer*, already referred to. He submits that there are no real mitigating circumstances in this case in spite of the explanations sought to be given by the respondents for the difficulties which these companies encountered, and that there are in fact aggravating circumstances identified by Mr McHale in his second affidavit, namely that the respondents allowed the companies to be struck off the register rather than allowing them to be wound up, that Anderson Kershaw Limited was allowed to continue trading in the face of significant indebtedness and insolvency, and that trading was shifted to Anderson Conforming Limited when it became impossible under Anderson Kershaw Limited.

27. Niamh McHugh BL has appeared for the respondents, and has made submissions to the effect that the Director has failed to properly send the registered letter required to be sent to the companies in accordance with the provisions of s. 12 of the 1982 Act, and that accordingly the Court cannot make the order sought for the disqualification of the respondents. The factual basis for this submission is the uncontroverted evidence that the letters sent on the 3rd October, 2003 to each of the companies by registered post to the registered office recorded on the companies' file at the Companies Registration Office, namely 56, Fitzwilliam Square, Dublin 2, were each returned undelivered and marked "Gone Away", and that at that date the companies had no access to these premises.

28. She submits that the companies were therefore not properly served with this letter, and that the Director ought then to have made an application to the Court for an order for substituted service of these letters to an address which would have ensured that the companies would have obtained actual knowledge of the contents of the letters so that action could have been taken by them on foot of same in order to avoid the consequences of failing to so act. She points out also that when the Director was proceeding to embark on the present applications for disqualification, he took the step of identifying a current address for the respondents, which was different from the address for them which was contained on the companies records in the Companies Registration Office and from which the respondents had in the meantime moved, and that the same efforts to ensure that the companies actually received the s. 12 letters should have been made. By failing to do so, the Director has, in her submission, deprived the companies of the opportunity of taking steps to ensure that the companies were not struck off, as warned in the letters, by ensuring that any outstanding returns were filed within the permitted time. She submits that the Director knew or ought to have known that the respondent directors were not on actual notice of the s. 12 letters. She refers also to the fact that when the first named respondent had learned of the first occasion that Anderson Kershaw Limited was struck off the register of companies, he had taken steps to have that company restored to the register by filing the outstanding returns.

29. Ms. McHugh has drawn an analogy between what has happened in this case regarding the non-receipt of the s. 12 letters and the situation which arises where an order for judgment is obtained against a company in default of appearance. In the latter situation, she submits, it is necessary for the plaintiff to satisfy the Court that the proceedings were properly served upon the company or that an order for substituted service has been complained with, in order to ensure that the defendant had a reasonable opportunity to be aware of the existence of the proceedings. She points to the fact that in such a situation there is a procedure for applying to set aside a judgment obtained in default of appearance where it can be shown that the requirements of service of the proceedings have not been fully complied with. She refers also to the requirements as to service of proceedings in relation to the enforcement of a foreign judgment in this jurisdiction, and submits that this Court should not grant the orders sought herein where it cannot be satisfied that proper efforts to serve the companies with the s. 12 letters were not made by the Director, especially when he could have ensured that the companies were aware of these letters by sending them to addresses which he could at that time have discovered in respect of the directors of the companies concerned.

30. In response to these submissions, Mr Cush has submitted that the fact that the s. 12 letters were sent by registered and returned marked "gone away" does not deprive the Court of its jurisdiction to make the disqualification orders sought herein, or provide any kind of discretionary basis for refusing to make such orders. He refers to the statutory obligation upon a limited liability company under s. 113 of the Companies Act 1963 to file particulars of its registered office to the Registrar of Companies and to give notice of any change in the situation of the registered office, and to the fact that it is an offence on the part of the officers of a company, as well as by the company itself, to fail to give notice of any change in the situation of a company's registered office. In this regard he refers to the respondents' averment in their first affidavit that when the company no longer had access to its office at 56 Fitzwilliam Square it traded out of a Portacabin in Shankill Business Centre. He submits that the respondents cannot now complain about the failure to receive the s. 12 notices when the respondents themselves failed to update the records of the company in the

Companies Registration Office in that regard, and that they have produced the very situation which they complain has prejudiced the companies in relation to complying with the letters in question.

31. Mr Cush also makes the point that the respondents cannot be heard on the present application to say that the companies were taken by surprise in relation to being struck off the register, or that in the absence of receipt by the companies of the s. 12 letters by the companies they themselves were unaware of the consequences of failing to file returns for the companies in respect of which they were directors at the relevant time, since on a previous occasion in 1999, as they have themselves accepted, Anderson Kershaw Limited, was struck off the register for failing to make returns, and was restored to that register following steps being taken in that regard by the first named respondent.

Conclusions

32. It is important to state that officers, including directors, of a company must be taken to be aware of the statutory obligation to file annual returns for the company of which they are officers. Similarly they cannot contend successfully that there were unaware that if those returns are not filed for one or more years, as required, the company was at least at risk of being struck off the register. The privilege of being able to trade under the cloak of limited liability where certain protections are afforded to the company and those who own its shares is balanced in the interests of the creditors of the company by a corresponding obligation on the part of the company and its officers to comply with the statutory requirements of the Companies Acts. These are not requirements devoid of real purpose. They exist for the protection of creditors so that they can be aware, *inter alia*, of the financial status of a company with which they have or are considering having dealings. The requirement to file annual returns and to update when appropriate the other information required to be filed, such as the situation of the registered office, the names and addresses of the officers of the company, and details of any share transactions which have taken place during the previous twelve months, are all important pieces of information which must be publicly available at all relevant times as required by statute.

33. In the present case it is not disputed that the companies failed to comply with these requirements and it is insufficient for directors of the company to state, as they have, that they appointed accountants to take care of all these matters for them. The appointment of accountants who will have the expertise to look after these matters does not remove from the directors the primary obligation upon them as officers of the company to ensure that the necessary forms are filed in a timely fashion. The delegation of that task does not absolve the officers from ensuring that these matters are attended to. The responsibility remains with the officers concerned.

34. In the interests of, *inter alia*, creditors, the Registrar of Companies is given powers to strike a company off the register where such returns have not been made for one year. The Oireachtas has prescribed a procedure to be followed in that regard, and has enabled the Registrar to send to the company a warning letter to the effect that if outstanding returns are not filed within one month of the date of that letter steps will be taken to have the company removed from the register of companies. Such a letter is in ease of a defaulting company, but it must be remembered that the obligation to file returns exists in any event, and it is not simply as a result of the warning letter that the obligation to file these returns exists. It is not a letter which informs the company or the directors of the obligation. It is simply warning that if returns are not filed steps will be taken to strike the company off the register.

35. This is a relevant factor when considering whether the companies in the present case can plead an unfairness where the Registrar sent the letter to the address which he had been given by the company for its registered office, and in circumstances where no notice of change of registered office had been filed. In my view it is not correct for an analogy to be drawn between a letter of that kind and the service of proceedings to recover a debt from the company. Service of proceedings is an entirely different scenario. The letter which is required by s. 12 of the Act to be sent could be compared possibly with the sending of a warning letter to a company warning that if the debt is not paid with fourteen days proceedings will be issued. In that situation, if the warning letter is sent to the company and is returned marked "gone away", there is no requirement that the plaintiff's solicitor should seek out another address at which the directors of the company may reside so that the letter can be sent again to that address. The plaintiff's solicitor is perfectly entitled to commence proceedings and serve the proceedings by post on the company at the registered office in accordance with the provisions of s. 379 of the Companies Act, 1963. In some circumstances an application for substituted service might be made if service in accordance with s. 379 was unsuccessful, but that does not apply in the case of a s. 12 letter sent by the Registrar of Companies.

36. The judgment of Finlay Geoghegan J. in *Clawhammer*, already referred to, clarified, if any clarification was needed, what steps are required to be taken by the Director when seeking a disqualification order against a director which has failed to comply with the terms of the letter. In the present case those requirements have all been satisfied and the Director is entitled to obtain the orders sought.

37. The question remains as to the length of the disqualification. The disqualification order is not to be seen as a punitive measure against the director respondents. It is in the nature of an order for the protection of the public generally, so that persons who have demonstrated by their actions or inactions in relation to a company of which they have in the past been a director or other officer of a company a capacity to ignore or otherwise neglect their statutory responsibilities as such officer, are prevented for a period of time from acting again as director or other officer in the public's interest.

38. The Court is given a discretion as to the length of that disqualification period in the provisions contained in s. 160 of the Act. My view is that it should be for a period of not less than five years, given the provisions of s. 150 of the Act regarding restriction orders. I respectfully agree with the comments of Finlay Geoghegan J. in *Clawhammer* in this regard. Where there are significant aggravating factors a much longer period could be justified. There are some aggravating factors in the present case, but it is necessary in the interests of fairness to have regard also to any mitigating factors. The aggravating factors in the present case are at the lower end of the scale of any such potential factors. However, the mitigating circumstances submitted on the respondents' behalf are not weighty. While the circumstances outlined by the respondents rely in the main on their having relied on third parties to keep them right in relation to their filing obligations and their tax compliance obligations, they cannot, as I have already stated, be justified in placing sole reliance on the company having engaged a form of accountants. The same applies in relation to their complaint about the behaviour of a staff member as alleged. It is also contended that these respondents genuinely attempted to trade out of the difficulties encountered, and that this should be taken as a mitigating factor. But the problem with that submission is that the method by which they made this attempt was by the use of Anderson Consulting Limited, and in respect of that company also they were in breach of their statutory obligations. That cannot avail them in such circumstances.

39. In my view it is appropriate for an order to be made for the disqualification of each of the respondents for a period of five years, and I will so order.