Neutral Citation Number: [2008] IEHC 423

THE HIGH COURT

2007 41 COS

IN THE MATTER OF KRANKS KORNER LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

SHANE McCARTHY

APPLICANT

AND
AUSTIN GIBBONS AND JACQUELINE GIBBONS

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered the 19th day of December 2008

1. The applicant is the Liquidator of Kranks Korner Limited (in voluntary liquidation) ("the Company"). By special resolution passed on 22nd April, 2004, it was resolved, pursuant to s. 251(1) (b) of the Companies Act, 1963, that the Company be wound up. It was proposed at that meeting that the applicant be appointed as Liquidator. A meeting of creditors of the Company was called and held on 23rd April, 2004. No creditors attended and it was adjourned until 30th April, 2004, and again there were no creditors in attendance. Accordingly, pursuant to s. 267(1) of the Act of 1963, the applicant was confirmed as Liquidator.

2. The respondents were the directors of the Company at the date of commencement of the winding up. A Statement of Affairs of the Company as of 23rd of April, 2004, was prepared by the respondents. This disclosed an excess of assets over liabilities of €10,594.12.

3. The Company carried on a restaurant business from premises at 6, Thomas Street, Limerick. The lease to the premises had been sold prior to the commencement of winding up and the Company had ceased to carry on business.

4. The applicant provided a report to the Director of Corporate Enforcement ("the Director") pursuant to s. 56 of the Company Law Enforcement Act, 2001 in May 2005. By letter dated 14th October, 2005, he was informed by the office of the Director that, in respect of the reports submitted, he was not relieved of his obligation, pursuant to s. 56 (2) of the Act of 2001, to make an application pursuant to s. 150 of the Companies Act, 1990 seeking the restriction of the directors of the Company. It was pointed out to him that he was therefore obliged to make an application pursuant to s. 150 of the Act of 1990, for the restriction of all the directors of the Company, within five months from the date of the receipt by the office of the report of May 2005, which was stated to have been received on 17th June, 2005.

5. The applicant did not bring the application pursuant to s. 150 until 25th January, 2007, when he issued a motion seeking a declaration of restriction of the respondents.

6. Thereafter, a number of affidavits were filed, both by the applicant and the second named respondent, and one affidavit from the first named respondent and from a Mr. Gearóid McGann, solicitor, in support of the respondents.

7. Those affidavits essentially raised two issues. The first was whether or not the Company was insolvent at the commencement of the winding up, or was, or is, insolvent in the course of the winding up and, secondly, if it was, or is, whether the respondents have satisfied the court that they had acted responsibly as directors in relation to the conduct of the affairs of the Company. On this latter issue there was really only one adverse matter brought to the attention of the court by the applicant, namely, the fact that the directors had permitted the Company to continue in business without insurance from a date that was initially thought to be 1st January, 2003, until the completion of the already contracted for sale of the property on 4th April, 2003.

8. The respondents following an exchange of affidavits issued a motion returnable for 18th February, 2008, seeking inter alia an order dismissing the application on the grounds that the Company was, and is, solvent and, accordingly, did not meet the requirements of s. 149 of the Companies Act, 1990. In the alternative, they sought an order striking out the application on the grounds that the decision of the Director not to relieve the Liquidator was predicated on an erroneous assertion in the s. 56 report submitted, as personal injuries claims against the Company were then covered by a policy of insurance. On 3rd March, 2008, having read all the affidavits in the substantive application and in support of the motion and, having heard counsel for the applicant in relation to the substantive application without determining the issues on the respondents' motion, I determined on the facts then before the court, in all the affidavits then sworn, that the court was satisfied that no issue arose on the facts in relation to the honesty of the respondents and that the respondents had satisfied the court that they acted responsibly in relation to the conduct of the affairs of the Company.

9. By that time, the following material facts had emerged from the affidavits and information obtained principally by the respondents from third parties and, in particular, insurance agents, since the commencement of the application pursuant to section 150:

> (i) The insurance of the Company, which at the date of the s. 150 application both parties appear to have believed expired on 1st January, 2003, in fact had been extended to 17th January, 2003. The importance of that extension was that there were two personal injuries claims notified against the company, one alleged to have occurred on 1st January, 2003, and the other on 14th January, 2003. The applicant had taken the view, both at the time of the making of the s. 56 report and the commencement of this application, that such claims were not covered by insurance.
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> (ii) The respondents had explained to the court, on affidavit, that the reason for which they had continued to trade without insurance after January 2003 was that they had contracted to sell the leasehold interest in the premises with a closing date in October 2002, but through no fault of the respondents the closing date had been deferred. There appears to have been a genuinely held belief that the purchasers were attempting to avoid completing the purchase of the leasehold interest in the premises. The respondents were advised by their solicitors that if they ceased trading it might permit the purchasers to avoid completing the contract to purchase the property. Further, despite what the court is satisfied were strenuous efforts to obtain a renewal of the Company's insurance, they were unable to do so.
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> (iii) The respondents had obtained information, and in one instance secured agreement from the insurers, which appeared to exclude the potential liability of the Company for excesses pursuant to the insurance policies in respect of certain of the personal injuries claims still pending against the Company.

10. Having regard to the view which I formed that, even if s. 149 did apply to the Company, the directors had satisfied the court that

they acted honestly and responsibly in relation to the conduct of the affairs of the Company. Hence the application to restrict them, pursuant to s. 150 of the Act of 1990, would be dismissed. I determined therefore it was unnecessary to decide upon the respondents' motion to have the s. 150 application struck out.

11. The respondents then sought an order for their costs of the s. 150 application against the applicant. I adjourned the matter to allow counsel prepare short legal submissions on the issue of costs, as such an application raises difficult questions.

12. I heard submissions from counsel for the applicant and respondents on the issue of costs.

13. Section 150 of the Act of 1990 does not contain any express provision dealing with the order for costs which may, or should, be made by the court on an unsuccessful application, whereas in this instance, the applicant is a liquidator who made a report to the Director pursuant to s. 56 of the Act of 2001, and was not relieved of his obligation to bring the application and is therefore bound to do so pursuant to s. 56 (2) of the Act of 2001. In *Murphy v. Murphy* [2003] 4 I.R. 451, I concluded that in such an application O. 99, r. 1 of the Rules of the Superior Courts is applicable. That conclusion has been followed and applied by other judges of the High Court. It was not suggested by counsel for either party that I should revisit that conclusion.

14. The relevant provisions of O. 99, r. 1, are that the costs of the proceedings are in the discretion of the court and that, "the costs of every issue of fact or law raised upon a claim or counterclaim, shall, unless otherwise ordered, follow the event" (O.99 r.1 (4)).

15. Counsel for the respondents submits that I should apply O. 99, r. 1(4) (commonly referred to as the principle that "costs follow the event") as meaning that the normal rule on a s. 150 application where, as in this instance, the respondents satisfy the court that they acted honestly and responsibly and the court refuses to make a declaration of restriction, as being that the respondents obtain an order for costs against the liquidator.

16. Counsel for the respondents relies upon the judgment of Peart J. in the matter of *USIT Ltd.* [2005] IEHC 481. In that decision, Peart J. refused to make declarations of restriction pursuant to s. 150 of the Act of 1990 against two respondent directors and, on the application for costs, approached the exercise of his discretion under O.99, r. 1, on the basis of the above principle that costs should follow the event, unless otherwise ordered, should apply, and found on the facts of the application that there was no special reason for which he should not make an order for costs in favour of the successful respondent directors against the liquidator.

17. Counsel for the applicant disputes this starting point and relies, in doing so, on the judgment of O'Leary J. in *Stafford v. Beggs and Ors.* [2006] IEHC 258.

18. That decision was on an application for costs by the third and fourth named respondents therein, where the Court had formed the view, on an application under s. 150 that they had acted honestly and responsibly and should not be restricted. In considering O. 99, r.1, and the question as to whether an application under s. 150 of the Act of 1990 comes within the type of claim envisaged by O. 99, r.1 (4), O'Leary J. stated:

> "This possible interpretation is, in the view of the Court, supported by (but not dependent on) the description (amounting possibly to a qualification) of the issues falling within the rule within O. 99, r. 1(4) as relating to a 'claim or counterclaim'. Can an application (pursuant to a legal duty) by a liquidator for adjudication by a court on the pre-liquidation (or post liquidation) behaviour of a director be properly called a claim or a counterclaim? The liquidator is merely the presenter of the application not a claimant or party with any interest in the outcome either for himself or on behalf of the creditors.
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> A comparable situation arises in criminal matters. When an accused in a criminal matter is charged with an offence he is under an obligation to use his/her funds to fight the case. In such cases the awarding of costs is very unusual and limited to cases where the prosecution has misbehaved in some way.
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> For all the foregoing reasons, the court is of the view that the proper application of O. 99, r. 1 of the Rules of the Superior Courts leads to a conclusion that costs should not be normally awarded to a director who satisfies the court that he/she should not be the subject of a restriction order under section 150."

19. I would respectfully prefer the approach of O'Leary J. and agree with him insofar as he has determined that an application by a liquidator pursuant to s. 150(4), which is brought by reason of the obligation imposed on him by s. 56(2) of the Act of 2001 (as distinct from some decision of his own to so pursue the application), is probably not one which comes within what is envisaged in O. 99, r. 1 (4) as a claim or counterclaim for the reasons he states. I agree with the conclusion which follows that the courts should not, in such applications under s. 150, start from a point, where respondent directors, or persons to whom s. 150 applies by reason of the provisions of s. 149 of the Act of 1990, satisfy the courts that they acted honestly and responsibly, that the normal rule is that they be awarded their costs against the applicant liquidator.

20. However, I would respectfully differ from O'Leary J., if, in the final paragraph of the extract cited, he was intending to suggest that in all applications under s. 150 of the Act of 1990, where a respondent director satisfies the court that he should not be the subject of a declaration of restriction, that costs should not normally be awarded to such a director. Rather, it appears to me, that having regard to the highly unusual manner in which such applications come before the Court, i.e. an involuntary applicant who is legally bound to bring the application (on some occasions against views expressed by him), following submission of a report to the Director under s. 56 (1) of the Act of 2001, that the court should not start from a position where there exists a normal rule which applies to applications, but rather exercise its discretion in each case, having regard to the relevant facts and the statutory scheme.

21. There is a limited subset of applications pursuant to s. 150, where I have, in a number of ex tempore decisions, followed an approach which would almost amount to the "normal rule" to which O'Leary J. referred. Those were applications where there was no dispute that s. 150 of the Act of 1990 applied to the company in liquidation, and to the respondents as directors of the company in liquidation. Further, that the liquidator had put before the Director all the relevant facts when making his s. 56 report and the respondent directors had been given an opportunity of either commenting on those facts in advance or furnishing the liquidator with the relevant information in response to queries. In such circumstances, a liquidator cannot in any way be considered responsible for the commencement of the application under section 150. On the relevant facts, where the Director takes the view that the liquidator should not be relieved of his obligation to bring the application under s. 150, the liquidator is, as stated by O'Leary J., obliged, pursuant to s. 56 of the Act of 2001, to bring the application. The statutory scheme in such circumstances now requires persons who are, or were, within twelve months of the commencement of the winding up, directors of an insolvent company, to then satisfy the High Court that they acted honestly and responsibly if they are to avoid a declaration of restriction. If, they succeed in so persuading the court, it appears to me that it is an inevitable consequence of the statutory scheme put in place by the Oireachtas that they

may have to bear their own legal costs of defending the application which the liquidator has been required to bring. There does not, in those circumstances, appear any justification for making an order for costs against a liquidator which would have to be borne by him, either personally, or if he was entitled to an indemnity out of the assets of the liquidation (and there were funds in the liquidation), effectively by the creditors of the insolvent company.

22. However, the starting point for the above analysis is both that there is no dispute that s. 150 applies to the company in liquidation and the respondent directors, and that the liquidator has put before the Director, when making the s. 56 report, all the relevant facts, following appropriate enquiries of the respondent directors. On the facts of this application, I have concluded that the court cannot start from such a premise.

23. The facts of this application are unusual, insofar as, on the date of commencement of the winding up, there existed a Statement of Affairs made by the respondents which showed the Company to be solvent. Nevertheless, the winding up was not, and is not, a members' voluntary winding up. No declaration of solvency was made. It is a creditors' voluntary winding up. The fact that it is a creditors' voluntary winding up does not, however, impose an obligation on a liquidator to make a report to the Director under s. 56 (1) of the Act of 2001. That obligation only applies where the company is insolvent. Section 56 (1) provides:

> "(1) A liquidator of an insolvent company shall, within 6 months after his or her appointment or the commencement of this section, whichever is the later, and at intervals as required by the Director thereafter, provide to the Director a report in the prescribed form."

24. No issue arose in this application as to whether s. 56 (1) applies to a company which was not insolvent at the date of commencement of the winding up, but which subsequently became insolvent.

25. The applicant herein, for reasons which have not been explained, appears to have determined in May 2005 that he should make a report to the Director, pursuant to s. 56 (1) of the Act of 2001 notwithstanding the Statement of Affairs prepared by the respondents, showing the Company to have an excess of assets over liabilities. Further he did so without making any contact with the respondents or giving them any opportunity to express a view as to whether the Company was, or was not, insolvent, either at the date of commencement of the winding up or thereafter. It is not clear whether prior to making the report the applicant formed a definitive view that the Company was insolvent. The s. 56 (1) report has not been exhibited in the affidavits. The deponents have referred to extracts of what was stated by the applicant. It appears that he stated that: "the Company was solvent on the date of liquidation, save and except for pending personal injuries litigation". He also stated, in that part of the form which requires him to indicate whether he was seeking to be relieved of his obligation to bring an application under s. 150 of the Act of 1990 (which he did not seek): "it appears that some of the personal injuries cases will not, or may not, be covered by insurance as a result of failure to renew".

26. The applicant was informed by the Director by letter of 14th October, 2005, that he was not relieved of his obligation, pursuant to s. 56 (2) of the Act of 2001, to make an application pursuant to s. 150 of the Act of 1990. Nevertheless, the applicant did not write to the respondents until May 2006, and then only seeking an indemnity in relation to certain personal injuries claims which, it then appeared to him, might not be covered by insurance or subject to an excess. He made no reference to the potential application under section 150. It is of relevance to the manner in which I propose exercising my discretion on the application for costs that, in response to that letter, the respondents, through their solicitors by letter of 13th June 2006, indicated that they could not obtain insurance from 1st January, 2003, and in relation to the schedule of personal injuries claims sent them, stated: "the only claim which was not insured that our clients are aware of, is the claim of M. McCarthy". They then made reference to the attempts made by the respondents to obtain a renewal of the insurance after 1st January, 2003.

27. At the time the applicant commenced the application under s. 150, the position of the respondents was that they did not have insurance from 1st January, 2003, and appeared to accept that there was one personal injuries claim which was not covered by insurance.

28. In his grounding affidavit, the applicant furnished a certificate indicating that the Company was solvent at the date of commencement of the winding up. However, he also exhibited the letter of 13th June 2006 and expressed the view at para. 5 of his affidavit that, by reason of the apparent lack of insurance in relation to certain of the claims: "I am unable to state with confidence that there will be sufficient funds to meet these claims if they are ultimately successful".

29. In the initial replying affidavits sworn by the respondents, dated 11th May, 2007, they stated that, to their recollections, they did not have insurance from 1st January, 2003. There were a number of other factual disputes with the applicant. The respondents also set out fully the steps taken by them in relation to attempting to obtain the renewal of the insurance in 2003.

30. It was only in November 2007 that the respondents ascertained from their former brokers that insurance had, in fact, been extended up to 17th January, 2003. Those facts are set out by the first named respondent in her affidavit of 13th December, 2007. Whilst complaint is made by the respondents that the information discovered by them was information which could have been discovered by the applicant, the Court must also conclude that it is information which could have been discovered by the respondents when they received the letter from the applicant in May 2006, and prior to replying in June 2006 accepting that there was no insurance from 1st January, 2003. If that had been done, it may have been that the s. 150 application might have been avoided by a further report with different facts to the Director or a decision taken that the Company was not insolvent. Whilst, of course, a liquidator should make proper enquiries, it is the directors or former directors of a company who are best placed to ascertain the relevant facts as to what occurred whilst they were in charge of the company. Similarly, it is information which could have been obtained by the directors when first served with the s. 150 application in January 2007, and before they put in their first replying affidavits in May 2007, and inevitably set the full proceedings in train.

31. Having regard to the above facts, it appears to me that the liquidator failed to make appropriate enquiries before deciding to make the s. 56 report to the Director in May 2005, and failed to give the respondents any opportunity of commenting on what must have been his then determination that this was an insolvent company in respect of which he was obliged to make a report to the Director. The applicant is primarily responsible for taking the step which put in train the ultimate obligation to bring the s. 150 application. However, the respondents also contributed to the fact that the application was brought by failing to make all the relevant enquiries before responding to the letter of May 2006. This failure resulted in their accepting (as it subsequently turned out wrongly) that insurance was not in place from 1st January, 2003 and one personal injuries claim was not covered by insurance. The respondents further contributed to the length of the proceedings by not ascertaining the true position before they filed the initial replying affidavits in May 2007. The applicant was put to the expense of continuing to deal with proceedings which might otherwise have been resolved at an earlier time, by reason of this failure.

32. In all the circumstances of the unusual facts of this application, it appears to me that I should exercise my discretion under O.99 r. 1, by making no order for costs.