Neutral Citation: [2014] IEHC 481

THE HIGH COURT

[2013 No. 361 COS]

IN THE MATTER OF DLOK ELECTRICAL SERVICES LIMITED (IN VOLUNTARY LIQUIDATION)

AND

THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

CIARAN KIRK

APPLICANT

AND

MATTHEW O'KANE

FIRST RESPONDENT

AND

BRENDAN LONG

SECOND RESPONDENT

JUDGMENT of Mr. Justice Max Barrett delivered on the 24thday of October, 2014.

1. This is an application made under s.150 of the Companies Act 1990, seeking a declaration that each of Mr. Matthew O'Kane and Mr. Brendan Long be restricted from acting as a company director. The application arises from their respective tenures as directors of a company that is variously referred to in documentation before the court as 'DLOK Electrical Services Limited' and 'DLOK Electrical Services Limited'. The court uses the capitalised version hereafter.

2. Under s.150 of the Act of 1990, the court must grant the declaration sought in respect of each respondent director in these proceedings unless satisfied that any of a variety of circumstances identified in s.150(2) pertains in respect of such individual, the relevant circumstances in this case being that each individual has, in relation to the conduct of DLOK, *"acted honestly and responsibly in relation to the conduct of the affairs of the company and…there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by [s.150]".* The liquidator's application in these proceedings focused on the issues of honesty and responsibility.

Some general principles

3. There is, if anything, a possible surfeit of judicial guidance on the criteria that are relevant to determining a s.150 application. An early but significant contribution was made by Shanley J. in *La Moselle Clothing Limited (in liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, his observations having since been described by Hardiman J. in *In the Matter of Tralee Beef & Lamb Limited* [2008] 3 I.R. 347 at 358, as being, at least at that time, of "*near canonical status*". Shanley J.'s observations had previously been affirmed and expanded upon by the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35, the court holding, *inter alia*, that it is important, in a s.150 application, to have regard to the entire tenure of an individual as director of a company. In his judgment in *La Moselle*, Shanley J. had, at p.352, mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a s.150 application. In the High Court decision in *Kavanagh v. Delaney* [2005] 1 I.L.R.M. 34 at 41, Finlay Geoghegan J. suggested that compliance by a director with the common law obligations of a director is also a relevant factor. In his judgment on appeal in what is now sometimes referred to as the *Tralee Beef* case, Hardiman J., at p.358 of his judgment, referred to above, indicated that he did not disagree with this 'amplification' by Finlay Geoghegan J., though he was concerned that no injustice should be wrought in that case as a result of the amplification being sounded therein for the first time. In truth it is somewhat difficult to see how a director could be held to have acted responsibly where he or she had complied with the Companies Acts but was in breach of his or her common law duties, though equally it is difficult offhand to see how a director could breach his or her common law duties where he or she was not guilty of any breach of, or exposed to any penalty under, the detailed and comprehensive code established by the Companies Acts. Be that as it may, the jurisprudence appears in any event to have further evolved, Fennelly J. signalling in *Re Mitek Holdings Ltd.* [2010] 3 I.R. 374 at p.396 that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. Thus Fennelly J. emphasises "*the need to identify the issues that are important in the particular case",* and then continues:

> *"I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute."*

Facts

4. Mr. O'Kane and Mr. Long are the onetime directors of DLOK Electrical Services Limited (in voluntary liquidation). The company was incorporated on 18th July, 2000. Its business involved the installation of electrical wiring and fittings. On 22nd June, 2010, it was resolved that DLOK be wound up; the applicant in these proceedings was appointed as liquidator of the company. In his affidavit evidence, the applicant suggests that the main reasons for the failure of DLOK were its inability to collect amounts outstanding to it for completed works and also the general downturn within the construction industry. The liquidator filed three reports pursuant to s.56 of the Company Law Enforcement Act 2001. In two of these reports the liquidator sought to be relieved of the obligation to bring a s.150 application in respect of the directors. Sometime after submitting his second report the liquidator received from the Labour Court a notice dated 3rd October, 2012. This notice indicated that DLOK had not made certain employee pension contributions

pursuant to a registered employment agreement which affected DLOK as employer. The liquidator has averred in his affidavit evidence that this was the first time that the non-payment of the pension contributions came to his attention.

5. The registered employment agreement to which the Labour Court notice related was made on 24th September, 1990, between the Electrical Contractors Association, Association of Electrical Contractors Ireland, of the one part, and the Technical Engineering and Electrical Union (TEEU), formerly the Electrical Trades Union, National Engineering and Electrical Trade Union of the other part. The court has not had sight of the notice referred to above. However, it has seen a copy of a Labour Court order of 3rd October, 2012, made against "*DLOK Electrical Services Limited (in liquidation) c/o KPMG, 1 Stokes Place, St. Stephen's Green, Dublin 2*". In the order, the Labour Court, acting pursuant to s.32 of the Industrial Relations Act, 1946:

> (i) states that having considered a complaint made by the TEEU against DLOK regarding non-compliance with the employment agreement "*and having heard all persons appearing to the Court to be interested and desiring to be heard*" it is satisfied that DLOK was an employer affected by the said employment agreement and that the complaint made by the TEEU was well-founded; and
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> (ii) orders that the sum of €192,437.32 in back-contributions to the Construction Federation Operatives Pension and Sick-pay Schemes in respect of certain named employees be made. This last amount was necessary to cover pension, mortality insurance and sick pay cover for various construction workers.

6. The respondent directors make a number of contentions regarding the Labour Court order. First, they maintain that to the best of their recollection they were never offered the opportunity to appear at the Labour Court proceedings. Second, they argue that it is not credible that throughout the period of his appointment, from June 2010 onwards, the liquidator did not receive any correspondence concerning the Labour Court proceedings and was unaware of same until he received a copy of the Labour Court order of 3rdOctober 2012. Third, they point to a letter from DLOK's auditors in 2009 confirming that DLOK was in compliance with its pension contribution requirements and to a letter from the Construction Workers Pension Scheme (CWPS) in June 2009 that contained a similar confirmation. (The court has not had sight of the auditor letter but its existence and contents have been confirmed implicitly by the liquidator in his evidence). Fourth, the respondent directors note that if (they maintain 'as') the company was in compliance with its pension obligations up to mid-2009 then it simply was not possible, with the number of staff that it had, to run up the supposedly outstanding contributions by the time DLOK suspended trading. Fifth, they note that sixteen of the employees listed in the Labour Court order as being persons in respect of whom there was a failure to make contributions were not persons in respect of whom such contributions fell to be made and so the computation that underlies the Labour Court order is wrong.

Conclusions regarding s. 150 application

7. For its part, the court struggles to believe that not a single item of correspondence issued to DLOK or the liquidator over a 2½ year period between June 2010 (when the liquidation commenced) and October 2012 (when the Labour Court order issued) concerning the Labour Court proceedings and pursuant to which suitable action might have been taken by the respondent directors had they been alerted to same. The court notes that both DLOK's auditors and the CWPS between them indicated DLOK to be in compliance with its pension contribution obligations to mid-2009. The court does not accept as credible the contention that the Pension Scheme simply relied on the previous auditor confirmation in this regard but notes that even were this so, the fact that professional auditors were satisfied to issue such a confirmation is itself a highly significant factor of relevance to the court's considerations, not least as it creates a serious question as to whether the supposed liabilities could thereafter have been incurred by DLOK. Lastly the court notes that there appears to be an issue with the number of persons on which the Labour Court based its calculations.

8. The non-payment by an employer of any amount of money, let alone almost a fifth of a million euro, to a contributory social protection scheme that has as its object the financial protection of manual workers and/or their families at vulnerable moments in their lives is a most serious wrong that, all else being equal, would typically merit the issuance of a restriction declaration under s.150. Such a declaration has of course potentially profound reputational and financial implications for any person in respect of whom it issues. The liquidator's case in these proceedings is essentially that each of the directors ought to be the subject of such a declaration because, given the Labour Court findings, it cannot be said that the directors acted honestly and responsibly in relation to the conduct of the affairs of DLOK. Yet the directors have raised significant and credible contentions regarding flaws in the process whereby the Labour Court order issued, the facts on which it is based and the detail it contains. The instant proceedings do not involve a judicial review of the Labour Court order. The court must assess whether or not a s.150 declaration should issue on the basis of the evidence before it, *i.e.* the Labour Court order and the affidavit evidence. Having regard to all of the foregoing, the court cannot conclude that a s.150 declaration is required to issue against the respondent directors on the basis of want of honesty or lack of responsibility in relation to the conduct of DLOK's affairs. Nor does the court consider the evidence before it to suggest any other reason why it would be just and equitable that such a declaration should issue against either of the respondent directors. It is important to emphasise that the court in reaching this finding does not mean to diminish the seriousness of a company failing to make required welfare contributions. However, the court does not consider that a s.150 order is mandated in the face of the various factors referred to above, not least the auditor and CWPS confirmations which, if correct, have the consequence that it would have been impossible for the alleged pension liabilities to have been incurred during the short time that DLOK continued to trade following the issuance of same.

Application for extension of time

9. The liquidator has, pursuant to s.56(2) of the Company Law Enforcement Act 2001, sought an order extending the time for the making of the instant application. Section 56 of the Act of 2001 provides that:

> *"(1) A liquidator of an insolvent company shall, within 6 months after his or her appointment…and at intervals as required by the Director [of Corporate Enforcement] thereafter, provide to the Director a report in the prescribed form.*
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> *(2) A liquidator of an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application.*
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> *(3) A liquidator who fails to comply with subsection (1) or (2) is guilty of an offence."*

10. There are a number of points to note regarding the above provisions. First, it appears that each report made to the Director of Corporate Enforcement is a "*report*" for the purposes of section 56, *i.e.* it does not appear that where a series of reports is made that the series of reports should be treated as a cumulative single report. Second, unless the Director of Corporate Enforcement has relieved a liquidator of the obligation to bring a s.150 application within the timeframe prescribed in s.56(2), such an application must ("*shall*") be brought, absent an extension of that timeframe by the court. Third, non-compliance with s.56(1) or (2) by a liquidator

renders the liquidator guilty of a criminal offence.

11. The liquidator in these proceedings made three s.56 reports. He was never relieved by the Director of Corporate Enforcement of the obligation to commence s.150 proceedings. Yet the liquidator did not commence such proceedings pursuant to the first report made under s.56 or the second report under s.56, and he eventually commenced the instant proceedings out of time. In his affidavit evidence, the liquidator avers that:

> *"This application has not been brought within a period of five months of providing the Director of Corporate Enforcement with my report as required by Section 56 of the Company Law Enforcement Act 2001. The delay in bringing this application relates to the fact that my solicitors, due to an oversight on their behalf, omitted to have the Affidavit herein finalised and the application issued in time. I filed my third and last Report with the ODCE on the 23rd November 2012, and accordingly the application herein ought to have been brought by me before 23rd April 2013. [The notice of motion is dated 30th July, 2013]. I say that the delay has not caused any prejudice to the Respondents in defending the application."*

12. A number of points arise from this averment:

> - first, it ignores the fact that as the Director of Corporate Enforcement never relieved the liquidator from the obligation to commence s.150 proceedings following any of the three reports made by the liquidator.
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> - second, the excuse offered by the liquidator has no relevance to the proceedings that, absent a letter of relief from the Director or an extension by the court, fell to be commenced pursuant to the liquidator's earlier reports, and in any event seems weak. The Oireachtas attaches such significance to compliance with the s. 56(2) time requirements that it renders a liquidator who commits an unexcused breach of same guilty of a criminal offence. 'My solicitor did not get my affidavit ready on time' does not seem much of a basis on which to justify a court in exercising its discretion under s.56(2) in such a way as to excuse non-compliance with requirements to which the Oireachtas clearly attaches considerable significance.
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> - third, as to the averment that "*the delay has not caused any prejudice to the Respondents in defending the application*", while this statement may be true in and of itself, it does not appear to the court that it is true to say that the respondents have suffered no prejudice at all. It is clear from s.56(2) that the Oireachtas intended that s.150 proceedings arising therefrom should be commenced relatively quickly. There seems good reason for the tight timeline to which that provision refers. As mentioned above, the making of a s.150 declaration can have very serious reputational and financial implications for a director. The Oireachtas appears to have contemplated that a person exposed to the risk of so serious an order ought to see a s.150 application visited upon him or her, or an alternative means of proceeding determined, within a relatively short timeframe after the making of a s.56 report. When, without the intervention of the court under s.56(2), a required s.150 application is commenced out of time or not at all, this objective is frustrated.

13. This is not the first s.150 application in which a liquidator has sought of this Court an extension of the timeline arising under s.56(2). Nor is it the first judgment in which this Court has emphasised the importance of a liquidator complying with the requirements of s.56. (See *Taite v. Breslin* [2014] IEHC 184 (Unreported, High Court, Barrett J., 1st April, 2014) and *Cotter v. Gilligan and Ors*. [2014] IEHC 305 (Unreported, High Court, Barrett J., 30th May, 2014)). It seems to the court that there are at least two good reasons why a liquidator should seek to comply with s.56. First, it is the law and that should be reason enough. Second, it is in a liquidator's personal interest to comply. After all, a liquidator who breaches s. 56(2) will be guilty of an offence unless a court later grants an extension of the applicable timeline. A liquidator who commits a criminal offence will almost certainly encounter difficulties with his or her professional body. As a result it seems, at the least, imprudent for a liquidator to countenance a breach of s. 56(2) and thereafter to be dependent on the benevolence of the court to obviate that offence by granting an extension of the s.56(2) timeline. To the extent, if at all, that there is a practice abroad whereby liquidators tend never to commence s.150 proceedings pursuant to s.56 unless a letter issues from the Director of Corporate Enforcement declining to relieve a liquidator of the obligation so to do, it seems clear from the foregoing analysis that such practice does not conform with s.56.

14. As the court has previously noted, in both the *Taite* and *Cotter* cases, an appropriate course of action for a liquidator to take if he or she contemplates that a potential difficulty may arise under s.56(2) would appear to be that identified by Dr Ahern in her learned text, *Directors' Duties*, (Dublin, 2009) in which she states, at p.511, that:

> *"Rather than a liquidator being in...[a] difficult position with the attendant criminal consequences, if there is likely to be a difficulty with the timing, it is sensible for a liquidator to make a pre-emptive application to the High Court for more time pursuant to s. 56(2)."*

15. In this case such an approach to the court would have been appropriate after each of the three reports issued to the Director of Corporate Enforcement and once it became apparent to the liquidator that a timing issue was likely to present under s.56(2). It matters not that during each of the two earlier periods the liquidator did not consider that s.150 applications were merited. At no point was it for him simply to ignore the timeline established by s.56(2) and await a response from the Director of Corporate Enforcement. Section 56(2) makes clear that the s.150 applications which it contemplates must be brought unless the Director relieves a liquidator of the obligation so to do. The only way out of this predicament is for a liquidator to seek an extension of the applicable timeline from the court. A liquidator might perhaps chafe at having to bring such an application, though it is difficult to see why; however, his or her sentiments in this regard are not relevant: s.56 is clear in what it requires and must be observed.

16. What factors ought a court to bear in mind when determining whether or not to grant that extension of time which s.56(2) anticipates? In *Coyle v. O'Brien & Ors.* [2003] 2 I.R.627 at p.633, Finlay Geoghegan J. indicated in this regard that:

> *"[T]he court should consider the matters put forward by or on behalf of the liquidator grounding the application for an extension of time in the context of the very clear intent expressed by the Oireachtas in s. 56(2) of the Act of 2001 that the liquidator must within the specified time bring the application before the court and if he fails to do so is to be considered guilty of an offence. It appears to be that the grounds must be such that they warrant the court, in fairness and justice, relieving the liquidator from the intended statutory consequences of a failure to act within the specified time."*

17. Finlay Geoghegan J. was notably sympathetic to the position of the liquidator in *Coyle* because the s.150 application brought in that case was among the first batch of applications which followed the making of the first s.56 reports to the Director of Corporate Enforcement. However, liquidators and legal practitioners ought now to be entirely familiar with the 2001 Act. Consequently the court is perhaps less likely to adopt a sympathetic approach to liquidators in this regard than might have pertained a decade or more ago.

18. If a liquidator is guilty of particularly egregious delay, it may of course be possible for an affected director to sustain an objection to a s.150 application on the grounds of such delay. The court has indicated above that it does not consider that a s.150 declaration is required to issue against either of the respondent directors in these proceedings. So it is not necessary for the court to consider further the issue of delay. However, the court notes in passing that a variety of factors present in this case which might have bolstered an application for relief on the grounds of excessive delay, for example: no approach was made to the court pursuant to s.56(2) regarding the non-commencement of s.150 applications after the first and second reports; no explanation was offered for the entirety of the delay arising; the reason offered for the last few months of delay was weak ("*my solicitors…omitted to have the Affidavit herein finalised*"); and the respondent directors were denied the opportunity to voice such concerns as might perhaps have been aired at hearings by the court of any applications made by the liquidator seeking an extension of the s.56(2) timeline.

19. For the reasons identified elsewhere in this judgment, the court does not consider that a s.150 declaration is required to issue in respect of either Mr. Matthew O'Kane or Mr. Brendan Long. In such circumstances it appears to the court that no purpose is served by declining the liquidator's application for an extension of time to the bringing of proceedings. The court therefore grants an extension of the applicable timelines such that no s.150 proceedings were required to be commenced by the liquidator until the date of commencement of the instant proceedings.