Neutral Citation Number: [2007] IEHC 424

THE HIGH COURT

2004 No. 169 COS

IN THE MATTER OF SALLYVIEW ESTATES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

PEARSE FARRELL, LIQUIDATOR

APPLICANT

AND
EMILIO BALZARINI AND PRESCILLA BALZARINI

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered 3rd December, 2007.

1. The applicant was appointed official liquidator of Sallyview Estates Limited ("the Company") on 27th January, 2004.

2. The respondents were directors of the Company within twelve months of the date of commencement of the winding up.

3. By notice of motion issued on 29th March, 2006 the applicant sought a declaration pursuant to s. 150 of the Companies Act, 1990 that the respondents, should not for a period of five years be appointed to act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotional formation of any company unless that company meets the requirements set out in sub-section (3) of s. 150 of the Companies Act, 1990 (as amended).

4. Initially the respondents sought to defend and oppose the application and affidavits were filed on their behalf by Irish solicitors who had entered an appearance in the application.

5. However, by letter of 11th July, 2007 an Italian lawyer representing the respondents informed the applicant that they were no longer seeking to defend the application under s. 150 of the Act of 1990. Thereafter, negotiations about the amount of costs payable by the respondents to the applicant took place. The negotiations have not been successful in reaching an agreement.

6. The respondents have discharged their Irish solicitors who were given liberty to come off record on the 5th day of November, 2007. In the course of the correspondence relating to costs the applicant, through his solicitors, put the respondents on notice that he was seeking the costs of the application and also the cost of investigating the matters the subject of the application, in the amount of €42,267.50 in respect of his remuneration. This was computed by reference to the time spent by the Official Liquidator and his staff investigating the matters the subject matter of the application for the s. 56 report to the Director of Corporate Enforcement and the subsequent application under s. 150 of the Act of 1990. The amount was computed by reference to the rate per hour charged by the Liquidator and those members of his firm who assisted him in investigating such matters.

7. At the hearing before me on 5th November, 2007 the respondents were not represented. The Liquidator in his affidavit of 5th October, 2007 has placed before the court the relevant correspondence.

8. At the hearing of the application on 5th November, 2007, I formed the view that having regard to the matters put before the Court by the Official Liquidator in his original grounding affidavit of 13th March, 2006, and having regard to the attitude now taken by the respondents, that they did not wish to defend the application, that the court was bound to make the declarations of restriction as sought and such orders were made.

9. I also decided that in accordance with the ordinary rule that "costs follow the event" and having regard to the provision for costs in s. 150(4B) of the Act of 1990 (as amended) which was in force at the date this motion was issued on 29th March, 2006 that the applicant was entitled to an order for the costs of the application against the respondents jointly and separately, such costs to be taxed in default of agreement.

10. I reserve my decision on the application for the costs of investigation as they were remuneration of the Official Liquidator and his staff. S. 150(4B) of the Act of 1990 as inserted by s. 41 of the Act of 2001 gave the court jurisdiction to make an order that the directors against whom a declaration was made should bear "any costs incurred by the applicant in investigating the matter". In *Mitek Holdings Limited & Ors. v. Companies Act* [2005] IEHC 160 (Unreported, High Court, Finlay Geoghegan J., 5th May, 2005) I construed that provision as not including the type of remuneration which is the only cost of investigating the matter which the applicant claims herein. That is the version of s. 150(4B) of the Act of 1990 which was in force on 29th March, 2006 when the motion against the respondents herein was issued.

11. The Investment Funds, Companies and Miscellaneous Provisions Act, 2006 was enacted on 24th December, 2006. Section 11 came into operation on 29th January, 2007 pursuant to the Investment Funds, Companies and Miscellaneous Provisions Act, 2006 (Commencement) Order, 2007 (S.I. No. 23 of 2007). Section 11(1) provides:

> "11.-(1) Section 150 (as amended by the Company Law Enforcement Act 2001) of the Act of 1990 is amended by substituting the following subsection for subsection (4B):
>
> '(4B) the court, on the hearing of an application for a declaration under subsection (1) by the Director, a liquidator or a receiver (in this subsection referred to as the "applicant"), may order that the directors against whom the declaration is made shall bear –
>
> (a) the costs of the application, and
>
> (b) the whole (or such portion of them as the court specifies) of the costs and expenses incurred by the applicant –
>
> (i) in investigating the matters the subject of the application, and
>
> (ii) in so far as they do not fall within paragraph (a), in collecting evidence in respect of those matters,

including so much of the remuneration and expenses of the applicant as are attributable to such investigation and collection."

12. Section 150(4B) of the Act of 1990, as amended by s. 11(1) of the Act of 2006 gives the Court jurisdiction to make the form of order sought on behalf of the applicant herein. The issue is whether or not it applies to this application.

13. Counsel for the applicant drew my attention to the fact that he understood that in another liquidation I had determined in an ex-tempore unrecorded decision that s. 150(4B) of the Act of 1990 as amended by s. 11(1) of the Act of 2006 did not apply to an application under s. 150 which had commenced prior to the date of the passing of the Act of 2006. Further, that I had done so by applying the principles as set out in the judgment of Davitt P. in *Re: McLoughlin* [1963] 1 I.R. 465. Davitt P., at p. 469 of that judgment stated:

> "In regard to party and party litigation the general rule appears to be, as submitted by counsel for the appellant, that where, after an action has been commenced, the law is altered by statute so as apparently to affect the rights of the parties the action must nevertheless be decided according to the law as it existed when the action was commenced, unless the legislature by the language used shows a clear intention to provide otherwise: *Hitchcock v. Way* 6 Ad. & E. 943."

14. *McLoughlin* was an application under the Intoxicating Liquor Acts. Davitt P. held that the same principle applied to such an application.

15. Counsel for the applicant accepts that such principle applies to an application under s. 150 of the Act of 1990 but submits that the court should construe s. 11(1) of the Act of 2006 as showing a clear intention of the Oireachtas that s. 150(4B) as amended therein should apply to an application under s. 150 of the Act of 1990 which had already commenced. He makes the submission in reliance in particular on the judgment which I gave in the matter of *Tipperary Fresh Foods Limited (In Liquidation) O'Riordan v. O'Connor* [2005] 1 I.R. 551.

16. The judgment in *Tipperary Fresh Foods Limited (In Liquidation)* concerned the proper construction of s. 41 of the Company Law Enforcement Act, 2001 which amended s. 150 of the Act of 1990 by the insertion, inter alia, of sub-ss. (4A) and (4B). The liquidation of Tipperary Fresh Foods Limited had commenced prior to the passing of the Act of 2001. The application under s. 150 commenced after the coming into force of s. 41 of the Act of 2001. In that judgment I formed the view firstly, that at latest, on the making of the winding-up order on 26th March, 2001, the respondents became persons to whom s. 150 of the Act of 1990 applied and were then at risk of the consequences of an application under s. 150 as then enacted by reason of their conduct as directors of the Company prior to 26th March, 2001. I then concluded that the new potential liability for "costs of investigating the matter" provided for by s. 150(4B) as inserted by s. 41 of the Act of 2001 if it applied to the respondents, created "a new obligation" in respect to "transactions … already passed" and in that sense was legislation which operated retrospectively within the meaning approved by the Supreme Court in *Hamilton v. Hamilton* [1982] I.R. 466. I further determined that this was a substantive obligation as distinct from a procedural matter and, accordingly, the presumption against retrospectivity applied.

17. The final issue to be determined, and the one relied upon by counsel for the applicant herein was whether, notwithstanding the presumption against retrospectivity, the Oireachtas in enacting s. 41 of the Act of 2001 clearly and unequivocally in its terms declared its intention that such section should take effect retrospectively in the sense of applying to a liquidation which commenced prior to the coming into operation of s. 41 of the Act of 2001. Having analysed the entire of s. 41 of the Act of 2001 and construed it in the context of the new scheme created by s. 56 of the Act of 2001, I concluded that the Oireachtas had clearly and unequivocally so declared its intention having regard to the overall scheme of the Act of 2001 as more fully set out in that judgment.

18. It is important to note that in *Tipperary Fresh Foods Limited (In Liquidation)* the application under s. 150 of the Act of 1990 commenced after the entry into force of s. 41 of the Act of 2001 and, no issue arose as whether there was an intention that s. 41 of the Act of 2001 should apply to an existing application under s. 150 of the Act of 1990.

19. I have considered s. 11 of the Act of 2006 in the context of the Act of 2006;: the then existing legislative scheme for applicants under s. 150 of the Act of 1990 and the amendment sought to be made, and cannot ascertain by the words used by the Oireachtas any intention that the substitution of the existing s. 150(4B) by that set out in s. 11(1) should apply to an application under s. 150 already in being before the High Court. There is no new scheme similar to that to be found in the Act of 2001 or other wording which permits the Court to reach a similar conclusion to that reached in *Tipperary Fresh Foods Limited (In Liquidation)*. Hence, applying the principle set out in *re: McLoughlin* s. 150(4B) of the Act of 1990, as amended by s. 11(1) of the Act of 2006 does not apply to this application.

20. Accordingly, I refuse that part of the applicant's application which seeks the costs of investigating the matters herein.