Neutral Citation No. [2005] IEHC 62

THE HIGH COURT

[2000 No. 109 COS]

IN THE MATTER OF CARECA INVESTMENTS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2001
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

BETWEEN

MARTIN V. FERRIS (OFFICIAL LIQUIDATOR OF CARECA INVESTMENTS LIMITED)

APPLICANT

AND
PETER FARRELL AND LEO COADY

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 4th March, 2005.

1. In these proceedings the applicant as liquidator of Careca Investments Limited seeks a declaration that both respondents should be subjected to the orders specified in s. 150 of the Companies Act 1990 (as amended) restricting their activities in relation to companies for a period of 5 years. The first named respondent has not contested the application. In his case the only matter outstanding is the question of costs which has been left over to the conclusion of the issues as against the second named respondent ("Mr. Coady"). This judgment, therefore, relates solely to the case as against Mr. Coady.

2. It is not in dispute that the company the subject matter of these proceedings (Careca Investments Limited "Careca") was in substance a single purpose company. The company purchased land in Donabate in or around May 1992. It was sold in June 1995 at what, on any view, was a substantial profit. This was the only significant transaction of the company while it traded. The petition to wind up the company was presented by the Collector General on foot of a capital gains tax liability which, when interest was included, amounted to IR£277,681.25. The company had not traded for approximately four years prior to the date of liquidation.

3. It is not contested but that Mr. Coady was a director up to and including the date of liquidation or that the company is unable pay its debts. In those circumstances s. 150 *prima facie* applies. The only issue which I have to consider is as to whether, in Mr. Coady's case, he is entitled to rely on s. 150(2) by establishing that he has acted honestly and responsibly in relation to the conduct of the affairs of the company.

4. For reasons which will become apparent in the course of this judgment there can be little doubt but that the affairs of the company were not conducted in a responsible manner. However the real issue between the parties is as to Mr. Coady's responsibility for such a state of affairs.

The running of the company

5. On the basis of the evidence put forward on behalf of the liquidator it seems clear that there were, to all intents and purposes, little or no books or records kept by the company so as to comply with its obligations under the Companies Acts. In the course of the liquidation a number of persons, including, Mr. Coady, Mr. Farrell, and the company's solicitor Mr. O'Sullivan, were examined under s. 245 of the Companies Act 1963. The transcripts of the evidence as so given were before me on this application. In respect of the complete lack of records of the company the explanation given by Mr. Coady at that time was that by virtue of the fact that the company was a single purpose company no records were necessary. In the course of affidavits filed by him during this application he suggested that he had no real responsibility for the lack of records because, by virtue of what he described as his exclusion from the affairs of the company, he had no ability to ensure that proper records were kept. Indeed this latter point characterises the substance of Mr. Coady's defence to these proceedings.

6. He does not dispute, therefore, the following matters:-

(a) the company had wholly inadequate books and records;

(b) there is no adequate information available to establish that the proceeds of sale of the property by the company were dispersed in a proper fashion.

7. In relation to the latter matter it should be noted that there remains considerable confusion as to the precise manner in which the company dealt with its financial affairs. It would appear that upon purchasing the property for a sum of IR£170,000, a sum of IR£277,000 was borrowed from the First National Building Society ("FNBS") secured against the lands. Mr. Coady's explanation is that the additional funding was required to put in place sufficient funds to progress the potential development of the lands in question. He does accept, however, that it would appear that the relevant staff members of the building society concerned were led to believe that the borrowings were entirely in respect of the consideration moneys. He also suggested that the surplus was used although not by him, in an improper manner. Precisely because there are wholly inadequate books and records of the company it is very difficult for the liquidator to ascertain with any precision what happened the additional moneys above and beyond those required to complete the purchase and, of equal if not greater relevance, the purpose for which such moneys were transferred in the way in which they were.

8. It should, therefore, be noted that this confusion would not be there if the company had prepared even tentative accounts during the period between 1992 and 1995 while it held the lands. Such accounts would have disclosed the purchase price of the lands, the basis for any disbursements out of the additional borrowing and would have enabled any person looking at those accounts to know the financial position of the company when it came to sell the property and thus to predict with some considerable degree of accuracy the amount of net funds which would be left over after the sale. Such accounts would also have disclosed the extent to which the company had incurred any additional liabilities in the intervening period whether by virtue of loans from directors or undischarged liabilities to creditors. No such accounts were prepared.

9. It would appear that the borrowings from the FNBS were not serviced so that as of the time of the sale of the property a sum of IR£401,518.43 was required to be discharged to clear that debt. Together with other minor adjustments the balance of the funds which were received on behalf of the company by its solicitors appears to have been just in excess of IR£335,000. The disbursement of those funds has also been a matter of some considerable controversy. It is common case that Mr. Coady received two payments totalling IR£67,118.25. As the liquidator deposes at paragraph 9 of his affidavit of 8th September, 2004 "due to the complete lack of books and records it is impossible to ascertain whether any payments were due to the directors, or whether there were distributable reserves from which a distribution could validly be made. He also notes that the payments which were made to Mr. Coady, and indeed his fellow director and shareholder Mr. Farrell, were made in circumstances where they were both aware that a substantial liability due to the Revenue Commissioners for capital gains tax remained unpaid".

Mr. Coady's position
10. In response Mr. Coady accepts, and indeed relies upon, the fact that there may well have been inappropriate payments both out of the funds initially received by the company on foot of its loan from the INBS and also from net proceeds of sale of the property.

11. However he seeks to make the case that he was, in substance, excluded wrongfully from the affairs of the company from a relatively early date and was thus not truly responsible for the manner in which the affairs of the company were conducted. He further draws attention to the fact that the made complaint in respect of the manner in which the company was conducting its affairs and also sought, ultimately, to bring court proceedings arising out of his complaints. In those circumstances he contends that he acted responsibly at all times.

The Issues
12. At the hearing the liquidator brought to the attention of the court three specific matters which he suggested indicated a lack of appropriate responsibility on the part of Mr. Coady. They are as follows:-

1. the principal concern of the liquidator was with the total absence of appropriate books and records

2. he drew to the courts attention his considerable concerns relating to what had happened to the net proceeds of sale of the Donabate property; and

3. he drew to the courts attention the fact that the company was not wound up for a very significant period indeed after it had ceased to trade. The property was sold in 1995. The company only went into liquidation on foot of a petition presented by the Collector General on 6th June, 2000. It is contended on behalf of the liquidator that Mr. Coady acted irresponsibly in failing, in all the circumstances, to seek to have the company wound up at a much earlier stage.

13. I deal with each of the issues in turn.

1. Books and Records
14. It is not seriously in contention that the company failed to maintain any significant books or records. In respect of this contention of the liquidator Mr. Coady's case is that he acted responsibly in that the exclusion from the affairs of the company, which he contends occurred, in effect precluded him from having any capacity to ensure proper books and records were kept.

15. While Mr. Coady seeks to place his exclusion from the affairs of the company at an earlier stage, the correspondence which he exhibits concerning his complaints does not really commence until 5th July, 1995 when, in the aftermath of the sale of the property, he complains in a letter to Mr. Cathal O'Sullivan (of O'Sullivan and Associates, the company solicitors) concerning that firms costs. He also complains about other items of financial detail. It does not, therefore, seem to me that there is any evidence of Mr. Coady being engaged in a significant complaint as to his exclusion from the affairs of the company until he became concerned about the manner in which the net proceeds of sale of the company's property was being dealt with.

16. Indeed on reading that correspondence it is clear that much of the detail of the disputes which had arisen concerned the appropriateness or otherwise of the paying of certain sums which were contended to be liabilities of the company. Clearly if the company had kept proper books and records then it would have been difficult for there to be any significant dispute as to the precise liabilities which the company would acknowledge itself bound to discharge. At a very minimum any such disputes should have been relatively minor. It is impossible to avoid the conclusion that the absence of proper books and records was itself a significant contributory factor to the fact that disputes as to what were the company's proper obligations could have existed in the aftermath of the sale of the Donabate property.

17. There is no significant evidence to suggest that, at any time up to and around the period when that property was sold, Mr. Coady was sufficiently excluded from the conduct of the affairs of the company so as to absolve him from his obligations to ensure that proper books and records were kept. It should be pointed out that it is not, of course, his obligation to keep those records himself. It is his obligation as a director to satisfy himself, to a reasonable extent, that they are been kept. I am not satisfied that he took any reasonable steps to ensure that sufficient books and records were being kept so as be able to identify the financial state of the company from time to time. The fact that no audited accounts were produced at any stage and the fact that no significant attempt seems to have been made to produce audited accounts until the early part of 1995 clearly supports the view that none of the directors took any adequate steps to ensure that proper books and records were kept. In the circumstances I am satisfied that Mr. Coady acted irresponsibly in failing to ensure that proper books and records of the company were kept at a minimum up to a period in the middle part of 1995 when disputes between him and the other director and principal of the company Mr. Farrell and the company solicitor Mr. O'Sullivan became serious.

2. The net proceeds of sale
18. Mr. Coady relies upon the fact that, in his view, the net proceeds of sale were improperly disposed of. In relation to the contention that moneys were paid out from the company without any regard to the fact that a significant liability would have arisen to the Collector General for capital gains tax he contends that it was his view that had the payments which he contends were improperly made not being made, or indeed had the sums so paid been returned to the company there would have been a sufficient sum to meet the Revenue's claims.

19. However this does not get away from the fact that he did himself receive a sum in excess of IR£67,000 out of those net proceeds. That was a significant sum of money which in today's currency and terms would exceed €100,000. There is no evidence that Mr. Coady took any steps to satisfy himself as to what was to happen to the net proceeds of sale at a time where he himself clearly accepted that he was to be a beneficiary of same. He does not suggest that he opposed the sale in anyway and indeed it is difficult to see effect could have been given to the sale without his agreement having regard to his position of one of only two directors. There were no, even informal, accounts prepared at the time of the sale to indicate what the net proceeds would be. In the circumstances it seems to me that Mr. Coady was irresponsible in accepting a payment out of the net proceeds without having satisfied himself as to the ability of the company to properly make such payments. Furthermore insofar as there was any confusion or lack of clarity in relation to how the net proceeds were to be dealt with this was undoubtedly contributed to by the failure of the company up to that date to have any appropriate books and records. Under this heading I must also, therefore, find that Mr. Coady has failed to discharge the onus upon him in showing that he acted responsibly.

3. The delay in winding-up
20. Under this heading counsel for the liquidator has drawn my attention to the decision of Costello J. (as he then was) in the matter of *Shannonside Holdings (In Liquidation) and In The Matter of the Companies Acts 1963 to 1990* (unreported judgment delivered 20th May, 1993) where at p. 10 of the judgment the following is stated:-

> "Secondly it is not denied that the company was insolvent and unable to pay its debts. The directors had a duty to wind up the company and the members of the company acceded to the request that a resolution to wind up be passed. Even though it may be advantageous to directors to pass a winding-up resolution, it seems to me that the resolution to wind up cannot be challenged on this ground once insolvency has been established and the duty to wind up shown to exist".

21. While that was a case in which persons were being critical of the directors for instigating a winding-up it nonetheless remains authority for the proposition that in general terms the directors of an insolvent company are under a duty to seek to have same wound up. That duty does, of course, depend on all the circumstances of the case and there may well be appropriate instances where, at least for a period of time, it may be appropriate to postpone winding-up pending attempts to deal with the issues that arise by virtue of the insolvency.

22. As was pointed out by counsel for the liquidator in the course of the hearing the correspondence detailing the complaints of Mr. Coady in respect of the conduct of the affairs of the company seem to have rested with his letter of 13th October, 1995 until they were reactivated by his letter of 23rd September, 1998. As is clear from the terms of that latter letter it itself was triggered by the receipt of correspondence from the Revenue Commissioners in the proceeding months concerning the potential liabilities of the company. On that basis it seems that the only inference that can be drawn is that Mr. Coady was, to a very large extent, prepared to let matters lie until the Revenue Commissioners became active. While he has indicated that he felt at all material times that the revenue debt could be met if the inappropriate payments made out of the funds of the company were returned he does not, quite frankly seem to have done very much about it. To this he pleads an absence of funds but no real explanation is given for why he did not take the advice which he concedes he was given by his solicitor to the effect that he should have sought to have the company wound up.

23. That the delay is a material matter on the facts of this case is also clear from the fact that the liquidator may now experience additional difficulties in attempting to recover any sums which may be due to the company because of the passage of time and the fact that certain claims (such as claims for the return of sums paid on foot of a fraudulent preference) may now be statute barred.

24. In all those circumstances I am also satisfied that Mr. Coady failed to act responsibly by virtue of not taking adequate steps to ensure the winding-up of the company within a reasonable period of it ceasing to trade and in circumstances where he knew or ought to have known that it was likely to be insolvent.

Conclusions

25. In all the circumstances it therefore seems to me that I should make the order sought by the liquidator.